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

"[A] few facts will . . . [give] point to Mr. Justice Jackson's description of conspiracy as 'that elastic, sprawling and pervasive offense,' whose development exemplifies, in Judge Cardozo's phrase, the 'tendency of a principle to expand itself to the limit of its logic'—and perhaps beyond."¹

INTRODUCTION

During the twentieth century, the crime of conspiracy expanded into a weapon used by law enforcement agencies against dangerous organizations and criminal group activity.² The crime of conspiracy, which is traditionally defined as an agreement between two or more people with the intent to commit an unlawful act, serves two important functions in the legal system.³ First, similar to attempt⁴ and solicitation⁵ law, conspiracy law punishes preparatory conduct before it develops into a substantive offense.⁶ Therefore, conspiracy law gives law enforcement officials another tool to use in crime prevention.⁷ Second, criminal conspiracy law counters special dangers inherent in criminal group activity.⁸ These special dangers regard the enhanced

¹ United States v. Borelli, 336 F.2d 376, 380 (2d Cir. 1964).
³ WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 525 (2d ed. 1986 & Supp. 1999) (stating that the crime of conspiracy is traditionally defined as an agreement between two or more people with the intent to commit an unlawful act); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 671 (7th ed. 2001) (stating that conspiracy serves two important functions in the legal system).
⁴ The crime of attempt is committed when an individual intends to commit a particular offense and engages in acts, which support the success of the particular offense. KADISH & SCHULHOFER, supra note 3, at 554.
⁵ The crime of solicitation occurs when an individual merely asks or incites another to commit a crime. KADISH & SCHULHOFER, supra note 3, at 584. Solicitation gives rise to particular dangers inherent in group criminal activity and is often thought of as an attempt to form a conspiracy. Id.
⁶ KADISH & SCHULHOFER, supra note 3, at 671.
⁷ See infra note 90 and accompanying text.
likelihood a criminal action will ensue when an agreement is made to commit a criminal act.\textsuperscript{9} The greater likelihood of action stems from the psychological pressures against withdrawal, which are inherent in the dynamics of criminal group activity.\textsuperscript{10}

Similar to most crimes, prosecution for conspiracy requires culpability.\textsuperscript{11} Culpability is the concurrence of an evil mind (mens rea) and an evil act (actus reus).\textsuperscript{12} Furthermore, like most other crimes, both mens rea and actus reus must exist concurrently for the crime of conspiracy to exist because evil thoughts alone are insufficient for liability.\textsuperscript{13} Consequently, culpability for conspiracy can be negated by evidence showing an individual has withdrawn from the conspiracy.\textsuperscript{14} Addressing the act of withdrawal, the United States Supreme Court stated that affirmative acts contrary to the events giving rise to the conspiracy and communicated in a way to notify other conspirators of an individual’s cessation in the conspiracy are enough to establish withdrawal and commence the statute of limitations.\textsuperscript{15}

What exactly constitutes withdrawal is important, in part, because the affirmative act of withdrawal determines when the statute of limitations begins to run on the crime of conspiracy.\textsuperscript{16} Title 18 of the United States Code section 3282 (“section 3282”) provides “no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”\textsuperscript{17} The prosecution, therefore, can be barred from bringing conspiracy charges against an individual if such conspiracy charges are brought more than five years after the individual has withdrawn from the conspiracy.\textsuperscript{18}

Recently, in \textit{United States v. Grimmett},\textsuperscript{19} the United States Court of Appeals for the Eighth Circuit determined that the act of withdrawal did not require a “full and utter” confession to start the statute of limitations period.\textsuperscript{20} In \textit{Grimmett}, Patricia Grimmett had helped her boyfriend keep books for his drug business (the sale and distribu-

\textsuperscript{9} KADISH, \textit{supra} note 2, at 232.
\textsuperscript{10} Id.
\textsuperscript{11} Id. at 231.
\textsuperscript{12} KADISH & SCHULHOFER, \textit{supra} note 3, at 173-74, 203-04.
\textsuperscript{13} KADISH, \textit{supra} note 2, at 231.
\textsuperscript{14} KADISH & SCHULHOFER, \textit{supra} note 3, at 568.
\textsuperscript{16} LAFAVE \& SCOTT, \textit{supra} note 3, at 525.
\textsuperscript{17} 18 U.S.C. § 3282 (2001).
\textsuperscript{18} 18 U.S.C. § 3282.
\textsuperscript{19} 236 F.3d 452 (8th Cir. 2001).
\textsuperscript{20} United States v. Grimmett, 236 F.3d 452, 452, 456 (8th Cir. 2001).
tion of marijuana) until his murder in June 1989.21 In July 1989, Grimmett disclosed the details of the drug conspiracy to the police.22 In 1992, investigators again contacted Grimmett and she voluntarily gave the investigators additional information.23 Then, in November 1994, the police charged Grimmett with conspiracy to distribute marijuana.24 The majority of the court declared that the government was four months too late to bring drug conspiracy charges.25 The court stated that for an individual's withdrawal to begin the statute of limitations period, a conspirator must separate from all aspects of the conspiracy and cooperate with officials.26 The court reasoned that Grimmett's 1989 confession evidenced her cooperation with authorities and separation from the conspiracy; therefore, she had withdrawn from the conspiracy in July 1989.27 Consequently, the five-year statute of limitations had run in July 1994, some four months prior to the charges made by the police.28

This Note will first discuss the facts and circumstances surrounding Grimmett's withdrawal from the conspiracy and review the holding of Grimmett.29 Second, the Background of this Note will examine case law that delineates the events that indicate culpability to commit a conspiracy crime.30 Specifically, the Background will discuss the facts and circumstances that indicate mens rea and actus reus for a conspiracy crime.31 Third, this Note will discuss the development of the law regarding withdrawal from a conspiracy.32 Fourth, the Analysis of this Note will specifically discuss the Eighth Circuit decision in Grimmett and demonstrate that Grimmett had the necessary concurrence of mens rea and actus reus (culpability) to commit the drug conspiracy crime.33 The Analysis will then examine how the Grimmett majority was correct in determining that Grimmett had withdrawn from the conspiracy despite the dissent's argument that a full and utter disclosure was required.34 The Analysis will continue by showing that the United States Supreme Court has never required a full and

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22. *id.*
23. *id.* at 454.
24. *id.*
27. *id.*
28. *id.*
29. *See infra* notes 37-86 and accompanying text.
30. *See infra* notes 87-248 and accompanying text.
31. *See infra* notes 87-248 and accompanying text.
32. *See infra* notes 249-364 and accompanying text.
33. *See infra* notes 365-466 and accompanying text.
34. *See infra* notes 467-558 and accompanying text.
utter confession. Finally, this Note will conclude by commending the Grimmett majority for concluding that Grimmett had sufficiently negated her mens rea and actus reus and had withdrawn from the conspiracy thereby barring the government's drug charges.

FACTS AND HOLDING

On June 27, 1989, Dennis Moore and Kevin Wyrick murdered Elmont Kerns. Kerns was a marijuana dealer who supplied large amounts of marijuana to several other drug dealers. When Kerns attempted to collect money from Moore for marijuana that Kerns had sold on credit, Wyrick, Moore's accomplice, entered Kerns' home and shot him several times. On several occasions during the investigation of Kerns' murder, the police questioned Kerns' girlfriend, Patricia Grimmett, who lived with Kerns and helped manage Kerns' drug distribution activities. Grimmett stated that she would help the police in any way possible and she admitted that she had kept Kerns' drug records because Kerns could barely read or write. However, Grimmett stated that Kerns used codes she did not understand so she could not decipher Kerns' drug books.

To help the police decipher Kerns' codes, Grimmett identified Kerns' drug "runners" who understood the code. Furthermore, Grimmett supported her statement that Kerns was a marijuana dealer by leading the police to a hidden storage area in Kerns' home where Kerns kept marijuana and a large sum of money. Grimmett also identified the cocaine suppliers whom she and Kerns used for their personal cocaine habits and she also identified Moore as one of Kerns' associates. After Grimmett's disclosures, the police termi-

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35. See infra notes 545-58 and accompanying text.
36. See infra notes 559-68 and accompanying text.
37. United States v. Moore, 149 F.3d 773, 777 (8th Cir. 1998).
38. Moore, 149 F.3d at 777.
39. Id. Moore owed another drug dealer a large sum of money and Kerns gave Moore a considerable amount of marijuana on credit so Moore could sell the marijuana and pay the other drug dealer with the profits. Id. Moore sold the drugs with the intent to pay the other drug dealer; however, Moore was never able to pay back Kerns for the drug loan. Id. After Kerns' request for the money, Moore recruited Wyrick to help him murder Kerns. Id.
40. United States v. Grimmett, 236 F.3d 452, 453 (8th Cir. 2001).
41. Grimmett, 236 F.3d at 453-54.
42. Id. But see id. at 456-57 (Murphy, J., dissenting) (declaring that Grimmett had knowledge of one of the terms in the drug books and this knowledge contradicted her 1989 testimony that she did not know what the terms in the drug books meant).
43. Grimmett, 236 F.3d at 453-54.
44. Id.
45. Id.
nated the murder investigation and did not bring charges against Grimmett or anyone she identified.\textsuperscript{46}

Nearly three years later, in 1992, federal agents interviewed Grimmett another time because they believed Grimmett might enlighten them in their continuing investigation of Moore.\textsuperscript{47} During this investigation, Grimmett disclosed several additional facts regarding her involvement with Kerns.\textsuperscript{48} She admitted she occasionally collected money with Kerns and occasionally received deliveries of cocaine for her personal use.\textsuperscript{49} Grimmett also disclosed that she knew of Kerns' trips to Columbia to buy drugs and clean out debtors who were late with their payments.\textsuperscript{50} Grimmett also admitted that in the process of keeping Kerns' drug books, she learned a code word used in the books.\textsuperscript{51} Two years after Grimmett's 1992 interview, on November 14, 1994, investigators charged Grimmett in the United States District Court for the Western District of Missouri with conspiracy to distribute marijuana.\textsuperscript{52}

Grimmett filed a motion to dismiss the district court action, contending that the five-year statute of limitations started to run when she confessed to the police in 1989; therefore, the statute of limitations had expired by the time she was charged with conspiracy to distribute marijuana in 1994.\textsuperscript{53} The district court denied Grimmett an evidentiary hearing on the motion to dismiss, opining that her withdrawal was not a possible defense to the charge of conspiracy to distribute marijuana.\textsuperscript{54} Grimmett pleaded guilty to the conspiracy to distribute marijuana charge; however, she reserved her privilege to appeal the judge's decision denying her motion to dismiss.\textsuperscript{55} After the district court sentenced Grimmett, she appealed to the United States Court of

\begin{footnotes}
\item 46. Id. at 454.
\item 47. Id. Grimmett voluntarily attended an interview at her home and she went to the police station to help the police review drug records. Id.
\item 48. Grimmett, 236 F.3d at 454. But see id. at 458 (Murphy, J., dissenting) (reasoning that the additional facts Grimmett disclosed in 1992 were not in accordance with a full and utter confession of her knowledge on June 27, 1989).
\item 49. Grimmett, 236 F.3d at 457 (Murphy, J., dissenting).
\item 50. Id. (Murphy, J., dissenting).
\item 51. Id. (Murphy, J., dissenting). Grimmett stated in 1992 that she understood the term "sticks" in Kerns' drug books to be a code word for the drug "Thai sticks." Id. (Murphy, J., dissenting).
\item 52. Grimmett, 150 F.3d at 958-59.
\item 53. Grimmett, 236 F.3d at 452, 454. See 18 U.S.C. § 3282 (2001) ("[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").
\item 54. Grimmett, 150 F.3d at 960. The court reasoned that a defense of withdrawal is a question of fact that should be given to the jury to decide in light of the entire case. Id.
\item 55. Grimmett, 150 F.3d at 960.
\end{footnotes}
Appeals for the Eighth Circuit and the Eighth Circuit accepted the appeal.56

On appeal before the Eighth Circuit, Grimmett argued that the charges were barred by the statute of limitations because her involvement with the conspiracy had ceased in July 1989.57 Therefore, Grimmett contended that the district court erred by not holding an evidentiary hearing to determine the date of her withdrawal.58 The United States government argued that the affirmative defense of withdrawal must be raised during trial.59 Furthermore, the government argued that a withdrawal defense is not available for a conspiracy to distribute marijuana charge because proof of an overt act is not required.60 The Eighth Circuit agreed with Grimmett, determining that even though withdrawal may not be a defense to the crime of conspiracy, withdrawal may be raised in combination with the statute of limitations defense.61

Circuit Judge Diana E. Murphy, writing for the majority, stated that if issues of fact do not exist, the statute of limitations bar may be determined without trial.62 Judge Murphy reasoned that the statute of limitations period would expire if Grimmett could show that she had affirmatively acted to defeat the purpose of the conspiracy before the pertinent statute of limitations date.63 Judge Murphy further reasoned that Grimmett could pursue her statute of limitations defense even though she could not pursue a substantive withdrawal defense.64 Therefore, the court opined that Grimmett's statute of limitations defense was a proper subject for a motion to dismiss.65 Upon determin-

56. Grimmett, 236 F.3d at 452, 454.
57. Id. at 452, 454.
58. Grimmett, 150 F.3d at 959. Grimmett argued that the district court erred by only considering the period alleged in the conspiracy charge. Id. at 960. Grimmett contended that the court should have considered whether she had withdrawn five years prior to the return of the indictment. Id.
59. Grimmett, 150 F.3d at 960-61.
60. Id. at 961.
61. Id. at 961 (citations omitted).
62. Id. at 959, 961-62.
63. Id. at 959, 961.
64. Id.
65. Id. at 962. See generally Fed. R. Crim. P. 12(b) (2001). The rule provides in pertinent part:

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: (1) Defenses and objections based on defects in the institution of the prosecution; or (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or (3) Motions to suppress evidence; or (4) Requests for discovery under Rule 16; or (5) Requests for a severance of charges or defendants under Rule 14.
ing that the issues regarding the statute of limitations were not fully presented in the district court, the Eighth Circuit reversed the district court's denial of Grimmett's motion to dismiss, vacated the judgment, and remanded the case to the district court.66

On remand before the United States District Court for the Western District of Missouri, the district court rejected Grimmett's statute of limitations defense.67 The court concluded that Grimmett had not disclosed the extent of her involvement in the conspiracy in her 1989 confession.68 Grimmett argued that the government's charges were barred by the statute of limitations because she had withdrawn from the conspiracy in 1989.69 The court rejected Grimmett's argument because the court determined that withdrawal required a "clean breast" or a "full and utter confession" to commence the statute of limitations period.70 The district court reasoned that Grimmett's confession in 1989 only constituted a partial disclosure and did not meet the rigorous standard of a full and utter confession as required by the clean breast doctrine.71 Subsequently, Grimmett appealed for a second time to the United States Court of Appeals for the Eighth Circuit and the Eighth Circuit accepted the appeal.72

On appeal before the Eighth Circuit, Grimmett challenged the district court's finding that her 1989 disclosures did not constitute a withdrawal from the conspiracy to begin the statute of limitations.73 Circuit Judge James B. Loken, writing for the majority, concluded that Grimmett had withdrawn from the conspiracy after her July 1989 disclosures.74 Judge Loken reasoned that even though Grimmet had disclosed further incriminating evidence during her 1992 interview, these facts did not give rise to her continued participation in the conspiracy.75 In so ruling, the Grimmett majority agreed with the district court, stating that public policy demands a rigid standard for

66. *Grimmett*, 150 F.3d at 962.
67. *Grimmett*, 236 F.3d at 452, 454.
68. *Id.* at 454.
69. *Id.*
70. *Id.* To determine the definition of "clean breast", the magistrate judge looked to the dictionary and interpreted "full and utter confession" to be a rigorous standard and found Grimmett's 1989 disclosures did not meet this standard. *Id.*
71. *Grimmett*, 236 F.3d at 454.
72. *Id.* at 452, 454.
73. *Id.*
74. *Id.* at 453, 456.
75. *Id.* at 455. The Eighth Circuit stated that no evidence existed that Grimmett continued to participate in the conspiracy after she had withdrawn. *Id.* at 454-55. Furthermore, the court stated that the mere fact she disclosed additional incriminating details about the conspiracy did not outweigh the fact that Grimmett acted affirmatively to defeat the conspiracy. *Id.* at 455.
withdrawal from a conspiracy crime. However, the Grimmett majority determined that the requirement of a “clean breast” did not demand a “full and utter confession” to begin the statute of limitation period. The majority further stated that all that is required for withdrawal is that the withdrawing conspirator must cut all ties to the objectives of the conspiracy and affirmatively act to destroy the conspiracy by cooperating and confessing to authorities. In light of Grimmett’s minor role in the conspiracy and the fact that Grimmett had disclosed vital information about the conspiracy, the majority concluded that Grimmett had withdrawn from the conspiracy in early July 1989.

