VARYING DECLARATIONS OF INTERDEPENDENCE: THE TENTH CIRCUIT'S INCONSISTENT ANALYSIS OF CRIMINAL CONSPIRACY

JEFF VAN DER VEER*

The Tenth Circuit distinguishes itself from its sister circuits by requiring the prosecution to prove a unique element in all federal criminal conspiracy cases: interdependence. Taken literally, interdependence exists when each conspirator relies on his fellow conspirators to achieve their collective criminal goal. While the Tenth Circuit may have enforced this literal definition in the past, it has since announced varying definitions that have relaxed the standard, thus creating an imprecise and confusing area of case law. This unfortunate evolution has transformed what was once a unique requirement into little more than a formality. The Tenth Circuit should return to enforcing its literal definition of interdependence, thus holding the prosecution to its burden of proving each distinct element that constitutes the crime. This standard will help ensure that defendants are convicted of not just any conspiracy, but the criminal conspiracy that they knew they were joining.

INTRODUCTION

Judge Learned Hand once referred to conspiracy charges as the "darling of the modern prosecutor's nursery."[1] That statement, made in 1925, holds true today. In 2008, the federal government obtained 11,560 convictions[2] under the attempt and conspiracy statute of the Controlled Substances Act.[3] This

* Juris Doctor candidate 2011, University of Colorado Law School. Bachelor of Arts, Tufts University, 2003. I never realized my boyhood dream of playing for the Boston Celtics. Because of that failure, I don't normally have a public forum to tell my parents how much I love them. Now is my chance. Mom and Dad, I love you. I can't thank you enough for everything you've done for me.

1. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

2. BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/fjsrc/tsec.cfm (select "Outcomes for defendants"; select "2008" for the year; select "Select by title and section within U.S.C."; then select title 21, section 846) (last visited Oct. 25, 2010).

3. 21 U.S.C. § 846 (2006) ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as

single law accounted for almost 49 percent of the federal drug control and enforcement convictions in that same year.[4] Strikingly, there were almost 150 convictions for every acquittal.[5] These convictions also resulted in lengthy sentences for defendants: for the over 10,000 criminals who received prison time for their offenses, the average term imposed for the conspiracy charge alone was over eight years.[6]

The Tenth Circuit distinguishes itself from its sister circuits by requiring the federal government to prove an extra element in every conspiracy charge: interdependence.[7] This should serve as an extra hurdle for prosecutors, but in practice, the Tenth Circuit has inconsistently applied this element, transforming it into something of a formality.[8] These inconsistencies have created a body of precedent that is imprecise at best, and confusing and disjointed at worst.

Taken literally, interdependence means that each member of a conspiracy relies on the other members in order to succeed in their shared criminal venture.[9] Consistent application of this standard would both punish criminals for the crimes that they actually commit, and guard against convicting small players for vast conspiracies that are beyond the scope of their involvement.

This Comment explores this unique requirement, arguing that the Tenth Circuit should consistently apply its most literal definition of the term in order to ensure fair and just results. The Supreme Court has recognized that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to con-*

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those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

4. BUREAU OF JUSTICE STATISTICS, *supra* note 2.

5. *Id.*

6. *Id.*

7. CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 2.19 cmt., at 105 (2005), *available at* http://ca10.uscourts.gov/downloads/pji10-circrim.pdf [hereinafter CRIMINAL PATTERN JURY INSTRUCTIONS] ("The Tenth Circuit is unique, at least among federal jurisdictions, in requiring the inclusion of 'interdependence' between or among conspirators as an essential element of conspiracies charged under 18 U.S.C. section 371 and 21 U.S.C. section 846. Interdependence, as an essential element of § 371 conspiracy, is an innovation of Tenth Circuit jurisprudence that evolved during the 1990s. It now appears to be settled law."); *see also* United States v. Dickey, 736 F.2d 571, 582 (10th Cir. 1984).

8. *See infra* Part II.D (discussing the effects of the *United States v. Evans* standard of interdependence).

9. *See Dickey*, 736 F.2d at 582.

stitute the crime with which he is charged."[10] In a Tenth Circuit conspiracy prosecution, one of those criminal elements is interdependence. The Tenth Circuit should uphold and apply a consistent, literal standard: the prosecution should be required to prove that each member's participation was essential to the group's collective conspiratorial goal.

Part I presents a brief overview of federal conspiracy law and the unique disadvantages it presents for defendants. Part II provides background on "wheel"[11] and "chain"[12] conspiracies, where the alleged conspirators are not directly connected with each other. Instead, the individual conspirators are joined to a common conspiracy through varying degrees of separation. These are the types of conspiracies where the Tenth Circuit's enhanced standard should guard against the conviction of minor players for their participation in large, attenuated conspiracies. Part III outlines the Tenth Circuit's varying approaches to, and definitions of, interdependence. Part IV examines the interplay between these inconsistent definitions and the facts of specific cases, focusing on the consequences for defendants. Finally, the conclusion argues that the Tenth Circuit should consistently apply its most literal definition of interdependence, thus creating a coherent standard that ensures the individualized guilt of every defendant who is convicted of a conspiracy charge.

I. AN OVERVIEW OF FEDERAL CONSPIRACY

Justice Jackson of the United States Supreme Court referred to conspiracy as an "elastic, sprawling and pervasive offense" that is "so vague . . . it almost defies definition."[13] However, the Court has also acknowledged both the unique danger

10. *In re* Winship, 397 U.S. 358, 364 (1970) (emphasis added).

11. A "wheel" conspiracy is a criminal enterprise where many of its members (the "spokes") know the central figure (the "hub"), but do not necessarily know each other. The connection to the hub is part of what creates one conspiracy. *See, e.g.*, United States v. Niemi, 579 F.3d 123, 127 (1st Cir. 2009) (discussing a "hub-and-spoke" conspiracy).

12. A "chain" conspiracy is similar to a wheel conspiracy, but instead of one central figure, there is a successive line of individuals. For instance, A will interact with B, who interacts with C, who then interacts with D. While A is not directly connected to D, they can be charged as part of one conspiracy. *See, e.g.*, United States v. Caldwell, 589 F.3d 1323, 1329 (10th Cir. 2009) (explaining "chain-and-link" conspiracies).

13. Krulewitch v. United States, 336 U.S. 440, 445–46 (1949) (Jackson, J., concurring).

that criminal conspiracies present to society, and the justice system's obligation to punish individuals who engage in collaborative criminal efforts.[14]

"[T]he essence of [a conspiracy] is an agreement to commit an unlawful act."[15] The agreement alone exists as a "distinct evil" that can "be punished whether or not the substantive crime ensues."[16] This is because cooperative illegal enterprises pose an enhanced danger to society. As the Court has recognized, a group scheming to commit one crime is more likely to commit related crimes.[17] Also, the group dynamic increases the chances that the criminal venture will succeed, while "decreas[ing] the probability that the individuals involved will depart from their path of criminality."[18] Criminal teamwork poses a unique threat that must be punished.

In order to establish the crime of conspiracy in all federal jurisdictions except the Tenth Circuit,[19] the government must prove three elements: (1) the existence of a conspiracy; (2) the defendant's knowledge of the conspiracy; and (3) the defendant's knowing and voluntary participation in the conspiracy.[20]

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14. *See, e.g.*, Salinas v. United States, 522 U.S. 52, 65 (1997) (stating that "conspiracy is a distinct evil, dangerous to the public and so punishable in itself"); Callanan v. United States, 364 U.S. 587, 593 (1961) ("[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts.").

15. Iannelli v. United States, 420 U.S. 770, 777 (1975).

16. *Salinas*, 522 U.S. at 65.

17. *Callanan*, 364 U.S. at 593–94.

18. *Id.* at 593.

19. *See infra* Part III.

20. *See, e.g.*, United States v. Portalla, 496 F.3d 23, 26 (1st Cir. 2007) ("In order to establish the crime of conspiracy, the government must prove the existence of a conspiracy, the defendant's knowledge of the conspiracy, and the defendant's knowing and voluntary participation in the conspiracy."); United States v. Santos, 541 F.3d 63, 70 (2d Cir. 2008) (stating that a conspiracy conviction must accompany proof of "(1) the existence of the conspiracy charged; (2) that the defendant had knowledge of the conspiracy; and (3) that the defendant intentionally joined the conspiracy") (internal citations omitted); United States v. Pressler, 256 F.3d 144, 147 (3d Cir. 2001) ("To make out a conspiracy charge, the Government must show: (1) a unity of purpose between the alleged conspirators; (2) an intent to achieve a common goal; and (3) an agreement to work together toward that goal."); United States v. Kellam, 568 F.3d 125, 139 (4th Cir. 2009) ("On the . . . conspiracy charge, the prosecution was obliged to prove (1) an agreement between two or more persons to engage in conduct that violates a federal drug law, (2) the defendant's knowledge of the conspiracy, and (3) the defendant's knowing and voluntary participation in the conspiracy.") (internal quotation marks omitted); United States v. Alix, 86 F.3d 429, 436 (5th Cir. 1996) ("A conviction for narcotics conspiracy requires proof beyond a reasonable doubt (1) that two or more people agreed to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator partici-

This seemingly straightforward crime, however, presents many unique procedural and evidentiary hurdles for federal conspiracy defendants. For instance, there is a hearsay exception for statements made by a conspirator "during the course and in furtherance of the conspiracy."[21] These hearsay statements are admissible if the government can show, by only a preponderance of the evidence, (1) that a conspirator-declarant was involved in a conspiracy with the defendant, and (2) that the conspirator-declarant made the statement in furtherance of the conspiracy.[22] Therefore, the government can prove a conspiracy charge by using the hearsay statements of an unindicted conspirator as its primary piece of evidence.[23] Furthermore, the government often introduces these conspirator hearsay statements through the testimony of another conspirator who has reached a plea agreement in exchange for prosecution-friendly testimony. Such evidence presents a high risk of "perjury and unwarranted believability"[24] due to the witness's incentive to "implicate others to minimize his own role and exaggerate the roles of his co-conspirators."[25]