Circuit Judge Diana E. Murphy dissented, contending that Grimmett did not properly and adequately terminate her involvement in the conspiracy. Judge Murphy argued that Grimmett’s 1992 disclosures indicated that Grimmett was more involved in the aspects of the conspiracy than the majority revealed. Judge Murphy noted that evidence indicated that Grimmett took sedatives during her polygraph test in 1989 in an effort to skew the test results. Evidence also showed that Grimmett stopped answering questions in her 1992 interview after being asked about her involvement in Kerns’ murder. Judge Murphy contended that Grimmett was dishonest in her 1989 interview about her knowledge of Kerns’ books and her involvement in collecting debts because in 1992, she disclosed further incriminating evidence about these aspects of Kerns’ drug activities. Judge Murphy opined that Grimmett did not help the police “in any way she could” when she had failed to make these disclosures in 1989. In light of these facts, Judge Murphy maintained that Grimmett did not make a full and utter confession, and therefore, had not withdrawn from the conspiracy in 1989.

76. Grimmett, 236 F.3d at 455-56.
77. Id. at 456 (citations omitted). The court stated that the United States Supreme Court has determined that withdrawal required an affirmative act to defeat the purpose of the conspiracy and no evidence that the defendant continued to support the conspiracy. Id. at 455. However, the term “clean breast” does not require a “full and utter” confession. Id. at 456.
78. Grimmett, 236 F.3d at 456.
79. Id.
80. Id. (Murphy, J., dissenting).
81. Id. at 457 (Murphy, J., dissenting).
82. Id. (Murphy, J., dissenting).
83. Id. (Murphy, J., dissenting).
84. Id. (Murphy, J., dissenting). Grimmett admitted she knew the code word “sticks” referred the drug “Thai sticks.” Id. (Murphy, J., dissenting).
85. Grimmett, 236 F.3d at 457 (Murphy, J., dissenting).
86. Id. at 457-58 (Murphy, J., dissenting).
BACKGROUND

The crime of conspiracy was developed in the late 1200s with the enactment of three statutes during the reign of England's King Edward I.87 Under these statutes and early common law, conspiracy was narrowly defined to correct the shortcomings of criminal procedure.88 Criminal conspiracies were originally construed only to constitute false indictments, false appeals, and vexatious suits.89 However, during the twentieth century, criminal conspiracy developed into a useful tool for federal prosecutors against organized crime, complex business associations in restraint of trade, and criminal political activity.90

87. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 525 n.3 (2d ed. 1986 & Supp. 1999). The First Order of Conspirators was enacted in 1292, and the Second and Third Order of Conspirators were enacted in 1300 and 1305, respectively. LAFAVE & SCOTT, CRIMINAL LAW at 525 n.3.
88. LAFAVE & SCOTT, supra note 87, at 525.
89. Francis B. Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 396 (1922).
90. 1 SANFORD H. KADISH, ENCYCLOPEDIA OF CRIME AND JUSTICE, Conspiracy 231 (1983). See Peter Buscemi, Conspiracy: Statutory Reform Since the Model Penal Code, 75 COLUM. L. REV. 1122, 1122 n.2 (1975) (quoting Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) which noted that Judge Learned Hand referred to criminal conspiracy as the "darling of the modern prosecutor's nursery"). The text of section 5.03 of the MODEL PENAL CODE reads in full:

(1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
    (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
    (b) agrees to aid such other person or persons in the planning or commis-
    sion of such crime or of an attempt or solicitation to commit such crime.
(2) Scope of Conspiratorial Relationship. If a person guilty of a conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.
(3) Conspiracy With Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
(4) Joinder and Venue in Conspiracy Proceedings.
    (a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:
        (i) they are charged with conspiring with one another; or
        (ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.
    (b) In any joint prosecution under paragraph (a) of this Subsection:
        (i) no defendant shall be charged with a conspiracy in any county [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and
        (ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and
The crime of conspiracy is traditionally defined as an agreement between two or more people with the intent to commit an unlawful act.\textsuperscript{91} Criminal conspiracy has two significant functions in the legal system.\textsuperscript{92} First, conspiracy punishes preparatory conduct before the conduct evolves into a substantive crime.\textsuperscript{93} Second, criminal conspiracy law counters the psychological pressures against withdrawal, which are inherent in the dynamics of criminal group activity.\textsuperscript{94}

Similar to most crimes, prosecution for conspiracy requires culpability.\textsuperscript{95} Culpability is the concurrence of two elements: mens rea and actus reus.\textsuperscript{96} First, mens rea requires both the intent to achieve the objectives of the crime and the intent to agree to the crime.\textsuperscript{97} The second element, actus reus, is defined as doing something or not doing something that should be done.\textsuperscript{98} However, even if culpability exists, an individual can negate culpability by evidence showing withdrawal from the conspiracy.\textsuperscript{99} Withdrawal occurs when one individual shows

(iii) the Court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(5)\textit{Overt Act.} No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(6)\textit{Renunciation of Criminal Purpose.} It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(7)\textit{Duration of Conspiracy.} For purposes of Section 1.06(4):

(a) conspiracy is a continuing course of conduct that terminates when the crime or crimes that are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and

(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and

(c) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

\textbf{MODEL PENAL CODE} \S 5.03 (1962).

91. LaFAVE \& SCOTT, supra note 87, at 525.


93. KADISH \& SCHULHOFER, supra note 92, at 671.

94. KADISH, supra note 90, at 232.

95. Id. at 231.

96. KADISH \& SCHULHOFER, supra note 92, at 173-74, 203-04.

97. LaFAVE \& SCOTT, supra note 87, at 535-37.

98. Id. at 195.

99. KADISH \& SCHULHOFER, supra note 92, at 568. Abandonment and withdrawal gives a conspirator the opportunity to change their mind. Id. The conspirator has decided to repent, contrary to mens rea. Id. at 567-68.
WITHDRAWAL FROM A CONSPIRACY

that he or she has parted from the conspiracy. \(^{100}\) To determine whether an individual has withdrawn from a conspiracy, the court must understand what events gave rise to the conspiracy in the first place. \(^{101}\) The events that give rise to the conspiracy and make an individual liable for the conspiracy are the events that indicate an individual's concurrence of mens rea and actus reus (culpability). \(^{102}\) For termination of the conspiracy as to an individual, the events showing an individual's culpability must be disavowed by affirmative acts of withdrawal. \(^{103}\)

A. CULPABILITY—MENS REA

1. Intent to Achieve the Objectives of the Conspiracy

Determining when an individual has the intent to become part of a conspiracy is an ambiguous area of conspiracy law. \(^{104}\) The United States Supreme Court opinions in United States v. Falcone \(^{105}\) and Direct Sales Co. v. United States, \(^{106}\) point to two different tests to determine when an individual intends to become part of a conspiracy. \(^{107}\) In Falcone, the Court determined that the knowledge that a sale of large quantities of sugar, yeast, and other material would be used to operate illicit stills was not enough to convict an individual of conspiracy. \(^{108}\) On the other hand, the Court in Direct Sales Co. declared that the sale of large quantities of narcotics to a rural physician provided evidence of the seller's intent to advance the illegal activity. \(^{109}\)

In Falcone, the United States Supreme Court affirmed the United States Court of Appeals for the Second Circuit, determining that conspiracy could not rest on mere proof of an individual's knowledge that an individual's goods or services would be put to an illegal end. \(^{110}\) In

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100. Buscemi, 75 COLUM. L. REV. at 1165.
101. United States v. United States Gypsum Co., 550 F.2d 115, 129 (3d Cir. 1977), cert. granted, 434 US. 815 (1977), and aff'd, 438 U.S. 422 (1978) (citations omitted) (stating that since culpability for a crime might be shown by direct or circumstantial evidence no reason exists why withdrawal or abandonment should not be held to this same proof); LAFAVE & SCOTT, supra note 87, at 558-59 n.188 (stating that affirmative acts negating the events of the conspiracy constitute withdrawal or abandonment). See also United States v. Antar, 53 F.3d 568, 582 (3d Cir. 1995) (stating that withdrawal depends on the context of the crime).
102. Gypsum Co., 550 F.2d at 129 (stating that since culpability for a crime might be shown by direct or circumstantial evidence, no reason exists why withdrawal would not be held to this same proof).
103. Gypsum Co., 550 F.2d at 129.
104. LAFAVE & SCOTT, supra note 87, at 535.
105. 311 U.S. 205 (1940).
106. 319 U.S. 703 (1943).
107. KADISH & SCHULHOFER, supra note 92, at 705.
108. LAFAVE & SCOTT, supra note 87, at 538.
109. KADISH & SCHULHOFER, supra note 92, at 707.
Falcone, the United States government sued Salvatore Falcone, Joseph Falcone, Alberico, John Nole, Nicholas Nole, and sixty-three other defendants in the United States District Court for the Northern District of New York. Between the years of 1937 and 1938, several individuals bought property just outside of Utica, New York to facilitate the operation of several alcohol distilleries. Joseph Falcone was a sugar supplier who sold sugar to a number of grocers in the Utica area. Since the distillers in the area needed large amounts of sugar to produce alcohol, Falcone's sugar business substantially increased while the alcohol stills were active. Joseph Falcone's brother, Salvatore Falcone, helped Joseph Falcone purchase sugar from their suppliers. Alberico also did business with the distillers and his sales of sugar drastically increased and decreased in correlation with the operation of the stills. Nicholas Nole supplied the distillers with cans and yeast. These individuals were all charged with conspiracy to operate illicit stills in the United States District Court for the Northern District of New York and were convicted of conspiracy to operate illicit stills.

Salvatore Falcone, Joseph Falcone, Alberico, John Nole and Nicholas Nole appealed the decision of the district court to the United States Court of Appeals for the Second Circuit, arguing that no evidence existed showing they were conspirators. The Second Circuit accepted the appeal and reversed the district court conviction reasoning that knowledge, that the goods or services are used for illegal activity, is not enough to convict an individual of conspiracy.

Circuit Judge Billings Learned Hand noted that the settled doctrine of several of the circuits was that mere knowledge of the illegal use of goods was sufficient evidence for a conspiracy. However, Judge Hand stated that a prior Second Circuit case had held that a

111. United States v. Falcone, 109 F.2d 579, 579-80 (2d Cir. 1940), cert. granted, 310 U.S. 620 (1940), and aff'd, 311 U.S. 205 (1940). The appeal before the court actually concerned eight individuals. Falcone, 109 F.2d at 580.
112. Falcone, 109 F.2d at 580.
113. Falcone, 311 U.S. at 208 n.1.
114. Falcone, 109 F.2d at 580.
115. Id.
116. Id. Alberico belonged to the firm Alberico & Funicello which was responsible for supplying Joseph Falcone with sugar. Id. at 580. The Second Circuit stated that Alberico's sales were around one-half million pounds of sugar during the operation of the stills. Id. at 579-80. After the stills were raided, Alberico's sales fell to very little and rose again when the distillers reopened the stills. Id. at 580.
117. Falcone, 311 U.S. at 209 n.1. John Nole was the distributor for the yeast company that ordered and received the yeast from Nicholas Nole. Id. at 209, 210 n.1.
118. Falcone, 311 U.S. at 206.
119. Falcone, 109 F.2d at 579-80.
120. Id. at 579, 581-82.
121. Id. at 581 (citations omitted).
seller's knowledge was not alone sufficient. Judge Hand maintained that liability for a conspiracy does not necessarily exist when an individual undergoes a lawful activity while others put the lawful activity to an unlawful end. Instead, the individual must promote the illegal venture and have an interest in its outcome. The Second Circuit reversed the district court convictions of Salvatore Falcone, Joseph Falcone, Alberico, Nicholas Nole, and John Nole. The United States government filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to review the Second Circuit judgment reversing the conspiracy conviction.

The Supreme Court affirmed the decision of the Second Circuit, maintaining that conviction of conspiracy could not rest on the mere fact that an individual's goods or services furthered the objectives of the conspiracy. Chief Justice Harlan Fiske Stone, writing for a unanimous Court, reasoned that a conspiracy could not be inferred from the respondent's sales of goods. Chief Justice Stone noted that conspiracy is defined as an agreement between the conspirators to commit an unlawful act to accomplish the objective of the conspiracy. Chief Justice Stone stated that if an individual does not have knowledge of a conspiracy, that individual cannot be held liable for the crime. Therefore, the Court determined that even though the suppliers' product might further the objective of the crime, the suppliers cannot be held liable if they had no knowledge of the conspiracy.

Three years later, in Direct Sales Co., the United States Supreme Court determined that conspiracies could be committed by acts consisting of sales alone where the volume, frequency, or repetition of the sales evidenced the seller's knowledge of a buyer's illegal activity. In Direct Sales Co., the United States government charged Direct Sales Company ("Direct Sales") with conspiracy in the United States

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122. Id. (citations omitted).
123. Id.
124. Id.
125. Id. at 582.
126. *Falcone*, 311 U.S. at 205-06.
127. *Id.* at 205, 210-11. See United States v. Moss, 591 F.2d 428, 435 (8th Cir. 1979) (stating that neither mere association with members of a conspiracy nor mere knowledge, acquiescence or approval in the objectives of a conspiracy is sufficient proof an individual is part of that conspiracy). See also United States v. Brown, 584 F.2d 252, 262 (8th Cir. 1978) (stating that a party does not become a member in a conspiracy by mere acquiescence and knowledge of the illegal activity).
129. *Id.* at 210 (citations omitted).
130. *Id.* at 210-11.
131. *Id.* But see United States v. Montanye, 962 F.2d 1332, 1342-43 (8th Cir. 1992) (distinguishing *Falcone* and determining that a vendor has knowledge if the goods alone are enough to cause the vendor to suspect the buyer's motives).
District Court for the Western District of South Carolina. Direct Sales was a wholesale pharmaceutical dealer that sold pharmaceuticals through the mail to their customers and offered one-quarter and one-half grain morphine sulfate pills for sale in various large-sized lots. In August 1936, a narcotic agent went to the offices of Direct Sales and informed it that large quantities of its pharmaceuticals were being diverted into unlawful channels. Even in light of the agent's concerns, the officers of Direct Sales failed to fully accommodate the agent. During this time, Dr. John Tate, a customer of Direct Sales, was purchasing approximately one thousand half-grain pills of morphine sulfate every five days or approximately four hundred doses of morphine sulfate everyday. Direct Sales was charged with conspiracy in the United States District Court for the Western District of South Carolina.