Another advantage for prosecutors is that courts almost always allow defendants to be tried together when they have

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pated in the conspiracy."); United States v. Caver, 470 F.3d 220, 232–33 (6th Cir. 2006) ("In the specific context of § 846, the government must prove, beyond a reasonable doubt, (1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.") (internal quotation marks omitted); United States v. Griffin, 493 F.3d 856, 862 (7th Cir. 2007) ("A conspiracy exists when: (1) two or more people agree to commit an unlawful act, and (2) the defendant knowingly and [(3)] intentionally joins in the agreement."); United States v. Johnson, 439 F.3d 947, 954 (8th Cir. 2006) ("To convict [a defendant] of conspiracy, the government needed to prove [the defendant] (1) had an agreement to achieve an illegal purpose, (2) knew of the agreement, and (3) knowingly became part of the agreement."); United States v. Iribe, 564 F.3d 1155, 1161 (9th Cir. 2009) ("The crime of conspiracy comprises three elements: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime.") (internal quotation marks omitted); United States v. Thompson, 422 F.3d 1285, 1290 (11th Cir. 2005) ("To sustain [a] conviction for conspiracy . . . the Government was required to prove beyond a reasonable doubt (1) that a conspiracy existed; (2) that the defendant knew of it; and (3) that the defendant, with knowledge, voluntarily joined it.") (internal quotation marks omitted).

21. FED. R. EVID. 801(d)(2)(E).

22. *Id.*; Bourjaily v. United States, 483 U.S. 171, 175–76 (1987).

23. Kevin Jon Heller, Note, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and* United States v. Shabani, 49 STAN. L. REV. 111, 126–33 (1996).

24. *Id.* at 124.

25. Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990).

allegedly participated in the same conspiracy.[26] This practice can lead to infighting among the defendants, who might try to save themselves at the others' expense.[27] Liberal joinder rules also create concerns that a jury might not be able to individually assess the defendants' guilt.[28] The Supreme Court has warned that courts "should be mindful of the serious risks of prejudice and overreaching that are characteristic of joint trials, particularly when a conspiracy count is included in the indictment."[29]

The Court has also eased the prosecution's burden of proving conspiracy charges under the Controlled Substances Act: the government does not have to prove that any of the conspirators committed an overt act in furtherance of the conspiracy.[30] The Court held that the mere meeting of the minds fulfills the *actus reus* requirement of this often-used criminal conspiracy charge.[31] This minimal *actus reus* requirement, combined with the fact that it can be proved through unreliable conspirator hearsay, creates a major advantage for the government.[32]

Conspiracy cases also have prosecution-friendly jurisdictional requirements and statute of limitations rules. Prosecutors can file charges in any district where a conspirator performed the conspiratorial act—regardless of whether that particular conspirator has been indicted.[33] This gives the government a strategic advantage of choosing the best district for its case. Also, the five-year statute of limitations commences when the final overt act is committed in furtherance of the conspiracy.[34] In the case of a non-overt act of conspiracy, the pros-

26. *See, e.g.*, United States v. Searing, 984 F.2d 960, 965 (8th Cir. 1993) ("In the context of conspiracy, severance will rarely, if ever, be required.").

27. *See, e.g.*, United States v. Garrett, 961 F.2d 743, 746 (8th Cir. 1992).

28. *See* Kotteakos v. United States, 328 U.S. 750, 774 (1946) ("The dangers for transference of guilt . . . are so great that no one really can say prejudice to a substantial right has not taken place.").

29. Zafiro v. United States, 506 U.S. 534, 545 (1993).

30. United States v. Shabani, 513 U.S. 10, 11 (1994) (holding that the prosecution does not need to prove an overt act when charging a conspiracy under the federal drug conspiracy statute, 21 U.S.C. § 846); *see also supra* note 2.

31. *Shabani*, 513 U.S. at 16 ("The prohibition against criminal conspiracy, however, does not punish mere thought; the criminal agreement itself is the *actus reus* . . . .").

32. *See generally* Heller, *supra* note 23 (criticizing the *Shabani* Court's decision to eliminate the overt act requirement in federal drug conspiracy prosecutions).

33. Hyde v. United States, 225 U.S. 347, 367 (1912).

34. 18 U.S.C. § 3282 (2006).

ecution satisfies the statute of limitations by merely proving that the conspiracy existed in the five-year window.[35] Prosecutors therefore have the opportunity to indict defendants who have not participated in a criminal scheme for some time, as long as the conspiracy continues to exist.

Finally, the prosecutor holds one more significant advantage: the defendant can be held liable for substantive crimes committed by his fellow conspirators if those crimes were committed in furtherance of the conspiracy.[36] This can have severe ramifications for conspirators. For example, imagine that two conspirators, David and Manny, plan the robbery of a gas station. They think that a gun should be used for intimidation, but neither conspirator talks about killing anyone. Since they agree that only one of them should go to rob the gas station, they flip a coin to see who will carry out the plan. Manny loses and leaves for the gas station, while David sits on his couch and turns on the Food Network. If things go awry, and Manny shoots and kills the attendant during the robbery, David could be tried and convicted for the murder, even though he was at home watching *Iron Chef*.[37] This type of scenario is not purely academic: federal defendants involved in a drug conspiracy have been found guilty of murder, despite the fact that they were not at the scene of the crime, because their fellow conspirators participated in a shootout during a drug deal.[38]

These distinctive rules have caused some commentators to question the fairness of conspiracy law.[39] To be sure, " '[c]onspiracy' is a net in which prosecutors catch many little fish."[40] Given all of these unique advantages for the government, any further efforts to "tighten the mesh"[41] should be met with skepticism.

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35. *E.g.*, United States v. Harriston, 329 F.3d 779, 783 (11th Cir. 2003).

36. Pinkerton v. United States, 328 U.S. 640, 647 (1946).

37. *See id.* at 646 ("[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward.").

38. *E.g.*, United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985).

39. *E.g.*, Heller, *supra* note 23; Mark Noferi, *Towards Attenuation: A "New" Due Process Limitation on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91 (2006); Saverda, *supra* note 25.

40. United States v. Martinez de Ortiz, 883 F.2d 515, 524 (7th Cir. 1989), *reh'g granted and opinion vacated*, 897 F.2d 220 (7th Cir. 1990) (Easterbrook, J., concurring).

41. *Id.*

II. WHEEL AND CHAIN CONSPIRACIES

The essence of a conspiracy is "an agreement to commit an unlawful act."[42] Oddly enough, a defendant can reach an "agreement" with his fellow conspirator without ever speaking to him. In fact, he can reach that "agreement" without even knowing that his partner-in-crime exists. One example of this unusual situation is known as a "wheel" conspiracy, where the alleged conspirators possess similar motives, but are unaware of each other's existence.[43] This type of conspiracy involves a central figure (the "hub") who is connected to many individuals (the "spokes").[44] The spokes, however, do not work with one another—it is the hub who coordinates the collective criminal effort.[45] Often, these spokes do not even know of each other's involvement in the conspiracy.[46] However, to complete this type of conspiracy, there must be a "rim" that connects each of these spokes together, thus forming the wheel.[47] For example, a rim can exist when the wheel's spokes are aware that other spokes exist and when the spokes act in furtherance of a single criminal venture.[48] Without the rim, there may be separate, distinct conspiracies, but the spokes should not be tried together under the umbrella of a single conspiracy charge.

Similar to the wheel conspiracy, a "chain" or "vertical" conspiracy is a criminal agreement where all of the conspirators are not directly connected to each other.[49] The difference, however, is that no central "hub" serves as a common connector for each party; instead, there is a stream of illegal transactions, where Conspirator A deals with Conspirator B, B with C, C with D, and so forth.[50] Chain conspiracies are common in drug distribution cases involving a "series of consecutive buyer-seller relationships."[51] Although the conspirators may not be directly linked to one another (e.g., A might not know D even exists), it

42. Iannelli v. United States, 420 U.S. 770, 777 (1975).

43. *See, e.g.*, United States v. Niemi, 579 F.3d 123, 127 (1st Cir. 2009) (discussing a "hub-and-spoke" conspiracy).

44. *Id.*

45. *Id.*

46. *Id.* ("[T]he proof need not show that each conspirator knew of all the others . . . .") (quoting United States v. Fenton, 367 F.3d 14, 19 (1st Cir. 2004)).

47. Kotteakos v. United States, 328 U.S. 750, 754–55 (1946).

48. United States v. Bustamante, 493 F.3d 879, 885–86 (7th Cir. 2007).

49. *See, e.g.*, United States v. Caldwell, 589 F.3d 1323, 1329 (10th Cir. 2009).

50. *Id.*

51. *Id.*

is still possible that they can be tried together and charged with a single cohesive conspiracy.[52]

The Supreme Court recognized the distinct nature of conspiracies involving indirectly connected conspirators in *United States v. Kotteakos*.[53] Seven defendants were convicted under the federal general conspiracy statute[54] for defrauding the Federal Housing Administration ("FHA").[55] They were accused of falsifying loan applications to the FHA under the National Housing Act.[56] Each defendant was connected to a "common and key figure," Simon Brown, who facilitated the illegal activity.[57] Brown had experience with the National Housing Act, and served as the agent who submitted the defendants' fraudulent loan applications.[58] Brown pled guilty and testified against the other conspirators.[59] At trial, the government proved its case by showing each defendant's connection to Brown, along with a "similarity of purpose" for using the falsified loan applications,[60] which established a "common adventure."[61] However, the government failed to show any connection among the defendants other than their similar dealings with Brown.[62]