After a guilty verdict in the district court, Direct Sales filed a motion for a new trial. The district court denied the motion for a new trial. Judge Charles Cecil Wyche gave weight to the amount and frequency of the sales that Direct Sales made to Dr. Tate. Judge Wyche noted that the president of Direct Sales testified that the only legal way Dr. Tate could dispose of the drugs was through prescription to his patients. Based on this testimony, Judge Wyche determined

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133. United States v. Direct Sales Co., 44 F. Supp. 623, 623-24 (W.D.S.C. 1942), aff'd, Direct Sales Co. v. United States, 131 F.2d 835 (4th Cir. 1942), cert. granted, 318 U.S. 749 (1943), and aff'd, 319 U.S. 703 (1943). The jury returned a verdict and Direct Sales filed a motion to set aside the verdict claiming that the evidence did not support the verdict. Id. at 624.

134. Direct Sales Co., 44 F. Supp. at 624. The lots sold by Direct Sales were in quantities of 500, 1000 and 5000. Id. An expert witness for the government stated that the standard dose of morphine for a patient was one-quarter grain and rarely one-half grain. Id. Dr. Blake stated that he used 100 codeine pills, which are used for similar purposes, to every one morphine tablet. Id. The court further stated that Direct Sales Company encouraged large sales of morphine by only offering the drug in large lots having discounted prices. Direct Sales Co., 319 U.S. at 706. Testimony also showed that the average physician rarely needs in excess of 400 one-quarter grain pills in a year. Id.

135. Direct Sales Co., 44 F. Supp. at 624-25. The agent further stated that 55 of the 204 registrants who have been convicted of drug related crimes were customers of Direct Sales. Id. at 625.

136. Direct Sales Co., 44 F. Supp. at 625. Direct Sales stopped giving discounts; however, the company merely added the discount into the listed price. Id.

137. Direct Sales Co., 319 U.S. at 706. Dr. Tate practiced in a small town of about 2000. Id. at 704.


139. Id. at 624.

140. Id. Direct Sales filed a motion for a directed verdict of not guilty, arguing that the evidence was insufficient. Id. The motion was denied and the jury returned a guilty verdict. Id.


142. Id. at 624-25. The President further stated that it was illegal for Dr. Tate to either resell the drug or give it away. Id. at 625. Testimony revealed that the one-half
that because Dr. Tate was buying quantities of drugs his patients could not possibly consume, Direct Sales surely knew Dr. Tate was dispensing drugs in a manner outside his medical practice.  

Judge Wyche distinguished the decision in Falcone, stating that the evidence of the volume of sales in Falcone was inconclusive and vague; yet, in the present matter, Direct Sales' contacts with Dr. Tate were systematic over a long period of time.  

Furthermore, Judge Wyche noted that the law strictly regulates narcotics, whereas sugar may be sold by anyone to anyone in any manner.  Judge Wyche opined that Direct Sales' knowledge that Dr. Tate could not possibly dispose of the drugs in a legal manner was an affirmative action not found in Falcone.  Judge Wyche held that this affirmative action made Direct Sales a party to an arrangement with Dr. Tate even though Direct Sales might not have knowledge of the parties with whom Dr. Tate was supplying.

Direct Sales appealed the decision of the district court to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit accepted the appeal and affirmed the district court's opinion, holding that Direct Sales' contentions had no merit and that the evidence was sufficient to support a verdict of guilty.

Judge Elliot Northcott, writing for a unanimous court, reasoned that Direct Sales had joined the conspiracy because it continued to sell Dr. Tate large amounts of morphine when it was not possible for Dr. Tate to legally distribute such a large amount of the drug. Judge Northcott stated that the mutual understanding among the parties was enough to convict an individual of conspiracy. Direct Sales filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to review the conspiracy conviction.

The United States Supreme Court affirmed the decision of the Fourth Circuit, maintaining that acts consisting of sales alone where the volume, frequency, or repetition of the sales evidenced the seller's
knowledge of a buyer’s illegal activity could constitute conspiracy. Justice Wiley Blount Rutledge, writing for a unanimous Court, reasoned that Direct Sales’ argument was based on its misunderstanding of the United States Supreme Court’s decision in Falcone. Justice Rutledge further stated that the Falcone decision merely meant that one did not become a party to a conspiracy through sales unless one knew of the conspiracy. Justice Rutledge reasoned that Direct Sales’ knowledge must be measured in light of the surrounding events. As recognized by the Court, unlike the articles of free commerce sold in the Falcone case, the commodities sold in the present matter were pharmaceuticals under strict regulation. The Court analogized the situation to the difference between a toy pistol and a machine gun. Both articles can be used illegally; yet, the toy gun and the machine gun do not have the same inherent susceptibility for illegal use. This inherent difference in the type of product can evidence a seller’s knowledge of a buyer’s illegal use of a product and the seller’s intent to promote the buyer’s objectives. Therefore, the Court established that Direct Sales’ association with Dr. Tate constituted a conspiracy because the company joined both mind and action with Dr. Tate.

2. Intent to Agree to Commit a Conspiracy

Along with an individual’s intent to achieve the objectives of the crime, an individual must have intent to make an agreement in order

153. Id. at 703, 714-15.
155. Id. See United States v. Montanye, 962 F.2d 1332, 1343 (8th Cir. 1992) (stating a vendor’s agreement to submit a false name of the buyer, avoid the police, and make the delivery to a hotel room does not support a Falcone intent instruction); Isaac v. United States, 657 F.2d 985, 990 n.2 (8th Cir. 1981) (stating that the Falcone decision is interpreted as meaning that one individual does not enter the conspiracy by sales unless he knows of the conspiracy and that knowledge cannot be evidenced merely from the seller’s knowledge that the buyer could use the product illegally). See also Valentine v. United States, 293 F.2d 708, 712 (8th Cir. 1961) (stating that when a product supplier sells goods that are later used in illegal activity, proof is necessary that the supplier had knowledge about the crime to use the goods illegally).
156. Direct Sales Co., 319 U.S. at 709. See Goode v. United States, 58 F.2d 105, 107 (8th Cir. 1932) (stating that a conspiracy is rarely proved by direct evidence, but is deduced from the conduct of the parties and the surrounding circumstances).
157. Direct Sales Co., 319 U.S. at 710. But see Montanye, 962 F.2d at 1343 (stating that the vendor sold glassware).
158. Direct Sales Co., 319 U.S. at 711.
159. Id. The court further noted that by the very nature of an object a seller can be put on notice of its intended use. Id.
160. Direct Sales Co., 319 U.S. at 711 (citing Falcone, 311 U.S. at 205 n.7). See Montanye, 962 F.2d at 1342-43 (stating that when an individual buys highly sophisticated glassware from a vendor, the vendor might suspect that the buyer is using the glassware to manufacture methamphetamine).
161. Direct Sales Co., 319 U.S. at 713.
for mens rea and the resulting conspiracy liability to exist.\textsuperscript{162} The parties must have a common purpose in mind.\textsuperscript{163} Even though intent to agree is nearly indistinguishable from the agreement aspect of the crime, courts have looked to the party's intent to agree to determine if the party entered the conspiracy.\textsuperscript{164} The century old case of \textit{State v. King}\textsuperscript{165} sets forth the principle that intent to agree is needed for conspiracy.\textsuperscript{166}

In \textit{King}, the Supreme Court of Iowa held that an individual must have intent to agree to a conspiracy for guilt of conspiracy to exist.\textsuperscript{167} In \textit{King}, the State of Iowa sued King in the district court of Iowa for conspiring to commit an assault on J.H. Willey.\textsuperscript{168} On September 22, 1896, De Wald, King, and Raymond gathered in Reisner's bar where King was questioned about a scar across his nose.\textsuperscript{169} King responded that Willey had struck him in the face with a cane.\textsuperscript{170} De Wald then remarked that Willey had earlier published a story in Willey's paper stating that cutting off De Wald's circulation would be a good move for the community.\textsuperscript{171} De Wald commented that he was going to beat Willey at his first opportunity.\textsuperscript{172}

In reply, King stated that if De Wald did beat Willey, De Wald's fine would be paid because Farwell, a partner of Willey, had declared he would pay the fine if someone would beat Willey.\textsuperscript{173} De Wald stated that he did not wish for someone else to pay his fine and repeated he just wanted to beat Willey's face.\textsuperscript{174} Both King and Raymond advised De Wald not to use his hands or feet to beat Willey; however, King and Raymond both stated that a slap in the mouth would suffice.\textsuperscript{175} De Wald left the bar to confront Willey and he proceeded to beat Willey so badly that Willey was unconscious for several days.\textsuperscript{176} Following the beating, King again allegedly offered to pay De Wald's fine for beating Willey.\textsuperscript{177}

\begin{itemize}
  \item \textsuperscript{162} LAFAVE & SCOTT, supra note 87, at 535.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id. at 535-36.
  \item \textsuperscript{165} 74 N.W. 691 (Iowa 1898).
  \item \textsuperscript{166} State v. King, 74 N.W. 691, 692 (Iowa 1898).
  \item \textsuperscript{167} King, 74 N.W. at 691-92.
  \item \textsuperscript{168} Id. at 691.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id. at 691-92.
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Id. at 692. De Wald, Raymond and King affirmed these facts; however, Mullick stated that after the fight was over King told Mullick he would pay De Wald's fine. Id.
  \item \textsuperscript{174} King, 74 N.W. at 692.
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} Id. at 691-92.
  \item \textsuperscript{177} Id. at 692.
\end{itemize}
Willey sued King in the District Court of Iowa for conspiring to beat Willey, and the district court convicted King of the conspiracy charge.\footnote{Id. at 691-92.} King appealed the district court conspiracy conviction to the Supreme Court of Iowa.\footnote{Id.} The Supreme Court of Iowa accepted the appeal and reversed the district court opinion, explaining that an individual has not joined a conspiracy if the individual does not have the intent to agree to the conspiracy.\footnote{Id. at 691-92. The court stated that advising or counseling could constitute intent to enter the conspiracy. Id. at 692.} The court stated that mere knowledge, approval of an act, or acquiescence without an agreement to cooperate is insufficient to constitute conspiracy.\footnote{King, 74 N.W. at 692.} The court reasoned that King merely suggested the beating and neither acted on the suggestions nor aided De Wald in the beating.\footnote{Id.} The court further reasoned that King’s offer to pay De Wald’s fine, even if true, would not be relevant because the statement was made after the beating took place and was merely an expression of satisfaction in the beating not a means to further the crime.\footnote{Id. at 692.} In light of the evidence, the court acquitted King because he did not intend to agree to a conspiracy to beat Willey.\footnote{Id.}

Nearly 100 years later, in United States v. Morillo,\footnote{158 F.3d 18 (1st Cir. 1998).} the United States Court of Appeals for the First Circuit held that the United States government could not escape its burden of proving Morillo’s intent to agree to a conspiracy.\footnote{Morillo, 158 F.3d at 18-19, 22.} In Morillo, the government sued Fidel Morillo in the United States District Court for the District of Puerto Rico for conspiracy to distribute cocaine and possession of cocaine with intent to distribute.\footnote{Id. at 19. Morillo was experiencing marital problems so he moved in with his mistress. Id.}

In April of 1996, Morillo leased an apartment near the San Juan airport for himself and his mistress.\footnote{Morillo, 158 F.3d at 20.} On October 2, 1996, Fiordaliza Durán and Rosa Peguero flew into Puerto Rico from New York with the intent to smuggle cocaine into the states.\footnote{Id. at 19-20.} Eddison and Hanzel Núñez dropped off the two women at Morillo’s apartment to spend the night.\footnote{Id. at 19-20.} On October 3, during Morillo’s visit to the apart-
ment, no evidence existed that Morillo discussed the women's intent to smuggle cocaine and no drugs or drug paraphernalia were visible in the apartment.\textsuperscript{191}

The next day, while Morillo was away from the apartment, the Núñez brothers went to the apartment and strapped several bags of cocaine to Durán and Peguero.\textsuperscript{192} During this process, drug paraphernalia, tape, white powder, and cellophane were scattered around the bedroom.\textsuperscript{193} At approximately eleven o'clock in the morning, Morillo entered the apartment; Peguero and Durán had the drugs concealed under their clothes.\textsuperscript{194} After Morillo arrived, Eddison Núñez, Durán, and Peguero left for the airport.\textsuperscript{195} Durán and Peguero were arrested at the airport and the authorities traced the vehicle back to Morillo's apartment.\textsuperscript{196} When the authorities entered the apartment, the bedroom was in the same condition as when Durán and Peguero had left.\textsuperscript{197} The authorities found two kilograms of cocaine concealed between two mattresses and a scale in the bedroom closet.\textsuperscript{198} Morillo was then indicted on one count of possession of cocaine with intent to distribute and one count of conspiracy to distribute cocaine.\textsuperscript{199}

The district court convicted Morillo on the charge of conspiracy to distribute cocaine and acquitted Morillo on the charge of possession of cocaine with intent to distribute.\textsuperscript{200} The judge rejected Morillo's request for acquittal and sentenced Morillo to a seventy-eight month prison-term.\textsuperscript{201} Morillo appealed the district court's decision to the United States Court of Appeals for the First Circuit, arguing that the district court erred in denying his motion for acquittal because a jury could not find sufficient evidence for a conviction of a cocaine distribution conspiracy.\textsuperscript{202} The First Circuit accepted Morillo's appeal and reversed the district court's opinion, explaining that the government had failed to prove that Morillo had intended to agree to the conspiracy.\textsuperscript{203}

\begin{itemize}
  \item[191.] \textit{Id.} at 20.
  \item[192.] \textit{Id.} at 20-21.
  \item[193.] \textit{Id.} at 21.
  \item[194.] \textit{Id.}
  \item[195.] \textit{Id.}
  \item[196.] \textit{Id.} at 19-20. Eddison Núñez dropped Durán and Peguero at the airport entrance and he left with the vehicle. \textit{Id.} at 21. After entering the airport the two women were apprehended. \textit{Id.}
  \item[197.] \textit{Morillo,} 158 F.3d at 22.
  \item[198.] \textit{Id.} The cocaine was wrapped in a woman's nightgown and was not visible without moving two mattresses and unwrapping it. \textit{Id.}
  \item[199.] \textit{Morillo,} 158 F.3d at 22.
  \item[200.] \textit{Id.} at 18, 20.
  \item[201.] \textit{Id.} at 22.
  \item[202.] \textit{Id.} at 18, 22.
  \item[203.] \textit{Id.} at 18, 26. \textit{See United States v. United States Gypsum Co.,} 438 U.S. 422, 443 n.20 (1978) (stating that two types of intent are required for conspiracy: 1) intent to
Circuit Judge Patti B. Saris, writing for a unanimous court, reasoned that even though the government did not need to prove an overt act, the mere fact that the defendant realized the conspiracy existed upon his arrest was not enough to establish the defendant was a member of the conspiracy. Judge Saris stated that the government must prove intent to agree to the conspiracy and intent to accomplish the substantive offense at the time the event occurred. Judge Saris also stated that the trial record did not reveal any direct evidence that Morillo had agreed to allow the drug traffickers to use his apartment for their drug business.