On appeal, the Supreme Court noted that the facts of the case established distinct conspiracies between Brown and each defendant.[63] The government, however, charged the defendants for their involvement in one overarching conspiracy that applied to the defendants as a cohesive group.[64] The question before the Court was whether the defendants suffered prejudice due to the fact that one conspiracy was charged, yet eight distinct conspiracies were proved by the evidence.[65] The government argued that the conviction of all the defendants for

52. *See, e.g.*, United States v. Watson, 594 F.2d 1330, 1340 (10th Cir. 1979) ("Where large quantities of narcotics are being distributed, each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know.").
53. 328 U.S. 750 (1946).
54. 18 U.S.C. § 88 (current version at 18 U.S.C. § 371 (2006)).
55. *Kotteakos*, 328 U.S. at 753.
56. *Id.* at 752.
57. *Id.* at 753.
58. *Id.*
59. *Id.* at 753, 755 n.6.
60. *Id.* at 769.
61. *Id.* at 768.
62. *Id.* at 769–70.
63. *Id.* at 771–72.
64. *Id.* at 758.
65. *Id.*

the same conspiracy was not prejudicial to the defendants because "guilt was so manifest" that a reversal would be "a miscarriage of justice."[66] The Supreme Court disagreed, identifying a difference between the "common purpose of a single enterprise [and] the several, though similar, purposes of numerous separate adventures of like character."[67] This distinction was crucial to maintaining a fair and just outcome.[68] The government asked the Court to affirm the conviction of defendants who knew nothing of each other and unknowingly shared similar conspiratorial goals; this theory, the Court said, would undermine the concept of individual guilt.[69] The Court warned that in order to avoid the dangers of "transference of guilt from one to another across the line separating conspiracies,"[70] courts must use "every safeguard to individualize each defendant in his relation to the mass."[71] While the *Kotteakos* defendants may have been guilty of smaller, distinct conspiracies, the Court held that the government should have pursued those charges more specifically, instead of lumping defendants together just because their crimes had similar characters and characteristics.[72] The nexus of one common figure in multiple conspiracies does not create a single conspiracy; rather, in a wheel conspiracy, there must be some rim that connects the spokes around the hub of the wheel.[73]

Ultimately, the accused has "the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others."[74] Courts must carefully review the specific criminal conspiracy that is charged to ensure individual guilt: "[The Tenth Circuit] cautiously review[s] conspiracy convictions obtained against broad groups of defendants because guilt is always dependent on personal and individual conduct, not on mere association."[75] In the Tenth Circuit, that cautious

66. *Id.* at 755–56.
67. *Id.* at 769.
68. *See id.* at 773 (noting that "our system [does not] tolerate" allowing members of distinct conspiracies to be tried together as one conspiracy, and that such a practice "lies the drift towards totalitarian institutions").
69. *Id.* at 772–73.
70. *Id.* at 774.
71. *Id.* at 773.
72. *Id.*
73. *See id.* (stating that no conspiracy exists when "the only nexus among [the alleged conspirators] lies in the fact that one man participated in all [of the distinct crimes]").
74. *Id.* at 775.
75. United States v. Powell, 982 F.2d 1422, 1429 (10th Cir. 1992).

review has evolved into an additional element to all conspiracy crimes: interdependence.[76]

III. TENTH CIRCUIT CONSPIRACY ELEMENTS

The interdependence element has the potential to serve as another safeguard that upholds the principle of individual guilt. However, the case law illustrates a varying, imprecise standard that Tenth Circuit courts apply in an inconsistent manner.[77] This lack of consistency undermines the protections that the interdependence element should afford conspiracy defendants.

This Part first outlines the framework of a conspiracy charge in the Tenth Circuit. Then, it discusses three different definitions of interdependence: (1) a literal definition announced in *United States v. Dickey*;[78] (2) a relaxed standard set forth in *United States v. Horn*;[79] and (3) the almost meaningless standard of *United States v. Evans*, which merely reaffirms the first three elements of a conspiracy charge.[80] Finally, this Part discusses how the government defines a conspiracy's "goal." This definition is related to the interdependence discussion, as it is crucial in determining whether the charged conspiracy actually *relied on* the defendant's involvement.

A. The Tenth Circuit's Conspiracy Framework

The Tenth Circuit is the only federal jurisdiction that requires the government to prove four elements when it prosecutes any conspiracy charge:[81] (1) that there was an agreement between two or more persons to violate the law; (2) that the defendant knew the essential objectives of the conspiracy; (3) that the defendant knowingly and voluntarily became part of the conspiracy; and (4) that the alleged conspirators were interde-

76. *See, e.g.*, United States v. Caldwell, 589 F.3d 1323 (10th Cir. 2009).

77. *See infra* Part IV (discussing various standards as applied to the facts of particular Tenth Circuit cases).

78. 736 F.2d 571 (10th Cir. 1984).

79. 946 F.2d 738 (10th Cir. 1991).

80. 970 F.2d 663 (10th Cir. 1992).

81. *See* CRIMINAL PATTERN JURY INSTRUCTIONS, *supra* note 7, § 2.19 cmt., at 105 ("The Tenth Circuit is unique, at least among federal jurisdictions, in requiring the inclusion of 'interdependence' between or among conspirators as an essential element of conspiracies charged under 18 U.S.C. section 371 and 21 U.S.C. section 846.").

pendent.[82] Thus, federal prosecutors in the Tenth Circuit are faced with the same challenge as their counterparts in having to prove the first three elements, but they also carry the additional burden of showing that the members of the conspiracy were interdependent.[83] The addition of the interdependence element presumably creates a heightened standard that guards against inappropriate convictions.

The Supreme Court's decision in *Kotteakos* did not require prosecutors to prove interdependence in every wheel or chain conspiracy where the conspirators are not directly connected.[84] The holding only recognized that a defendant suffers substantial prejudice if the government convicts him of one general conspiracy when, in fact, the evidence proves that there were several smaller conspiracies.[85] The Court did not set forth any specific standard that would distinguish a properly-charged conspiracy from one that is too broad.[86] The Tenth Circuit, however, insists that the government prove interdependence for every conspiracy—wheel, chain, or otherwise.[87] Other circuits point to interdependence as one of many factors when evaluating whether or not a single conspiracy existed; however, they do not require it for a successful prosecution.[88]

B. The Dictionary and Dickey*: A Literal Definition*

As mentioned in Part I, certain prosecutorial advantages have caused some commentators to question the fairness of conspiracy law.[89] The Tenth Circuit has seemingly created a more level playing field by requiring the government to prove interdependence. The court has announced varying definitions of this element, but before addressing those definitions, it may help to begin with a dictionary definition of the term. The Oxford English Dictionary defines interdependence as "[t]he fact or condition of depending each upon the other; mutual depen-

82. *Id.* §§ 2.19, 2.87.

83. *Compare supra* note 20, *with* United States v. Sells, 477 F.3d 1226, 1235 (10th Cir. 2007).

84. *See Kotteakos*, 328 U.S. 750.

85. *Id.* at 774.

86. *See id.*

87. *See supra* note 82.

88. *E.g.*, United States v. Niemi, 579 F.3d 123, 127 (1st Cir. 2009); United States v. Farias, 469 F.3d 393, 398 (5th Cir. 2006) ("[W]e do not explicitly require 'interdependence' in this circuit . . . .").

89. *See supra* note 39.

dence."[90] Dependence means "that on which one relies or may rely; object of reliance or trust; resource."[91] Applied to a conspiracy charge, these definitions indicate that conspirators are interdependent when they *rely* on each other in order to achieve their shared criminal goal.

In one of its earliest, and most literal, definitions of interdependence, the Tenth Circuit stated that the prosecution meets its burden by proving that "each alleged coconspirator . . . depend[ed] on the successful operation of each link in the chain to achieve the common goal."[92] This commonsense definition, announced in *United States v. Dickey*, implies that the element is only satisfied when the conspiracy's success *relied* on each conspirator's involvement. This standard matches up with the dictionary definition of interdependence, discussed above. Under the literal *Dickey* standard, interdependence serves as a litmus test that can differentiate a single, cohesive conspiracy from multiple conspiracies that might happen to involve some overlapping parts. For example, in a wheel conspiracy, even though each spoke may not be directly related to the other spokes, the existence of every spoke should be crucial to achieving the conspiracy's goal. The more ambitious the goal, the less likely it is that the conspiracy *relied* on the minor players. In other words, each member must serve as a sort of keystone—if one conspirator were removed, the entire plan should crumble. Thus, the literal standard would mean that each conspirator's actions must be crucial to achieving the illegal goal of the conspiracy.

C. Horn*: Relaxing the Standard*

Seven years after *Dickey*, the Tenth Circuit used a different version of interdependence in *United States v. Horn*, defining it as acts that "facilitate[ ] the endeavors of other alleged coconspirators or facilitate[ ] the venture as a whole . . . ."[93] While this standard is close to the literal definition of interdependence in *Dickey*, there is a slight, but significant, difference: instead of the conspirators *relying* on each other to achieve the conspiracy's common goal, now under the *Horn* approach, the

90. 7 THE OXFORD ENGLISH DICTIONARY 1096 (2d ed. 1989).

91. 4 *id.* at 475.

92. United States v. Dickey, 736 F.2d 571, 582 (10th Cir. 1984) (internal quotation marks omitted).

93. 946 F.2d 738, 740–41 (10th Cir. 1991).

conspirator must only facilitate, or *assist*, in the undertaking.[94] These concepts are similar, but the new definition demonstrates movement towards a more relaxed standard that begins to ease the government's burden. *Horn* represents the first step in the Tenth Circuit's gradual blurring of the *Dickey* interdependence standard into practical nonexistence.