The evidence showed that Morillo was comfortable with loaning the apartment to the individuals; however, no evidence existed proving that Morillo was involved in any aspect of the distribution conspiracy. Also, no evidence existed showing that Morillo had arranged for or concealed the drugs or that he knew what was stored in the bedroom. The court determined that the United States government's evidence was insufficient for a reasonable fact finder to conclude that Morillo knew about the conspiracy at the time the events occurred. The court explained that even if Morillo was aware of the drug conspiracy at the time of his arrest, the government must still prove Morillo's intent to agree and to accomplish the substantive offense at the time the events of the conspiracy took place.

B. Culpability—Actus Reus

Along with the requirement of mens rea, an individual must have actus reus for culpability to exist; the law does not punish evil thoughts alone. In United States v. Shabani, the United States Supreme Court reasoned that the drug conspiracy statute, 21 U.S.C. § 846 ("section 846"), does not require proof that a conspirator com-

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204. Morillo, 158 F.3d at 19, 23 (citations omitted).
205. Id. (citations omitted).
206. Id.
207. Id. at 23. The court stated that the knowledge issue is not determined by the defendant's accessibility to the drugs and paraphernalia, but by the defendant's knowledge of their existence. Id. at 24.
208. Morillo, 158 F.3d at 19, 24.
209. Id. at 25.
210. Id. at 26.
211. KADISH, supra note 90, at 231 (stating that the law requires actus reus and does not punish evil thoughts alone); BLACK'S LAW DICTIONARY 37, 999 (7th ed. 1999) (defining actus reus as committing an evil act).
213. 21 U.S.C. § 846 (1997). The statute provides in whole that "[a]ny person who attempts or conspires to commit any offense defined in this title shall be subject to the
mitted an overt act in furtherance of a conspiracy.\textsuperscript{214} In \textit{Shabani}, the United States government charged Reshat Shabani in the United States District Court for the District of Alaska for conspiracy to distribute cocaine.\textsuperscript{215} After moving to Anchorage, Alaska, Shabani joined a drug ring that consisted of his girlfriend and her family and friends.\textsuperscript{216} Shabani was positioned as the drug supplier to transport drugs from California to Alaska.\textsuperscript{217} During a sting operation, the conspirators sold drugs to federal officers.\textsuperscript{218} Subsequently, Shabani's girlfriend, Mayfield, pleaded guilty to the charge of conspiracy to distribute cocaine.\textsuperscript{219} Shabani was also charged under section 846 with conspiracy to distribute cocaine.\textsuperscript{220}

Shabani moved to dismiss the indictment against him, arguing that the indictment failed to allege an overt act to further the conspiracy.\textsuperscript{221} Shabani argued that an overt act was an essential element of the crime; however, the case proceeded to trial after the district court denied the motion to dismiss.\textsuperscript{222} Shabani then requested that the court advise the jury that a conviction required proof of an overt act.\textsuperscript{223} The district court rejected Shabani's request and reasoned that precedent did not require the indictment to contain an allegation of an overt act but instead required proof at trial.\textsuperscript{224} The district court further reasoned that Shabani's proposed jury instructions were completely illogical and contrary to the statute; therefore, the court rejected the instructions.\textsuperscript{225} The court then determined that Shabani was guilty and sentenced him to a prison term of 160 months.\textsuperscript{226}

Shabani appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing that the government did not prove or plead a necessary element of the crime.\textsuperscript{227} The Ninth Circuit accepted Shabani's appeal and reversed the district court opinion, concluding that the district court's lack of instructions

same penalties as those proscribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. § 846 (1997).

\textsuperscript{214} United States v. Shabani, 513 U.S. 10, 10, 17 (1994).
\textsuperscript{216} \textit{Shabani}, 993 F.2d at 1420.
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Shabani}, 513 U.S. at 11.
\textsuperscript{219} \textit{Shabani}, 993 F.2d at 1420.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Shabani}, 513 U.S. at 11.
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.} The district court invited the parties to appeal so the Ninth Circuit could address the overt act issue thoroughly. \textit{Shabani}, 993 F.2d at 1419, 1421.
\textsuperscript{226} \textit{Shabani}, 513 U.S. at 11.
\textsuperscript{227} \textit{Shabani}, 993 F.2d at 1419-20.
concerning the overt act did not allow the jury to find a necessary element to convict Shabani.\textsuperscript{228} Circuit Judge Eugene A. Wright, writing for the majority, stated that proof of conspiracy under section 846 requires both an agreement to participate in a criminal act and at least one overt act furthering the conspiracy.\textsuperscript{229} Judge Wright recognized that every other circuit interprets section 846 as not requiring an overt act; however, Judge Wright also recognized that Ninth Circuit precedent contradicts all other circuits.\textsuperscript{230} Since this was the Ninth Circuit, the court could not maintain that the jury instructions were harmless, and therefore, the case was reversed and remanded.\textsuperscript{231}

Chief Judge John Clifford Wallace concurred, recognizing that circuit precedent binds the three-judge panel.\textsuperscript{232} However, Judge Wallace stated that the court’s conclusion seemed rather odd because no other circumstances existed in the law where an element must be proven at trial that was not alleged in the indictment.\textsuperscript{233} Chief Judge Wallace reasoned that no textual support for the court’s holding existed in the statute, and therefore, the requirement of an instruction on an overt act made no sense when an overt act was not necessary for the indictment.\textsuperscript{234} The United States Supreme Court granted certiorari to resolve the conflict regarding the overt act within the circuits.\textsuperscript{235}

The Supreme Court reversed the decision of the Ninth Circuit, determining that the plain language of section 846 and settled interpretive principles disclose that evidence of an overt act is not necessary.\textsuperscript{236} Justice Sandra Day O’Connor, writing for a unanimous Court, reasoned that the statute’s plain language did not require an overt act.\textsuperscript{237} The statute provides that “[a]ny person who attempts or conspires to commit an 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.”\textsuperscript{238} Justice O’Connor noted that the Court has not inferred the requirement of an overt act where Congress was silent on the issue.\textsuperscript{239} Just-
With the Court had consistently affirmed this common law understanding that an overt act was not required where congress was silent on the issue. Furthermore, Justice O'Connor stated that congress's silence on the overt act requirement speaks volumes considering congress specifically included an overt act requirement in the federal general conspiracy statute. The federal general conspiracy statute, 18 U.S.C. § 371, specifically requires that a conspirator "do any act to effect the object of the conspiracy." This general conspiracy statute preceded and established the framework for the more particular drug conspiracy statute. Justice O'Connor determined that, in light of the history of the general conspiracy statute, congress deliberately made a choice not to require an overt act in section 846; therefore, an overt act requirement should not be read into the statute.

Shabani further contended that conspiracy without an overt act violates the principle that the law does not punish criminal thoughts alone. The Court, however, stated that the criminal agreement itself was the actus reus; therefore, Shabani was not being punished for mere thoughts alone. The Court reversed the judgment of the Ninth Circuit, emphasizing that the district court had correctly noted that the plain language of section 846 did not require proof of an overt act.

240. Id. at 13-14. Justice Holmes stated that "[w]e can see no reason for reading into the Sherman Act more than we find there" and the Court held that antitrust conspiracy liability does not require an overt act. Id. The United States Supreme Court has also concluded that an overt act is not required for conspiracy under the Selective Service Act. Id.


If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

244. Id.
245. Id.
246. Shabani, 513 U.S. at 16.
247. Id. at 10, 16. This has been the view of the common law since 1705. Id. (citation omitted).
C. TERMINATION OF THE CONSPIRACY

Even where an individual has the culpability for a conspiracy crime, the conspiracy terminates when either the conspiracy is successful or the conspiracy is abandoned.\textsuperscript{249} A conspiracy is abandoned as to one individual when that individual withdraws from the conspiracy.\textsuperscript{250} To establish whether an individual has withdrawn from a conspiracy, a court must first understand what events were the objectives of the conspiracy.\textsuperscript{251} The events that were the objectives of a conspiracy and made an individual liable for a conspiracy are the events that evidence an individual's mens rea and actus reus to commit the crime.\textsuperscript{252} For a conspirator to terminate the conspiracy as to himself, the events that indicate an individual's mens rea and actus reus must be disavowed by affirmative acts of withdrawal.\textsuperscript{253}

On July 31, 1964, in \textit{United States v. Borelli},\textsuperscript{254} the United States Court of Appeals for the Second Circuit disclosed the criteria for withdrawal as requiring either a clean breast to law enforcement officials or a reasonable communication of withdrawal to co-conspirators.\textsuperscript{255} Over ten years after the \textit{Borelli} decision, the United States Supreme Court cited the \textit{Borelli} decision and concluded that affirmative acts contrary to the objective of the conspiracy and communicated in a reasonable way to reach co-conspirators was sufficient for withdrawal.\textsuperscript{256} In 1992, the United States Court of Appeals for the Seventh Circuit recognized that United States Supreme Court precedent does not require a clean breast for withdrawal.\textsuperscript{257} Then, nearly three years later, the United States Court of Appeals for the Third Circuit also looked to the United States Supreme Court's interpretation of \textit{Borelli} and reasoned that withdrawal does not require a full and utter confession to authorities.\textsuperscript{258}

\textsuperscript{249} United States v. Kissel, 218 U.S. 601, 608 (1910).
\textsuperscript{250} LAFAVE & SCOTT, supra note 87, at 555, 558.
\textsuperscript{251} Id. at 555, 558 n.18.
\textsuperscript{252} KADISH, supra note 90, at 231.
\textsuperscript{253} United States v. Antar, 53 F.3d 568, 582 (3d Cir. 1995) (stating withdrawal depends on the context of the crime); United States v. United States Gypsum Co., 550 F.2d 115, 129 (3d Cir. 1977) (stating that since culpability for a crime might be shown by direct or circumstantial evidence, no reason exists why withdrawal could not be held to this same proof); LAFAVE & SCOTT, supra note 87, at 558-59 n.188 (stating affirmative acts negating the events of the conspiracy constitute withdrawal).
\textsuperscript{254} 336 F.2d 376 (2d Cir. 1964).
\textsuperscript{255} United States v. Borelli, 336 F.2d 376, 376, 388 (2d Cir. 1964) (citations omitted).
\textsuperscript{256} United States v. United States Gypsum Co., 438 U.S. 422, 464-65 (1878) (citations omitted).
\textsuperscript{257} United States v. Schweihis, 971 F.2d 1302, 1302, 1323 (7th Cir. 1992) (citations omitted).
\textsuperscript{258} United States v. Antar, 53 F.3d 568, 568, 582 (3d Cir. 1995).
In *Borelli*, the Second Circuit interpreted withdrawal as requiring either communication of withdrawal in a reasonable manner to co-conspirators or the making of a clean breast to law enforcement officials. In *Borelli*, Rosario Magavero, Lacasicio, Tantillo, Cinquegrano, Borelli, Smith and Sedotto were indicted on August 15, 1962 for a conspiracy to operate an illicit business, which included the distribution of heroin. During the summer of 1950, Rosario Magavero and Lacasicio were involved in a drug enterprise and directed heroin deliveries, shipments, and transactions. On several occasions, Rosario Magavero and Lacasicio instructed Rinaldo to pick up drugs, communicate with runners, deliver drugs to wholesalers, and pick up drugs from providers. Tantillo, Cinquegrano, and Borelli were heroin wholesalers who typically received two-to-three kilograms of heroin from Rinaldo's deliveries.

In 1953, Rosario Magavero was incarcerated for a state extortion conviction. Lacasicio and Joe Magavero continued the business and introduced Rinaldo to Sedotto and Smith in 1954. At this time, Rinaldo began making deliveries to Sedotto, who was a runner. Smith worked as a provider and Rinaldo picked up large quantities of drugs from Smith and delivered the drugs to the wholesalers: Tantillo, Cinquegrano, and Borelli.

In 1956, Cinquegrano was incarcerated for an unrelated federal narcotics crime. After August 15, 1957, no evidence existed that Tantillo, Sedotto, Borelli, or Smith were involved in the heroin distribution enterprise. Then, on August 15, 1962, the United States government filed an indictment in the district court against the members of the heroin business stemming from the conspiracy that com-

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259. *Borelli*, 336 F.2d at 376, 388 (citations omitted).
260. *Id.* at 380-81, 388. Dominick Castiglia, Thomas Garibaldi, Angelo Locascio and Roco Sancinella also appealed the decision of the district court; however, their case is not relevant inasmuch as they did not contend withdrawal. *Id.* at 376, 388.
261. *Borelli*, 336 F.2d at 380. The drug enterprise also included Joe Magavero who worked with Locascio after Rosario Magavero was incarcerated in 1953. *Id.*
262. *Borelli*, 336 F.2d at 380-81. In 1950, Rosario Magavero and Locascio instructed Rinaldo to fly to Italy and pick up "some junk." *Id.* at 380. In 1955, Rinaldo made a trip to Italy to sort out a matter regarding impure heroin the drug business had received from their Italy supplier. *Id.* at 381. Rosario Magavero and Locascio hired Rinaldo to make deliveries to Tantillo, Cinquegrano and Borelli for one hundred dollars a package. *Id.* at 380-81.
263. *Borelli*, 336 F.2d at 380-81.
264. *Id.* at 381. Before Rosario Magavero was incarcerated, he instructed Rinaldo to report to Joe Magavero and Locascio and act as if the orders were coming from him. *Id.*
265. *Borelli*, 336 F.2d at 381.
266. *Id.*
267. *Id.*
268. *Id.* at 388.
269. *Id.*
The district court convicted Rosario Magavero, Lacasicio, Tantillo, Cinquegrano, Borelli, Smith, and Sedotto for conspiring to import and distribute illegal narcotics.270

Rosario Magavero, Lacasicio, Tantillo, Cinquegrano, Borelli, Smith, and Sedotto appealed the decision of the district court to the Second Circuit.271 Tantillo, Sedotto, Borelli, and Smith contended that they had withdrawn from the conspiracy prior to August 15, 1957 because no evidence existed that they were active with the drug business after this date.272 Rosario Magavero and Cinquegrano, on the other hand, claimed that their incarceration prior to August 15, 1957 evidenced their withdrawal from the conspiracy.273 Therefore, the conspirators maintained that they had all withdrawn from any conspiracy prior to August 15, 1957 and were entitled to acquittal because the statute of limitations had expired.274 The Second Circuit accepted the appeal but overruled the conspirators' contentions and determined that an acquittal was not warranted.275

Circuit Judge Henry Jacob Friendly, writing for a unanimous court, reasoned that withdrawal is a rigorous standard that does not commence the statute of limitations until the conspirator acts to defeat or disavow the purpose of the conspiracy.276 Judge Friendly further reasoned that mere cessations of conspiratorial acts are not sufficient to begin the limitations period.277 Judge Friendly determined that withdrawal must consist of affirmative acts of the person intending to withdraw.278 In recognition of this rigorous standard, Judge Friendly traversed Tantillo, Sedotto, Borelli, and Smith's withdrawal contention.279 Judge Friendly reasoned that the conspiracy members could not merely contend inaction after a certain date; the conspirators must show an affirmative demonstration that they had abrogated the conspiracy.280 Regarding Rosario Magavero and Cin-

270. Id. at 380.
271. Id. at 376, 380.
272. Id. at 376, 388.
273. Id. at 388.
274. Id.
275. Id.
276. Id.
277. Id. at 379, 388 (citations omitted).
278. Id. at 388 (citations omitted).
279. Id. at 379, 388 (citations omitted).
280. Id. at 379, 389. The court stated that even if they relaxed the rigorous rule of withdrawal, the mere lack of proof that an individual's conspiratorial activity continued into the limitations period does not require the court to consider withdrawal. Id. at 389. It is not unreasonable or unfair to require the conspirator to show that the conspiracy was abrogated at an earlier time. Id.
281. Borelli, 336 F.2d at 389.
quegrano's contentions that their incarceration constituted withdrawal, Judge Friendly noted that neither reason nor authority suggested that mere imprisonment was sufficient to constitute withdrawal. Judge Friendly determined that an individual must either make a clean breast to law enforcement officials or communicate notice of withdrawal in a reasonable manner to co-conspirators in order to successfully withdraw.