D. Evans*: Removing the "Dependence" from Interdependence*

The Tenth Circuit truly confused the interdependence issue by introducing an even more diluted standard in *United States v. Evans*.[95] This definition—announced a year after *Horn* and eight years after the literal definition in *Dickey*—has become the benchmark in the jurisdiction.[96] As a result, the element has lost its power to ensure that conspiracy convictions involve a single conspiracy, as opposed to multiple distinct criminal acts. The revamped definition states that the government may prove interdependence by showing "that [the conspirators] intended to act *together* for their *shared mutual benefit* within the scope of the conspiracy charged."[97] Acting *together* to *benefit* an alleged conspiracy, however, is fundamentally different from *relying* on fellow conspirators to *achieve* a criminal goal.

Surely, there are scenarios where an alleged conspirator might perform an act that *benefits* a conspiracy but, at the same time, the act is not so integral that the criminal venture *relies* on the conspirator's participation. For example, imagine two friends, Robert and Kevin. Robert sells massive amounts of cocaine that he receives from his dealer, Larry. Kevin is a pretty straight-laced guy, but he knows that his buddy Robert is a drug dealer. He even knows that Larry is Robert's supplier. One day, Robert and Kevin are hanging out. Robert asks Kevin for a ride to the street corner where Robert sells most of his drugs. Kevin is a little wary, but Robert offers him some cash for his troubles. After some convincing, Kevin finally obliges, knowing that Robert is going there to deal. While the ride may *benefit* the Larry/Robert drug conspiracy, it would be a stretch to say that Larry and Robert are *relying* on Kevin's

94. *Compare Horn*, 946 F.2d at 740–41, *with Dickey*, 736 F.2d at 582.
95. 970 F.2d 663, 671 (10th Cir. 1992).
96. *See* CRIMINAL PATTERN JURY INSTRUCTIONS, *supra* note 7, §§ 2.19, 2.87.
97. *Evans*, 970 F.2d at 671 (emphasis in original).

act: Robert could have easily walked, taken a taxi, or called up his other buddy, DJ, and asked for a ride. Under the diluted *Evans* standard, however, Kevin could be charged as a conspirator in a Larry/Robert/Kevin drug-dealing operation—Kevin and Robert acted together, and all of the members benefitted from their cash-for-a-ride agreement.

With this relaxed standard, the Tenth Circuit turned interdependence into a superfluous element that simply reiterates the other elements of the crime.[98] First, the *Evans* court's view of interdependence says that the conspirators must have "intended to act *together*."[99] But any *agreement* between conspirators inherently means that they will act together—proof of the existence of an agreement alone will satisfy this prong. Thus, this merely restates the first element common to all jurisdictions: that the prosecution must prove the existence of an illegal agreement between parties.[100] Next, the *Evans* court adds to the definition by requiring the government to show that the conspirators acted for their "shared mutual benefit."[101] But again, this does nothing to increase the prosecution's burden. Surely, a person would not agree to assist another in criminal activity unless that person stood to benefit in some way. In other words, conspirators who agree to act together will *always* be acting for their mutual benefit. The *Evans* version of interdependence is therefore toothless, posing no additional requirement for the prosecution. It is almost a non sequitur, in that it defines inter*dependence* by removing any semblance of *dependence* between the conspirators. Instead, the new definition merely acknowledges that the agreement should benefit each member. While it is difficult to understand the criminal mind, it can be universally acknowledged that most criminals commit crimes with the subjective belief that it will further their own interests.

Since *Evans*, the Tenth Circuit has relied on this watered-down version of interdependence far more often than the literal *Dickey* standard. Though the court decided *Evans* eight years after *Dickey*, the Tenth Circuit has used the *Evans* language to define interdependence twenty-two times in appellate opin-

98. *See id.* at 673.
99. *Id.* at 671 (emphasis in original).
100. *See supra* note 20.
101. *Evans*, 970 F.2d at 671.

ions,[102] whereas the *Dickey* language is offered in only nine opinions.[103] The *Evans* standard is also found in the Tenth Circuit's jury instructions, which serve as the guide for the district courts.[104] Thus, at the trial level, juries are evaluating conspiracy defendants under the diluted, toothless definition. The Tenth Circuit seems to prefer this prosecution-friendly standard, which simply reaffirms the first three elements of conspiracy.

Some may argue that this development is fine because it simply aligns the Tenth Circuit with its sister circuits, which require the government to prove only three elements when prosecuting conspiracies. Such an argument, however, ignores a fundamental due process right: a defendant cannot be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[105] The Tenth Circuit made the choice to add an "innovation [to its] jurisprudence"[106] by adopting interdependence as an additional element, thus (presumably) heightening the prosecution's burden. Yet, under the *Evans* standard, interdependence loses any force or meaning in the context of criminal conspiracy.

Others may argue that the Tenth Circuit is justifiably applying a standard that has evolved into something different than the literal meaning. However, that evolution has turned interdependence into a redundant, meaningless element. Therefore, the Tenth Circuit is allowing prosecutors to prove conspiracy cases by essentially ignoring a specific element of the crime. This type of evolution is unacceptable because, as discussed above, it raises serious due process concerns.