Over ten years later, in United States v. United States Gypsum Co., the United States Supreme Court referenced Borelli and concluded that affirmative events contrary to the objective of the conspiracy and communicated in a reasonably calculated way would constitute withdrawal. In Gypsum Co., the United States government sued several major gypsum board manufacturers in the United States District Court for the Western District of Pennsylvania for violations of the Sherman Act.

After World War II, gypsum board replaced plaster as the primary construction material for internal walls in residential and commercial buildings. During this time, the gypsum board industry was very concentrated, with the number of producers ranging from nine to fourteen. Of these companies, eight made up approximately ninety-four percent of the national market and most of these companies belonged to the same trade association for gypsum board manufacturers. Furthermore, no significant difference between the gypsum board of the various manufacturers existed and the price of the board was not correlated to the demand produced from the con-

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282. Id. at 389-90.
283. Id. at 388 (citations omitted).

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

287. Gypsum Co., 550 F.2d at 117.
288. Id.
Considering that the product between producers was nearly identical, a buyer's decision to purchase from a particular manufacturer was usually dependant on the price of the board.291

In the mid-1960s, the Justice Department and the Federal Trade Commission began tracking possible antitrust violations in the industry.292 The investigation centered on the industry practice of contacting competitors to determine their price and terms of sale.293 In 1973, an indictment was filed in the district court charging the manufacturers with agreeing to fix prices and the conditions of sale and delivery of the gypsum board.294

The district court determined that the gypsum manufacturers were guilty of using price fixing in violation of the Sherman Act.295 Regarding the manufacturers' evidence of withdrawal from the conspiracy, Judge Herbert Irving Tietelbaum instructed that withdrawal must be established by either 1) an affirmative notice to every other member of the conspiracy; or 2) by disclosure of the illegal enterprise to law enforcement officials.296 Judge Tietelbaum did not instruct the jury per the manufacturers' request that vigorous price competitions during the period in question could be considered as evidence of withdrawal from the conspiracy.297

The gypsum manufacturers appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing that the trial court's instruction regarding withdrawal from the

290. Gypsum Co., 550 F.2d at 117.
291. Id.
293. Id. at 428.
294. Id. at 427.
295. Id. at 422-23.
296. Gypsum Co., 550 F.2d at 115, 130. Specifically, the district court charged as follows:

In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.

Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise.

alleged conspiracy was insufficient. The Third Circuit accepted the appeal and reversed the district court decision on the grounds that the jury instructions improperly confined the jury's consideration of withdrawal. Circuit Judge James Hunter, III, writing for the majority, stated that since formation of a criminal conspiracy is evidenced by direct or circumstantial evidence, no reason exists why withdrawal should not be held to the same proof. The manufacturers did not need to directly inform each co-conspirator of their intent to withdraw from the conspiracy. The Third Circuit reasoned that by limiting withdrawal to only two possibilities the district court excluded other possibilities such as conduct inconsistent with the theory of continued adherence.

Circuit Judge Joseph Francis Weis, Jr. dissented, reasoning that the jury instructions were adequate because they reflected the essence of the majority's desired instructions. Judge Weis opined that the jury's instructions did not constitute grounds for reversal. The district court's statement that the manufacturers must take a definite, decisive step showing a separation from the conspiracy was similar to the majority's opinion that the manufacturers must show conduct entirely inconsistent with the purpose of the conspiracy. Since the district court instructed on a general statement of the law, the manufacturers had the responsibility of objecting to the instructions. Judge Weis found this instruction did not constitute reversible error. The United States Supreme Court granted certiorari to consider the jury instructions regarding participation in a conspiracy and withdrawal.

The Supreme Court affirmed the decision of the Third Circuit, concluding that the instructions regarding withdrawal were insufficient because they unnecessarily confined the jury. The gypsum manufacturers requested that the Court implement a broader instruction that would allow the jury to consider competitive behavior, such as price-cutting, as evidence of withdrawal from the price fixing con-

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298. Id. at 129.
299. Id. at 130.
300. Id. at 129.
301. Id.
302. Id.
303. Id. at 134, 137.
304. Id. at 134, 138.
305. Id.
306. Id. at 134, 138-39.
307. Id. at 134, 139.
309. Id. at 422, 462, 465.
The United States government maintained that the district court’s instruction to the jury was sufficiently broad. Chief Justice Warren E. Burger agreed with the contentions of the gypsum board manufacturers, concluding that the instructions of the district court were erroneous because they limited the jury’s considerations to only two possible ways an individual could withdraw. Chief Justice Burger was unable to find that confining binders should constrain the jury’s freedom to weigh evidence regarding the conspirators continued participation in a conspiracy. Citing Borelli, the Court concluded that the correct instructions would have included a statement that affirmative events contrary to the objective of the conspiracy and communicated in a reasonably calculated way to reach co-conspirators would constitute withdrawal.

Several years later in 1992, the Seventh Circuit recognized that under the Gypsum Co. decision, withdrawal does not require a clean breast. In United States v. Schweihs, the United States government charged Frank Schweihs and Anthony Daddino in the United States District Court for the Northern District of Illinois with conspiring to affect interstate commerce by extortion. In Schweihs, William Wemette had an adult video store in Chicago and his live-in friend, Leonard Cross, helped him run the business. The Chicago

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310. Id. at 464. The withdrawal instruction was important because the gypsum manufacturers argued that they had withdrawn from the conspiracy before the critical limitations date. Id. at 465 n.37. See 18 U.S.C. § 3282 (2001) (“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”).


312. Id. at 464-65.

313. Gypsum Co., 438 U.S. at 426, 464. See United States v. Kissel, 218 U.S. 601, 608 (1910) (stating that a conspiracy continues until abandonment or success); LaFave & Scott, supra note 87, at 555 (defining abandonment as occurring when no party to the conspiracy has committed an overt act to advance the objectives of the crime during the statute of limitations period). See also United States v. Schweihs, 971 F.2d 1302, 1323 (7th Cir. 1992) (stating that the decision in Gypsum Co. means an individual can withdraw or abandon a conspiracy without making a clean breast to law officials or communicating abandonment to co-conspirators).

314. Gypsum Co., 438 U.S. at 464-65 (citations omitted). See United States v. Antar, 53 F.3d 568, 582 (3d Cir. 1995) (stating that there is no single way that withdrawal can be established). See also United States v. Gornio, 792 F.2d 1028, 1033 (11th Cir. 1986) (stating that withdrawal outside the applicable statute of limitations bars conviction).

315. United States v. Schweihs, 971 F.2d 1302, 1302, 1323 (7th Cir. 1992) (citations omitted).

316. 971 F.2d 1302 (7th Cir. 1992).


318. Schweihs, 971 F.2d at 1309.
"Outfit" persuaded Wemette and Cross to pay a "street tax" to the members of their organized crime group.\textsuperscript{319} The Outfit informed Wemette and Cross that their business might fall on hard times, possibly by a fire or an accident, if they did not pay the tax.\textsuperscript{320} From 1974 to 1988, Wemette and Cross paid the "street tax" to protect their business from falling on possible hard times.\textsuperscript{321}

On several occasions, Daddino collected approximately eleven hundred dollars per month from Wemette and Cross.\textsuperscript{322} After making several payments, Wemette declined to make the monthly payments until Wemette's complaint about his competitor's expansion were heard by a higher-ranking individual in the Outfit.\textsuperscript{323} Daddino warned Wemette and Cross about holding back their payments and threatened that they may not enjoy the next collector.\textsuperscript{324} After this confrontation, Daddino did not return to Wemette's apartment and Schweis collected the tax thereafter.\textsuperscript{325} These events led the United States government to indict Daddino on four counts of conspiring to affect interstate commerce by extortion.\textsuperscript{326}

The district court found Daddino guilty on all four counts of conspiracy.\textsuperscript{327} The district court refused to charge the jury with an instruction regarding Daddino's withdrawal because the district court found no evidence in the record to endure such a charge.\textsuperscript{328} Daddino was sentenced to ninety-six months of imprisonment and five years of probation.\textsuperscript{329}

Daddino appealed the decision of the district court to the United States Court of Appeals for the Seventh Circuit, arguing that the district court had erred in not giving the jury an instruction on withdrawal.\textsuperscript{330} Daddino contended that the evidence supported a

\begin{itemize}
\item \textsuperscript{319} Id. Apparently the crime group was able and willing to hurt anyone who would not hand over the street tax. Id.
\item \textsuperscript{320} Schweis, 971 F.2d at 1309. At the time of the threat, Amato was the tax collector. Id.
\item \textsuperscript{321} Schweis, 971 F.2d at 1309. After Wemette complained to the organized crime group about Amato's threats, the crime group put Wemette in contact with Schweis. Id. Schweis who had a reputation as a vehement person arranged for Anthony Daddino to begin collecting the tax from Wemette. Id.
\item \textsuperscript{322} Schweis, 971 F.2d at 1309.
\item \textsuperscript{323} Id. In 1987, Wemette began to work with the FBI and Wemette agreed to record his conversations with Schweis and Daddino. Id. Wemette's refusal to pay Daddino was in coordination with the directions of the FBI. Id.
\item \textsuperscript{324} Schweis, 971 F.2d at 1309.
\item \textsuperscript{325} Id. at 1309, 1323. Daddino ceased to collect money from Wemette because Schweis instructed him not to return. Id. at 1323.
\item \textsuperscript{326} Schweis, 971 F.2d at 1308-09.
\item \textsuperscript{327} Id. at 1309.
\item \textsuperscript{328} Id. at 1322.
\item \textsuperscript{329} Id. at 1309.
\item \textsuperscript{330} Id. at 1302, 1322-23.
\end{itemize}
withdrawal instruction because Daddino never returned to Wemette’s apartment after Wemette instructed him not to do so.\textsuperscript{331} The Seventh Circuit accepted Daddino’s appeal but disagreed with Daddino’s contentions, holding that the district court had correctly denied the withdrawal instruction because Daddino did not show proof of affirmative action of withdrawal.\textsuperscript{332}

Circuit Judge Thomas E. Fairchild, writing for a unanimous court, stated that more is required to withdraw from a conspiracy than a mere cessation of conspiratorial activity; withdrawal requires the conspirator to affirmatively act to defeat or disavow the intent of the conspiracy.\textsuperscript{333} Judge Fairchild recognized that Supreme Court precedent did not require a clean breast for withdrawal.\textsuperscript{334} However, Judge Fairchild emphasized that a withdrawal defense had stringent standards, which required affirmative action, and as such, an individual could not walk away from a ticking bomb and be absolved of guilt.\textsuperscript{335} Judge Fairchild determined that Daddino had merely turned his back on a ticking bomb and walked away because Daddino had not affirmatively acted in any way to disavow the conspiracy.\textsuperscript{336}

In \textit{United States v. Antar},\textsuperscript{337} the Third Circuit recognized that an individual could sufficiently establish withdrawal without making a confession to authorities.\textsuperscript{338} On September 6, 1989, the United States government charged Mitchell and Eddie Antar in the United States District Court for the District of New Jersey with racketeering and securities fraud conspiracy.\textsuperscript{339} In the 1970s, Eddie Antar was a key figure in his family owned retail chain.\textsuperscript{340} Eddie Antar was the com-

\begin{itemize}
\item \textsuperscript{331} Id. at 1323.
\item \textsuperscript{332} Id. at 1302, 1323.
\item \textsuperscript{333} Id. at 1307, 1323 (citations omitted).
\item \textsuperscript{334} Id. (citations omitted). Judge Fairchild referenced \textit{United States v. Patel}, 879 F.2d 292 (7th Cir. 1989). \textit{Schweihs}, 971 F.2d at 1307, 1323. In \textit{Patel}, Circuit Judge Richard A. Posner formulated the criteria for withdrawal as follows: A conspiracy is an agreement, but it is an agreement without formalities, and an agreement made informally can be dissolved informally. The same applies to the collateral agreement joining a particular individual to the conspiracy. All that would be required for withdrawal, one might think, would be proof that the individual was no longer a party. Making a clean breast to the government is one way of indicating that one has quit—although it is not conclusive, for one might make a clean breast one day and repent of it the next and resume participation in the conspiracy. Notifying one’s co-conspirators that one has quit is another way. Death is a third. One supposes there could be others.
\item \textsuperscript{335} \textit{Schweihs}, 971 F.2d at 1307, 1323.
\item \textsuperscript{336} Id.
\item \textsuperscript{337} 53 F.3d 568 (3d Cir. 1995).
\item \textsuperscript{338} \textit{United States v. Antar}, 53 F.3d 568, 568, 582 (3d Cir. 1995).
\item \textsuperscript{339} \textit{Antar}, 53 F.3d at 568, 571-72.
\item \textsuperscript{340} Id. at 570. The business, Crazy Eddie, Inc., began as a small business but grew into a major New York retail chain with stores in four states and sales equaling over 300 million dollars. Id.
\end{itemize}
pany's President and on the Board of Directors. Eddie Antar's younger brother, Mitchell Antar, also worked for the company as Vice-President of purchasing and later joined the company's Board of Directors in May 1984.

Between 1980 and 1983, Eddie Antar skimmed cash from the business for tax-free personal use. Eddie Antar ceased his cash-skimming scheme when the company decided to go public and was preparing for an initial public offering. When Eddie Antar decided to stop skimming from the books, the additional cash recorded in the books gave the perception that the company reaped a large earnings growth. This false appearance of growth gave investors the impression they had found a gold mine; thereafter, the company's stock increased from eight dollars a share to over seventy-five dollars a share. On June 5, 1987, Mitchell Antar relinquished all his positions at the company but continued to hold stock. On September 6, 1989, the United States government sued Eddie and Mitchell Antar and several others for a racketeering and securities fraud conspiracy.

The district court determined that Eddie and Mitchell Antar were guilty for several of the conspiracy charges. Eddie Antar was sentenced to 151 months of incarceration and required to pay restitution of 121 million dollars. Mitchell was sentenced to fifty-one months of jail time and required to pay three million dollars in restitution.

341. Antar, 53 F.3d at 570.
342. Id.
343. Id. at 570-71.
344. Id. at 571.
345. Id.
346. Id. at 570-71.
347. Id. at 579. Mitchell issued the board the following justifications for his resignation:

Over the past months, my brother Eddie's relationship with my family has been acrimonious and has resulted in a series of very disturbing developments involving the Company. My father, brother Alan and Eddie's mother-in-law have been fired and certain key employees who are particularly important to the marketing area—my end of the business, have been forced to resign or have been fired summarily.

Although part of the three member Office of President, I have not been consulted on major decisions, among them the firing of personnel . . . , executive compensation and the like. Under these conditions, I find it impossible to continue as Director and Executive Officer of the Company. Therefore, effective immediately, I am resigning as an Executive Officer of Crazy Eddie and as a Director.

Id. at 579-80.
348. Antar, 53 F.3d at 571-72.
349. Id. at 572.
350. Id.
351. Id.
Mitchell appealed the decision of the district court to the Third Circuit, arguing that he had resigned from the corporation outside the five-year statute of limitations period. Mitchell contended that acts committed after his resignation cannot be accredited to him based on his purported membership in the conspiracy. The Third Circuit accepted the appeal but determined that Mitchell did not establish his withdrawal.

Circuit Judge Morton I. Greenberg, writing for a unanimous court, disagreed with Mitchell's contentions, reasoning that Mitchell did not establish a prima facie case of withdrawal because he had retained stock in the company which evidenced that he did not cut his ties with the business. Judge Greenberg stated that withdrawal is not established by mere cessation of conspiratorial activity. Typically, a conspirator either discloses to co-conspirators that he has withdrawn from the conspiracy and its goals or the conspirator makes a full and utter confession to officials. However, Judge Greenberg stated that no single way to withdraw from a conspiracy exists; acts of withdrawal depend on the context of the situation. Judge Greenberg noted that the Supreme Court had warned against confining the jury's consideration of withdrawal evidence. Therefore, affirmative acts contrary to the purpose of the conspiracy and communicated in a reasonable manner to reach co-conspirators is sufficient to establish withdrawal.

Judge Greenberg determined that Mitchell did not sever all his ties with the conspiracy because he had retained ownership in the corporation. Judge Greenberg also determined that Mitchell did not produce any evidence that he had acted contrary to the purpose of the conspiracy, and Mitchell's failure to report the fraud further indicated acts in support of the conspiracy. Specifically, Judge Greenberg noted that Mitchell continued to receive the fruits of the conspiracy through his ownership of stock. Therefore, Judge Greenberg deter-

352. Id. at 568, 579.
353. Id. at 579.
354. Id. at 583.
355. Id. at 570, 583.
356. Id. at 570, 582 (citations omitted).
357. Id. at 582 (citations omitted).
358. Id.
359. Id. at 570, 582. The Supreme Court warned against putting confining blinders on the jury. Id.
360. Antar, 53 F.3d at 582 (citations omitted).
361. Id. at 570, 583.
362. Id. at 570, 584.
363. Id. at 570, 583-84.
WITHDRAWAL FROM A CONSPIRACY

mined that even though Mitchell resigned from the corporation, his actions were insufficient to constitute withdrawal.364

ANALYSIS

In United States v. Grimmett,365 Patricia Grimmett assisted her boyfriend, Elmont Kerns, with his drug business until his murder in June 1989.366 In July 1989, Grimmett disclosed several of the various details of the drug conspiracy to the police.367 In 1992, investigators again contacted Grimmett and she voluntarily gave the investigators additional information.368 Then, in November 1994, the police charged Grimmett with conspiracy to distribute marijuana.369 The United States Court of Appeals for the Eighth Circuit concluded that Grimmett had withdrawn from a conspiracy to distribute marijuana after her disclosure to officials in 1989; therefore, the United States government was time-barred from charging Grimmett with conspiracy.370

In reasoning that Grimmett had withdrawn from the conspiracy, the Grimmett majority addressed the applicability of the “clean breast” doctrine to the facts surrounding Grimmett’s withdrawal.371 The Grimmett majority reasoned that the phrase “clean breast” discussed in United States v. Borelli372 does not require a full and utter confession.373 The majority instead stated that in order to sufficiently withdraw, the conspirator must simply cut ties from the conspiracy and affirmatively act to disavow the conspiracy by cooperating and confessing to authorities.374

Judge Diana E. Murphy dissented, arguing that Grimmett did not make a complete confession to the police in 1989.375 Judge Murphy believed that withdrawal had a rigorous standard that required a full and utter confession to police officials or communication to co-conspirators that Grimmett had disengaged the conspiracy.376 According to Judge Murphy, Grimmett did not withdraw in 1989 because during her 1992 interview, she disclosed additional incriminating informa-

364. Id.
365. 236 F.3d 452 (8th Cir. 2001).
367. Grimmett, 236 F.3d at 453-54.
368. Id. at 454.
369. Id.
370. Id. at 452, 456.
371. Id. at 453-56.
372. 336 F.2d 376 (2d Cir. 1964).
373. Grimmett, 236 F.3d at 456.
374. Id.
375. Id. at 456-57 (Murphy, J., dissenting).
376. Id. at 456 (Murphy, J., dissenting) (citations omitted).
tion about her involvement in the conspiracy thereby indicating that she did not make a full and utter confession in 1989. Therefore, Judge Murphy determined that the government's prosecution was not barred by the statute of limitations.

In Grimmett, the majority correctly concluded that Grimmett had disavowed the events of her culpability thereby withdrawing from the conspiracy. To determine whether an individual has withdrawn from a conspiracy, a court must first understand what events were the objectives of the conspiracy. The events that were the objectives of a conspiracy and made an individual liable for a conspiracy are the events that evidence an individual's concurrence of mens rea and actus reus. In Grimmett, the events surrounding Grimmett's situation indicated that she had culpability to conspire to distribute marijuana. First, Grimmett had mens rea to commit a conspiracy because she had both the intent to achieve the objectives of the conspiracy and the intent to agree. Second, Grimmett's agreement evidenced her actus reus (a guilty act) of the crime. Notwithstanding the facts and circumstances surrounding Grimmett's culpability, the majority correctly determined that Grimmett had successfully withdrawn from the conspiracy in 1989 by negating the acts that gave rise to her culpability. Furthermore, the Grimmett majority correctly disregarded the reasoning behind Judge Murphy's dissent as contrary to nearly twenty-five years of United States Supreme Court precedent.

A. Culpability—Mens Rea

One requirement of culpability for the crime of conspiracy is that the individual have mens rea (a guilty mind to commit the crime). In a conspiracy, two different types of intent are required for mens rea to exist. Mens rea requires intent to achieve the objectives of the

377. Id. at 456-58 (Murphy, J., dissenting).
378. Id. at 456, 458 (Murphy, J., dissenting).
379. See infra notes 387-558 and accompanying text.
381. 1 SANFORD H. KADISH, ENCYCLOPEDIA OF CRIME AND JUSTICE, CONSPIRACY 231 (1983) (stating that the events that indicate a persons mens rea and actus reus evidence a conspiracy); WEBSTER'S NEW COLLEGIATE DICTIONARY 274, 506 (1st ed. 1979) (defining culpability as a concurrence of mens rea and actus reus).
382. See infra notes 387-466 and accompanying text.
383. See infra notes 387-442 and accompanying text.
384. See infra notes 443-66 and accompanying text.
385. See infra notes 467-544 and accompanying text.
386. See infra notes 545-58 and accompanying text.
387. KADISH, supra note 381, at 231.
388. LAFAVE & SCOTT, supra note 380, at 535.
conspiracy and the basic intent to agree to commit a crime.\textsuperscript{389} In light of the facts and circumstances surrounding Grimmett's situation, she had the necessary mens rea to commit the crime of conspiracy.\textsuperscript{390}

1.\textit{ Intent to Achieve the Objectives of the Conspiracy}

Grimmett had intent to achieve the objectives of the conspiracy to distribute marijuana.\textsuperscript{391} Evidence existed that Grimmett had limited knowledge of the full scope of the conspiracy; however, Grimmett did know, on some level, that Kerns was distributing drugs.\textsuperscript{392} In\textit{ United States v. Falcone}\textsuperscript{393} and \textit{Direct Sales Co. v. United States},\textsuperscript{394} the Supreme Court discussed an individual's intent to achieve the objectives of a conspiracy through sales of products.\textsuperscript{395} In \textit{Direct Sales Co.}, the United States Supreme Court maintained that an individual did not need knowledge of the full extent of the conspiracy to have intent to achieve the objectives of the conspiracy.\textsuperscript{396} However, in \textit{Falcone}, the Supreme Court reasoned that an individual who did not know that legal goods or services would be put to an illegal end did not have intent to achieve the objectives of the conspiracy.\textsuperscript{397}

In \textit{Direct Sales Co.}, the Supreme Court determined that Direct Sales' knowledge of a medical doctor's large purchases of regulated prescription drugs evidenced the company's intent to achieve the objectives of the conspiracy.\textsuperscript{398} Given Direct Sales' profit from the sales and that no other explanation existed except to conclude that the doctor was distributing the drugs through illegal means, the Court reasoned that Direct Sales had knowledge of the conspiracy.\textsuperscript{399} The \textit{Falcone} Court explained that the "type" of sale helped to determine whether an individual had knowledge of a conspiracy.\textsuperscript{400} In \textit{Falcone}, the Supreme Court found that sugar distributors did not join a conspiracy to illegally distill alcohol even though their sales might have furthered the objectives of the conspiracy.\textsuperscript{401}

In addressing the holding in \textit{Falcone}, the Supreme Court in \textit{Direct Sales Co.} stated that the drugs sold to the doctor were articles of re-

\begin{footnotes}
\textsuperscript{389} Id.
\textsuperscript{390} See infra notes 391-442 and accompanying text.
\textsuperscript{391} See infra notes 392-418 and accompanying text.
\textsuperscript{392} See infra notes 393-418 and accompanying text.
\textsuperscript{393} 311 U.S. 205 (1940).
\textsuperscript{394} 319 U.S. 703 (1943).
\textsuperscript{395} United States v. Direct Sales, 319 U.S. 703, 703, 714-15 (1943); United States v. Falcone, 311 U.S. 205, 205, 210 (1940) (citations omitted).
\textsuperscript{396} \textit{Direct Sales Co.}, 319 U.S. at 703, 709, 714-15.
\textsuperscript{397} \textit{Falcone}, 311 U.S. at 205, 210-11 (citations omitted).
\textsuperscript{398} \textit{Direct Sales Co.}, 319 U.S. at 703, 706, 714-15.
\textsuperscript{399} \textit{Id.} at 705, 711, 713.
\textsuperscript{400} \textit{Falcone}, 311 U.S. at 210-11.
\textsuperscript{401} \textit{Id.} at 205, 210.
\end{footnotes}
stricted trade, unlike the sugar in *Falcone*. Both products could be used illegally; however, each product puts a seller on different levels of notice that the products may be illegally used. Large quantities of sugar might be bought without it being evident to the seller that the buyer is using it illegally. Yet, when large quantities of seldom-proscribed regulated drugs are purchased, a seller has a higher level of knowledge the product could be put to an illegal end. Therefore, when a product supplier sells goods that are later used in illegal activity, further proof is necessary that the supplier had knowledge of the conspiracy to use the goods illegally and only then can an individual's intent to achieve the objectives be shown.

In *Grimmett*, several facts existed that indicated Grimmett had intent to achieve the objectives of the conspiracy. Grimmett identified to the police several of the drug runners Kerns had used to move marijuana because she knew they could help the police decipher Kerns’ codes. Grimmett also identified Dennis Moore as one of Kerns’ drug associates. The evidence showed that Grimmett knew Kerns went to Columbia to arrange a drug deal and was later threatened by the Columbians. Grimmett further disclosed that Kerns went on a trip to Chicago to collect a drug debt, and even though Grimmett kept Kerns’ drug books in code, she knew Kerns was dealing drugs. Grimmett also knew where Kerns hid the drugs and large quantities of money.

Similar to *Direct Sales Co.* and *Falcone*, the illegal or regulated nature of the drugs was enough proof alone to show that Grimmett knew or was on notice of the illegal distribution of the drugs. Therefore, Grimmett knew Kerns was distributing and involved in a

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403. *Id.* at 711.
404. *Id.* Knowledge is the foundation for intent. *Id.*
406. *See supra* notes 393-405 and accompanying text.
407. *See infra* notes 408-12 and accompanying text.
408. *Grimmett*, 236 F.3d at 453-54.
409. *Id.*
410. *Id.* at 457 (Murphy, J., dissenting).
411. *Id.* at 453-54 (stating that Grimmett knew Kerns was dealing drugs even though she kept his books in code). *Id.* at 457 (Murphy, J., dissenting) (stating that Grimmett went on a trip to Chicago to collect a drug debt).
412. *Id.* at 453-54.
413. *Compare Falcone*, 311 U.S. at 205, 210 (stating that the size of the sugar sales was too vague to support a finding that Falcone knew of the conspiracy), and *Direct Sales Co.*, 319 U.S. at 711 (stating that the volume, frequency and type of sales was enough to show a seller knew of a conspiracy especially where the product was highly regulated and the buyer only had certain avenues of dispensing the product), with *Grimmett* 236 F.3d at 453-54 (determining that Grimmett knew she was keeping a drug book, she knew the “runners” were running drugs, and knew her boyfriend was buying drugs).
conspiracy to distribute marijuana.\textsuperscript{414} Furthermore, like Direct Sales' knowledge of the doctor's illegal use of drugs and the monetary benefit Direct Sales received from the doctor's purchases, Grimmett not only had knowledge of the conspiracy to distribute drugs but intended to achieve the objectives of the conspiracy by keeping the drug books and helping Kerns with his drug business.\textsuperscript{415} Accordingly, these events indicated that Grimmett had the intent to achieve the objectives of the conspiracy.\textsuperscript{416} Even though the Grimmett court did not address Grimmett's intent, her intent was important, in part, because it indicated the events that gave rise to the conspiracy and her culpability.\textsuperscript{417} These events that gave rise to the conspiracy and her culpability were important because, for withdrawal to have taken place, Grimmett must have disassociated herself and acted contrary to these events of the conspiracy.\textsuperscript{418}

2. Intent to Agree to Commit a Conspiracy

The second prong for an individual's mens rea is intent to agree to a conspiracy.\textsuperscript{419} Although no evidence existed that Grimmett intended to make an express written or verbal agreement with Kerns, her actions indicated that she intended to agree to the conspiracy to distribute marijuana.\textsuperscript{420} In the 1898 case, \textit{State v. King},\textsuperscript{421} the Iowa Supreme Court explained what was meant by an individual's intent to agree to a conspiracy crime.\textsuperscript{422} One hundred years later, in \textit{United States v. Morillo},\textsuperscript{423} the United States Court of Appeals for the First Circuit addressed a drug conspiracy case and an individual's intent to agree.\textsuperscript{424}

\textsuperscript{414} See supra notes 393-413 and accompanying text.
\textsuperscript{415} Compare Direct Sales Co., 319 U.S. at 705, 711, 713-15 (concluding that Direct Sales had intent to achieve the objectives of the conspiracy because it continued to sell to Dr. Tate after it knew that he could not possibly be distributing the drugs legally and because Direct Sales was profiting from Dr. Tate's venture), with supra notes 393-413 and accompanying text (establishing Grimmett had knowledge of the conspiracy); and Grimmett 236 F.3d at 453-54 (finding that Grimmett kept records in the drug books, she knew where Kerns kept money and drugs and she knew the names of Kerns' drug runners).
\textsuperscript{416} See supra notes 393-415 and accompanying text.
\textsuperscript{417} See supra notes 393-416 and accompanying text.
\textsuperscript{418} See supra notes 380-81 and accompanying text.
\textsuperscript{419} LAFAYE & SCOTT, supra note 380, at 535.
\textsuperscript{420} See infra notes 421-42 and accompanying text.
\textsuperscript{421} 74 N.W. 691 (Iowa 1898).
\textsuperscript{422} State v. King, 74 N.W. 691, 691-92 (Iowa 1898).
\textsuperscript{423} 158 F.3d 18 (1st Cir. 1998).
\textsuperscript{424} United States v. Morillo, 158 F.3d 18, 18, 26 (1st Cir. 1998). ("After a careful review of the record, we now reverse, although we agree with the trial judge that this is a close case.").
In King, the Iowa Supreme Court reasoned that mere satisfaction with another's actions is not enough to enter a person in a conspiracy. The court declared that King did not intend to enter a conspiracy to beat another individual. The court reasoned that King's comments at the bar were merely expressions of his satisfaction that someone beat J.H. Willey. The court explained that this expression of satisfaction did not further the crime and did not evidence that King intended to agree to this crime.

In Morillo, the First Circuit opined that an individual must have knowledge of a crime in order for that individual to intend to agree. The Morillo court determined that no evidence existed indicating that Fidel Morillo saw, heard, or knew of anything that would give him notice that his apartment guests were conspiring to transport cocaine into the United States. Even though Morillo was in the apartment on several occasions when drug paraphernalia was in the bedroom, no evidence existed that he entered the bedroom and saw the items. Furthermore, the court stated that the drugs were not visible to anyone who entered the bedroom. King, as well as Morillo, stands for the proposition that an individual cannot agree to a crime if knowledge of the crime does not exist or an individual merely expresses satisfaction with the outcome. Therefore, an individual must have knowledge of a crime and do something more than merely express satisfaction with the results of another's actions.

In Grimmett, several events took place that evidenced Grimmett's intent to agree with Kerns to distribute marijuana. Grimmett knew Kerns was dealing drugs. Grimmett affirmatively acted to further the conspiracy by keeping Kerns' drug books and accompanying him to collect drug debts. Dissimilar to the lack of knowledge and the mere expression of satisfaction in Morillo and King, respectively, Grimmett's active involvement with the book keeping and other

425. King, 74 N.W. at 691-92.
426. Id. at 692.
427. Id.
428. Id.
429. Morillo, 158 F.3d at 18, 26.
430. Id. at 20, 25.
431. Id.
432. Id. at 24.
433. Compare King, 74 N.W. at 692 (stating that knowledge or approval of an act alone, without participation or agreement to participate, was not enough for conspiracy liability), with Morillo, 158 F.3d at 26 (providing that even if Morillo knew of the conspirator's crime, the State must still prove Morillo intended to agree when he had knowledge of the crime).
434. See supra notes 425-33 and accompanying text.
435. See infra note 437 and accompanying text.
436. See supra notes 393-413 and accompanying text.
437. Grimmett, 236 F.3d at 453-54.
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aspects of the business indicated she was intertwined with the conspiracy. Therefore, Grimmett intended to agree to the conspiracy to distribute marijuana. Accordingly, Grimmett’s intent to achieve the objectives of the marijuana conspiracy and her intent to agree to the conspiracy indicated she had mens rea to commit the crime. Even though the Grimmett court did not address the events that indicated Grimmett’s evil mind to commit a conspiracy, her evil mind was important, in part, because it indicated the events that gave rise to the conspiracy and her culpability. These events that gave rise to the conspiracy and her culpability were important because in order for her to withdraw from the conspiracy, she must have acted contrary to these events of the conspiracy.

B. CULPABILITY—ACTUS REUS

In addition to mens rea, another requirement of culpability is that an individual have actus reus (commit a guilty act). A guilty mind alone is not enough for a conviction of conspiracy. An individual must commit an act or an omission for liability to arise. An act is defined as doing something or not doing something that should be done. The unanimous United States Supreme Court decision in United States v. Shabani addressed the issue of actus reus in a drug conspiracy case.

In Shabani, the United States Supreme Court stated that conspiracy is an inchoate offense, and the agreement to commit the conspiracy is essential for liability. The Court held that the agreement itself is the actus reus of the crime. In Shabani, a drug supplier

438. Compare King, 74 N.W. at 692 (stating that knowledge or approval of an act alone, without participation or agreement to participate is not enough for conspiracy liability), and Morillo, 158 F.3d at 26 (providing that even if Morillo knew of the conspirator’s crime, the State must still prove Morillo intended to agree when he had knowledge of the crime), with Grimmett, 236 F.3d at 453-54 (stating that Grimmett knew of several of the aspects of Kerns’ drug business and she affirmatively participated by keeping Kerns’ drug books).
439. See supra notes 419-38 and accompanying text.
440. See supra notes 387-439 and accompanying text.
441. See supra notes 387-440 and accompanying text.
442. See supra notes 380-81 and accompanying text.
443. LAFAVE & SCOTT, supra note 380, at 195 (stating that actus reus is a guilty act); BLACK’S LAW DICTIONARY 37 (7th ed. 1999) (stating that in addition to mens rea, criminal liability requires actus reus).
444. LAFAVE & SCOTT, supra note 380, at 195.
445. Id.
446. Id.
449. Shabani, 513 U.S. at 16 (citations omitted).
450. Id.
and his girlfriend operated a distribution scheme between California and Alaska.\textsuperscript{451} Reshat Shabani arranged the drug smuggling between the two states.\textsuperscript{452} Federal agents discovered the drug conspiracy during an undercover operation.\textsuperscript{453} Subsequently, the government charged Shabani with conspiracy to distribute drugs.\textsuperscript{454} Shabani argued that the government must prove he committed an overt act to further the conspiracy otherwise he would be punished for thoughts alone.\textsuperscript{455} The Supreme Court unanimously determined that under the drug conspiracy statute, 21 U.S.C. § 846\textsuperscript{456} ("section 846"), the government does not need to prove an overt act.\textsuperscript{457} The Court reasoned that the agreement itself is the actus reus of the crime of conspiracy.\textsuperscript{458}

In Grimmett, Grimmett willfully and knowingly managed the records of Kerns' drug business.\textsuperscript{459} Since Kerns was illiterate, her book managing helped Kerns' drug business by allowing Kerns to keep track of his inventory.\textsuperscript{460} Furthermore, Grimmett always accompanied Kerns on trips to collect money.\textsuperscript{461} As in Shabani, the government in Grimmett is not required to show that Grimmett committed an overt act in furtherance of the conspiracy because an agreement is all that is required to prove the actus reus element of her conspiracy crime.\textsuperscript{462} However, Grimmett's willful actions in furtherance of the crime are relevant because they evidence that she made an agreement with Kerns to participate in the drug conspiracy.\textsuperscript{463} Accordingly, Grimmett had actus reus to commit the conspiracy to distribute marijuana and her concurrence of mens rea and actus reus indicated that

\textsuperscript{451} Id. at 11.
\textsuperscript{452} Id.
\textsuperscript{453} United States v. Shabani, 993 F.2d 1419, 1420 (9th Cir. 1993), cert. granted, 510 U.S. 1108 (1994), and rev'd, 513 U.S. 10 (1994).
\textsuperscript{454} Shabani, 513 U.S. at 11.
\textsuperscript{455} Id. at 11, 16.
\textsuperscript{456} 21 U.S.C. § 846 (1997). The statute provides in whole that "any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those proscribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.
\textsuperscript{457} Shabani, 513 U.S. at 10, 17.
\textsuperscript{458} Id. at 16.
\textsuperscript{459} Grimmett, 236 F.3d at 453-54.
\textsuperscript{460} Id.
\textsuperscript{461} Id. at 457 (Murphy, J., dissenting).
\textsuperscript{462} See supra notes 449-61 and accompanying text.
\textsuperscript{463} Compare Shabani, 513 U.S. at 16-17 (stating that under section 846 the government did not need to prove an overt act because the agreement itself was the actus reus of the conspiracy crime), with Grimmett 236 F.3d at 453-54 (stating that Grimmett kept Kerns' drug books, which allowed Kerns to keep track of his inventory), and Grimmett, 236 F.3d at 457 (Murphy, J., dissenting) (stating Grimmett accompanied Kerns to collect debts and counted money).
she had culpability to commit the crime of conspiracy. The events indicating Grimmett's culpability were important because they indicated the events that brought about the conspiracy. These events that brought about the conspiracy and her culpability were important because for her to withdraw from the conspiracy, she must have acted contrary to these events.

C. Termination of the Conspiracy

Similar to most crimes, prosecution for conspiracy requires culpability. Culpability is the concurrence of two elements: mens rea and actus reus. However, even where culpability exists, an individual can negate culpability by evidence showing withdrawal from the conspiracy. An individual can show withdrawal from a conspiracy by negating the events that indicate his or her culpability. The time when an individual negates culpability (withdrawal) is important because the affirmative act of withdrawal determines when the statute of limitations begins to run. The prosecution, therefore, can be barred from bringing conspiracy charges against an individual if such conspiracy charges were brought more than five years after the individual had withdrawn from the conspiracy.

The Grimmett majority correctly determined that Grimmett did not need to make a full and utter confession to authorities and that Grimmett's 1989 confession sufficiently negated the events that gave rise to her culpability thereby withdrawing her from the conspiracy. The Grimmett majority stated that the phrase "clean breast" used in Borelli does not require a full and utter confession to authorities. The majority explained that the limitations period begins when a conspirator cuts all ties to the conspiracy and its objectives.

See supra notes 387-463 and accompanying text.
See supra notes 387-464 and accompanying text.
See supra notes 380-81 and accompanying text.
Kadish, supra note 381, at 231.
Kadish & Schulhofer, supra note 468, at 568. Abandonment and withdrawal gives a conspirator the opportunity to change their mind. Id. The conspirator has decided to repent, contrary to mens rea. Id. at 567-68.
Gypsum Co., 550 F.2d at 129 (stating that since culpability for a crime might be shown by direct or circumstantial evidence no reason exists why withdrawal would not be held to this same proof).
LaFave & Scott, supra note 380, at 525.
See infra notes 474-558 and accompanying text.
Grimmett, 236 F.3d at 456.
and the conspirator acts contrary to the conspiracy by confessing and cooperating with the authorities.\textsuperscript{475}

Furthermore, the \textit{Grimmett} majority correctly disregarded Circuit Judge Diana E. Murphy’s dissent as contrary to the language of \textit{United States v. Antar}\textsuperscript{476} and nearly twenty-five years of United States Supreme Court precedent.\textsuperscript{477} Judge Murphy believed that a full and utter confession was required to constitute withdrawal; therefore, Judge Murphy believed that Grimmett had failed to withdraw from the conspiracy.\textsuperscript{478} In support, Judge Murphy believed that the \textit{Antar} decision stood for the proposition that a full and utter confession to the authorities is required to withdraw from a conspiracy.\textsuperscript{479} In light of Judge Murphy’s interpretation of \textit{Antar}, she determined that Grimmett’s additional disclosures in 1992 indicated that Grimmett did not make a full and utter confession in 1989.\textsuperscript{480} However, the \textit{Grimmett} majority correctly disregarded Judge Murphy’s position by correctly recognizing the current interpretation of the clean breast doctrine.\textsuperscript{481}

On July 31, 1964, in the \textit{United States v. Borelli},\textsuperscript{482} the United States Court of Appeals for the Second Circuit determined that withdrawal required a reasonable communication of withdrawal to co-conspirators or a clean breast to law enforcement officials.\textsuperscript{483} Over ten years later, the United States Supreme Court cited the \textit{Borelli} decision, concluding that affirmative acts contrary to the objectives of the conspiracy and communicated in a reasonable way to reach co-conspir-

\begin{itemize}
\item \textsuperscript{475} \textit{Id.}.
\item \textsuperscript{476} 53 F.3d 568 (3d Cir. 1995).
\item \textsuperscript{477} See infra notes 545-58 and accompanying text.
\item \textsuperscript{478} \textit{Grimmett}, 236 F.3d. at 456-57 (Murphy, J., dissenting).
\item \textsuperscript{479} \textit{Id.} at 456 (Murphy, J., dissenting) (quoting \textit{United States v. Antar}, 53 F.3d 568, 582 (3d Cir. 1995) ("[A defendant] must ‘present evidence of some affirmative act of withdrawal on [her] part, typically either a full and utter disclosure to the authorities or communication to [her] co-conspirators that [she] has abandoned the enterprise and its goals.’"). Judge Murphy continued her dissent by reasoning as follows: Whether the information Grimmett had provided in 1989 gave prosecuting authorities sufficient evidence or incentive to indict her was for them to decide. That question is different from the one before the court, which is whether Grimmett met the test for withdrawal from the conspiracy by making “a full confession to the authorities.” The stipulated record shows that Grimmett did not make a full confession in 1989 about her knowledge and role in the conspiracy. Her additional disclosures in 1992 related directly to her involvement and culpability in the conspiracy, and in some respects they contradicted what she had told authorities in 1989.
\item \textsuperscript{480} \textit{Id.} at 457-58 (emphasis added).
\item \textsuperscript{481} \textit{Grimmett}, 236 F.3d at 457-58 (Murphy, J., dissenting).
\item \textsuperscript{482} See infra notes 545-58 and accompanying text.
\item \textsuperscript{483} 336 F.2d 376 (2d Cir. 1964).
\item \textsuperscript{484} \textit{United States v. Borelli}, 336 F.2d 376, 376, 388 (2d Cir. 1964) (citations omitted).
\end{itemize}
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tors was sufficient for withdrawal.\textsuperscript{484} The United States Court of Appeals for the Seventh Circuit then recognized, in 1992, that United States Supreme Court precedent does not require a clean breast to withdraw.\textsuperscript{485} Nearly three years later, the United States Court of Appeals for the Third Circuit also looked to the United States Supreme Court’s interpretation of \textit{Borelli} and reasoned that withdrawal does not require a full and utter confession to authorities.\textsuperscript{486} Accordingly, the \textit{Grimmett} majority correctly concluded that a full and utter confession is not required for withdrawal and Grimmett’s affirmative acts in 1989 were sufficient to constitute withdrawal from the conspiracy at that time.\textsuperscript{487}

In \textit{United States v. Borelli},\textsuperscript{488} several members of a drug operation were indicted on August 15, 1962 for conspiracy to operate an illicit business, which included the distribution of heroin.\textsuperscript{489} The district court convicted the members for conspiring to import and distribute illegal narcotics.\textsuperscript{490} The members of the drug operation appealed the decision of the district court to the Second Circuit, arguing that they had withdrawn from the conspiracy prior to the pertinent statute of limitations dates.\textsuperscript{491} Four of the members contended that no evidence existed that they were active with the drug business after the pertinent statute of limitations date.\textsuperscript{492} Two members of the drug operation argued that their incarceration prior to August 15, 1957 evidenced their withdrawal from the conspiracy.\textsuperscript{493}

The Second Circuit reasoned that mere cessation of conspiratorial acts is not sufficient for withdrawal; an individual must either make a clean breast to law enforcement officials or communicate notice of withdrawal in a reasonable manner to co-conspirators.\textsuperscript{494} The Second Circuit stated that the conspiracy members could not merely contend inaction after a certain date.\textsuperscript{495} The conspirators must show an affirmative demonstration that they abrogated the conspiracy.\textsuperscript{496}

\begin{footnotesize}
\begin{enumerate}
\item[485.] United States v. Schweihs, 971 F.2d 1302, 1302, 1323 (7th Cir. 1992) (citations omitted).
\item[486.] United States v. Antar, 53 F.3d 568, 568, 582 (3d Cir. 1995).
\item[487.] See infra notes 488-558 and accompanying text.
\item[488.] 336 F.2d 376 (2d Cir. 1964).
\item[489.] United States v. Borelli, 336 F.2d 376, 380-81, 388 (2d Cir. 1964).
\item[490.] \textit{Borelli}, 336 F.2d at 376, 380.
\item[491.] \textit{Id.} at 388.
\item[492.] \textit{Id.}
\item[493.] \textit{Id.}
\item[494.] \textit{Id.} (citations omitted).
\item[495.] \textit{Id.} at 389.
\item[496.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
Second Circuit also stated that neither reason nor authority suggested that imprisonment was sufficient to constitute withdrawal. 497

In United States v. United States Gypsum Co., 498 the Supreme Court of the United States cited the Borelli decision and determined that acts contrary to the objectives of the conspiracy and communicated in a reasonable way to reach co-conspirators were sufficient for withdrawal. 499 In Gypsum Co., the Justice Department and the Federal Trade Commission began tracking possible antitrust violations in the gypsum industry. 500 The investigation centered on the industry practice of contacting competitors to determine price and terms of sale. 501 In 1973, an indictment was filed in the district court charging the manufacturers with agreeing to fix prices and the conditions of sale and delivery of gypsum board. 502

Regarding evidence of the gypsum manufacturers' withdrawal from the conspiracy, the district court stated that two possible ways for the gypsum manufacturers to withdraw from the conspiracy existed. 503 First, the district court stated the conspirator could notify each co-conspirator that he will no longer take part in the conspiracy, so the other conspirators know they can no longer anticipate participation from that individual. 504 Second, the district court stated that the individual could disclose the conspiracy to law enforcement officials. 505 The United States Supreme Court disagreed with the district court because the charge limited withdrawal to two arguably impractical modes of demonstrating an individual's withdrawal from a conspiracy. 506 The United States Supreme Court stated that no case law existed that confined evidence regarding an individual's continued participation in a conspiracy. 507 Citing Borelli, the Supreme Court stated that affirmative acts contrary to the events giving rise to the conspiracy and communicated in a reasonable way to notify other con-

497. Id. at 389-90.
501. Id. at 428.
502. Id. at 427.
503. Id. at 463-64.
504. Id.
505. Id.
506. Id. at 422, 464.
507. Id. See Schweihs, 971 F.2d at 1323 (stating that the decision in Gypsum Co. means an individual can withdraw or abandon a conspiracy without making a clean breast to law officials or communicating abandonment to co-conspirators). See also Antar, 53 F.3d at 582 (stating that withdrawal depends on the context).
spirators of the individual’s cessation in the conspiracy are enough to establish withdrawal.\textsuperscript{508}

Several years later, in 1992, the Seventh Circuit recognized that under the \textit{Gypsum Co.} decision, withdrawal does not require a clean breast.\textsuperscript{509} In \textit{United States v. Schweihs},\textsuperscript{510} the United States government charged Anthony Daddino in the United States District Court for the Northern District of Illinois with conspiring to affect interstate commerce by extortion.\textsuperscript{511} The district court found Daddino guilty on all four counts of conspiracy.\textsuperscript{512} Daddino appealed the decision of the district court to the Seventh Circuit, arguing that the district court erred in not giving the jury an instruction on withdrawal.\textsuperscript{513}

Circuit Judge Thomas E. Fairchild disagreed with Daddino’s contentions, holding that the district court correctly denied the withdrawal instruction because Daddino did not show proof of affirmative action of withdrawal.\textsuperscript{514} Judge Fairchild reasoned that more is required to withdraw than a mere cessation of conspiratorial activity; withdrawal requires the conspirator to affirmatively act to defeat or disavow the intent of the conspiracy.\textsuperscript{515} Interpreting the \textit{Gypsum Co.} decision, Judge Fairchild recognized that Supreme Court precedent does not require a clean breast; however, Judge Fairchild emphasized that a withdrawal defense has stringent standards, which require affirmative action.\textsuperscript{516} Judge Fairchild stated that an individual cannot walk away from a ticking bomb and be absolved of guilt.\textsuperscript{517}

In \textit{United States v. Antar},\textsuperscript{518} the Third Circuit recognized that an individual does not necessarily need to make a confession to authorities to successfully withdraw.\textsuperscript{519} On September 6, 1989, the United States government charged Mitchell and Eddie Antar in the United States District Court for the District of New Jersey with a racketeering and securities fraud conspiracy.\textsuperscript{520} The district court determined that Eddie and Mitchell Antar were guilty for several of the conspiracy charges.\textsuperscript{521} Mitchell Antar appealed the decision of the district

\begin{itemize}
\item \textsuperscript{508} \textit{Gypsum Co.}, 438 U.S. at 464-65.
\item \textsuperscript{509} \textit{United States v. Schweihs}, 971 F.2d 1302, 1302, 1323 (7th Cir. 1992) (citations omitted).
\item \textsuperscript{510} 971 F.2d 1302 (7th Cir. 1992).
\item \textsuperscript{511} \textit{United States v. Schweihs}, 971 F.2d 1302, 1303, 1308, 1311 (7th Cir. 1992).
\item \textsuperscript{512} \textit{Schweihs}, 971 F.2d at 1309.
\item \textsuperscript{513} \textit{Id.} at 1302, 1322-23.
\item \textsuperscript{514} \textit{Id.} at 1307, 1323.
\item \textsuperscript{515} \textit{Id.} at 1307, 1323 (citations omitted).
\item \textsuperscript{516} \textit{Id.} (citations omitted).
\item \textsuperscript{517} \textit{Id.}
\item \textsuperscript{518} 53 F.3d 568 (3d Cir. 1995).
\item \textsuperscript{519} \textit{United States v. Antar}, 53 F.3d 568, 568, 582 (3d Cir. 1995).
\item \textsuperscript{520} \textit{Antar}, 53 F.3d at 568, 571-72.
\item \textsuperscript{521} \textit{Id.} at 572.
\end{itemize}
court to the Third Circuit, arguing that he had withdrawn from the conspiracy by resigning from the corporation. 522

The Third Circuit accepted the appeal but disagreed with Mitchell's contentions, reasoning that Mitchell did not establish a prima facie case of withdrawal because he retained stock in the company evidencing that he did not cut his ties with the business. 523 Circuit Judge Morton I. Greenberg stated that withdrawal is not established by mere cessation of conspiratorial activity. 524 Typically, a conspirator either discloses to co-conspirators that he has withdrawn from the conspiracy and its goals, or the conspirator makes a confession to officials. 525 However, Judge Greenberg continued by stating that no single way to withdraw from a conspiracy exists; the acts of withdrawal depend on the context of the situation. 526 Citing Gypsum Co., Judge Greenberg maintained that affirmative acts contrary to the purpose of the conspiracy and communicated in a reasonable manner to reach co-conspirators were sufficient to establish withdrawal. 527

In Grimmett, the Eighth Circuit correctly determined that Grimmett had withdrawn from the drug conspiracy by her 1989 confessions. 528 In accord with the Gypsum Co. decision that an individual must act contrary to the mind and actions of the conspiracy for withdrawal, Grimmett's 1989 confession constituted affirmative action contrary to the events that made her culpable for the crime of conspiracy. 529 As disclosed in Schweidhs and Antar, Grimmett was neither required to make a clean breast nor make a confession to the authorities. 530 In further concordance with Gypsum Co., Grimmett's cessation in the conspiracy was also communicated in a reasonable manner to co-conspirators. 531

In Grimmett, Grimmett voluntarily met with the police on several occasions and she told authorities that she would cooperate in any way possible. 532 Grimmett told the police that she believed that Kerns distributed marijuana. 533 Grimmett disclosed the events that took place during her bookkeeping operation, and she told the police

522. Id. at 568, 579.
523. Id. at 570, 583.
524. Id. at 570, 582 (citations omitted).
525. Id. at 582 (citations omitted).
526. Id. at 570, 582.
527. Id. (citations omitted).
528. See infra notes 529-44 and accompanying text.
529. See supra notes 498-508 and accompanying text.
530. See supra notes 509-22 and accompanying text.
531. See supra notes 498-508 and accompanying text.
532. Grimmett, 236 F.3d at 454.
533. Id. at 453-54. She also stated that Kerns attempted to protect her by not disclosing the details of the drug business. Id.
the names of Kerns' drug runners who could decipher Kerns' codes. Grimmett told the police that Moore was one of Kerns' associates. Furthermore, Grimmett showed the police where Kerns kept some of his drug money and marijuana supplies. Therefore, Grimmett acted affirmatively in contradiction to the purpose of the conspiracy as required by the Supreme Court decision in Gypsum Co.

Grimmett's cessation in the conspiracy was also communicated in a reasonable manner to co-conspirators. Evidence indicated that during her 1989 confession to police, Grimmett disclosed the names of the co-conspirators that she knew. Evidence also existed that none of Kerns' former drug buyers wanted anything to do with Grimmett. At Kerns' funeral, the other conspirators ostracized Grimmett. Moreover, no evidence existed, nor did the government argue, that Grimmett further participated in the conspiracy during the five-year statutory period after Kerns was murdered. Therefore, Grimmett's cessation in the conspiracy was communicated in a reasonable manner to co-conspirators. Accordingly, Grimmett had withdrawn from the conspiracy in 1989 by both acting affirmatively in contradiction to the purpose of the conspiracy and communicating her withdrawal in a reasonable manner to co-conspirators as required by the Supreme Court decision in Gypsum Co.

Circuit Judge Diana E. Murphy dissented, determining that Grimmett did not withdraw from the conspiracy because she did not make a full and utter confession to the police in 1989. Judge Murphy reasoned that Grimmett's additional disclosures in 1992 had indicated she was more involved in the various aspects of the conspiracy than recognized by her 1989 disclosures. Judge Murphy stated that during Grimmett's 1992 interview, she would not cooperate with officials when they questioned her about Kerns' murder. Judge Murphy further noted that Grimmett had failed to disclose in 1989 that she had received cocaine for her personal use and that she knew

534. Grimmett, 236 F.3d at 453-54.
535. Id.
536. Id.
537. See supra notes 482-536 and accompanying text.
538. See infra notes 539-42 and accompanying text.
539. Grimmett, 236 F.3d at 453-54.
540. Id. at 456.
541. Id. at 454.
542. Id. at 453-55.
543. See supra notes 539-42 and accompanying text.
544. See supra notes 482-543 and accompanying text.
545. Grimmett, 236 F.3d at 456-58 (Murphy, J., dissenting).
546. Id. (Murphy, J., dissenting).
547. Id. at 456-57 (Murphy, J., dissenting).
what a code word was in Kerns’ books. Judge Murphy stated that Grimmett also failed to disclose in her 1989 interview that she had always gone with Kerns to collect marijuana debts, helped him count his profits, and that she knew Kerns had traveled to Columbia for drug related business.

As foundation for her contention that Grimmett did not withdraw in 1989, Judge Murphy interpreted the Antar decision as standing for the proposition that a full and utter confession to the authorities was required to withdraw from a conspiracy. Judge Murphy determined that Grimmett’s additional disclosures in 1992 proved that Grimmett did not successfully convey a full and utter confession in 1989.

Judge Murphy’s contention, however, is neither supported by the Antar decision nor nearly twenty-five years of United States Supreme Court precedent.

In Antar, the Third Circuit stated that a full and utter confession was one typical way of showing withdrawal. The Third Circuit next explained that “there is no single way withdrawal can be established; in large part whether a particular action constitutes withdrawal depends on context.” The Third Circuit continued the analysis in Antar by citing the United States Supreme Court decision in Gypsum Co., which determined that affirmative acts contrary with the purpose of the conspiracy and disclosed in a reasonable manner to reach co-conspirators are sufficient for withdrawal. The Third Circuit specifically pointed out that the Supreme Court had warned against con-

548. Id. (Murphy, J., dissenting). Grimmett knew the term “sticks referred to the drug ‘Thai sticks.’” Id. at 457 (Murphy, J., dissenting).
549. Grimmett, 236 F.3d at 456-57 (Murphy, J., dissenting). Kerns negotiated drug deals and was threatened by the Columbians. Id. at 457 (Murphy, J., dissenting).
550. Grimmett, 236 F.3d at 456 (Murphy, J., dissenting) (quoting United States v. Antar, 53 F.3d 568, 582 (3d Cir. 1995) which stated “[A defendant] must ‘present evidence of some affirmative act of withdrawal on [her] part, typically either a full and utter disclosure to the authorities or communication to [her] co-conspirators that [she] has abandoned the enterprise and its goals’”).
551. Grimmett, 236 F.3d at 457-58 (Murphy, J., dissenting).
552. See infra notes 553-56 and accompanying text.
553. Antar, 53 F.3d at 568, 582.
554. Id. at 582. The court provided:
[T]he defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals. Of course, there is no single way withdrawal can be established; in large part whether a particular action constitutes withdrawal depends on context. Thus, the Supreme Court has cautioned against placing confining blinders on the jury’s consideration of evidence of withdrawal and has held that 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.

Id. (citations omitted) (emphasis omitted).
555. Antar, 53 F.3d at 582.
fining the jury's consideration of withdrawal evidence. Therefore, Judge Murphy's contention that Grimmett did not make a full and utter confession is insufficient to establish that Grimmett did not withdraw because the language of United States Supreme Court precedent indicated that an individual may withdraw from a conspiracy by other means than a full and utter confession. Accordingly, in light of Grimmett's affirmative acts and her communication of cessation, the Grimmett majority correctly concluded that Grimmett had withdrawn from the conspiracy in 1989 and the government was barred from bringing charges against Grimmett after July 27, 1994 because the five-year statute of limitations had lapsed.

CONCLUSION

In United States v. Grimmett, the United States Court of Appeals for the Eighth Circuit concluded that Patricia Grimmett had withdrawn from the conspiracy after her disclosure to officials in 1989; therefore, the United States government was time-barred from charging Grimmett with conspiracy. In Grimmett, Grimmett helped her boyfriend keep books for his drug business until his murder in June 1989. In July 1989, Grimmett disclosed the details of the drug conspiracy to the police. In 1992, investigators contacted Grimmett again and she voluntarily gave the investigators additional information. Then, in November 1994, the police charged Grimmett with conspiracy to distribute marijuana.

In reasoning that Grimmett had withdrawn from the conspiracy, the Grimmett majority addressed the applicability of the "clean breast" doctrine to the facts surrounding Grimmett's withdrawal. The majority stated that the phrase "clean breast" did not require a full and utter confession. The majority also stated that withdrawal only required the conspirator to cut ties from the conspiracy and affirmatively act to disavow the conspiracy by cooperating and confessing to authorities.

556. Id.
557. See supra notes 482-556 and accompanying text.
558. See supra notes 482-557 and accompanying text.
559. 236 F.3d 452 (8th Cir. 2001).
561. Grimmett, 236 F.3d at 453-54.
562. Id. at 453-54.
563. Id. at 454.
564. Id.
565. Id. at 453-56.
566. Id. at 456.
567. Id.
556. Id.
Notwithstanding the facts and circumstances surrounding Grimmett's culpability, the majority correctly determined that Grimmett had withdrawn from the conspiracy by negating the acts that gave rise to her culpability. Furthermore, the majority correctly disregarded the reasoning behind Judge Murphy's dissent because Judge Murphy's reasoning was contrary to nearly twenty-five years of United States Supreme Court precedent.

The court's decision in Grimmett has helped define the reach of the sprawling arms of conspiracy law because the decision helped to clarify the reach of the clean breast doctrine and withdrawal from a conspiracy. Furthermore, the court's decision is in sync with the common law rule that criminal liability requires culpability or a concurrence of mens rea and actus reas. The majority recognized that by disclosing the conspiracy to the police, Grimmett eliminated her culpability and had sufficiently withdrawn from the conspiracy. Because the government waited over five years past Grimmett's withdrawal, the government was barred from charging Grimmett with the crime of conspiracy. The Eighth Circuit's conclusion has helped tame the elastic, sprawling and pervasive monster, which has been described as having a tendency to expand itself to the edge of its logic—and beyond.568

Ryan Thomas Grace — '03