E. One More Factor to Consider: The Conspiracy's "Goal"

Before addressing specific facts of Tenth Circuit conspiracy cases, there is one more factor to consider: under any of the varying interdependence definitions, the trial court's analysis will largely be affected by how the government defines the "goal" of the alleged conspiracy. For instance, consider a marijuana dis-

102. *E.g.*, United States v. Hamilton, 587 F.3d 1199, 1208 (10th Cir. 2009). The twenty-two cases include both published and unpublished decisions.

103. *E.g.*, United States v. Yehling, 456 F.3d 1236, 1241 (10th Cir. 2006). The nine cases include both published and unpublished decisions.

104. CRIMINAL PATTERN JURY INSTRUCTIONS, *supra* note 7, §§ 2.19, 2.87.

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

106. CRIMINAL PATTERN JURY INSTRUCTIONS, *supra* note 7, § 2.19 cmt., at 105.

tribution conspiracy that involves five street dealers who each rely on a common supplier. In this example of a wheel conspiracy, each street dealer is unaware of the specific identity of the other dealers. That being said, each dealer also knows, in a general sense, that the supplier does business with other dealers. All five of the dealers have sold 10 kilograms of their supplier's marijuana on the street.

Now, consider two possible scenarios resulting from the arrest of the dealers and their supplier. In the first, the government indicts the entire drug ring together. Under the literal *Dickey* standard, the government would be required to show that the entire operation relied on each dealer "to achieve the common goal."[107] If the government characterizes the conspiratorial goal as the "distribution of 50 kilograms of marijuana," it would have to prove that each dealer had that goal and that each dealer *relied* on every other dealer to achieve it. This would be difficult for the government to prove, especially if the dealers did nothing to assist each other in distributing their own personal 10 kilograms.

On the other hand, consider a second scenario where the government indicts each street dealer individually. Here, the goal of each conspiracy would be to distribute 10 kilograms of marijuana. Each street dealer would face one count of conspiracy, while the supplier could be convicted on five counts for each separate case. For sentencing purposes, the street dealers would only be on the hook for their individual 10 kilograms of marijuana, instead of the entire 50 (as in the scenario above). The kingpin supplier would still be held accountable for his role in distributing 50 kilograms of marijuana. Also, prosecuting these smaller conspiracies would temper the dangers of "transference of guilt from one to another across the line separating conspiracies . . . ."[108] If the street dealers were not working in concert, this outcome seems the most just.

These two scenarios demonstrate that, under the literal *Dickey* standard, federal prosecutors must carefully charge conspirators for the crimes in which they are actually involved. This second scenario upholds the worthy concept of individual guilt while still punishing defendants for group criminal behavior. The Tenth Circuit appears to adhere to these principles by requiring the government to prove interdependence. However,

107. United States v. Dickey, 736 F.2d 571, 582 (10th Cir. 1984).
108. Kotteakos v. United States, 328 U.S. 750, 774 (1946).

as specific Tenth Circuit cases discussed in Part III demonstrate, the ambiguous standard of interdependence does not, in practice, "scrupulously safeguard each defendant individually . . . from [the] loss of identity in the mass."[109] Instead, these varying interdependence standards create a malleable definition that can confuse prosecutors, defendants, juries, and judges alike, thereby leading to inconsistent verdicts.[110]

III. SPECIFIC TENTH CIRCUIT CASE LAW

The consequences of the Tenth Circuit's varying definitions of interdependence become apparent when specific cases are examined. While the court has stated, with regard to its conspiracy jurisprudence, that "[its] precedents are often very fact specific, and do not always provide clear guidance,"[111] the mere recognition of an imprecise standard does not help defendants, juries, and district court judges in practice. This lack of "clear guidance" results in inconsistent decisions that undermine the heightened standard that the Tenth Circuit adopted in *Dickey*.

This Part will discuss two cases—*United States v. Evans* and *United States v. Ivy*—that demonstrate just how unclear the interdependence standard is in practice. It will also point out other curious outcomes in the Tenth Circuit as well as confusing techniques that the court has used to review conspiracy cases. Finally, it will discuss *United States v. Caldwell*, a recent case that shows how the Circuit may be returning to the more literal version of interdependence previously announced in *Dickey*.

A. United States v. Evans

In *United States v. Evans*, a trial court convicted five defendants of a drug conspiracy involving the sale of crack cocaine.[112] The government presented the case as a wheel conspiracy, with each defendant connected to the hub, Carl Walker—the central importer and distributor in the drug net-

109. *Id.* at 776.

110. *See infra* Part III (discussing the effects of the varying standards applied to the specific facts of Tenth Circuit cases).

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

112. 970 F.2d 663, 665 (10th Cir. 1992).

work.[113] Walker was granted immunity from prosecution in exchange for his cooperation with the investigation.[114]

Four defendants—Dominic Evans, James Joubert, Perry Roberts, and Diana Brice—appealed, challenging the sufficiency of the evidence for their conspiracy convictions.[115] Each of these alleged spokes contended that the evidence did not reflect a single, cohesive conspiracy to distribute drugs.[116] The government broadly defined the goal of the conspiracy as distributing crack cocaine in Oklahoma.[117] The court affirmed the convictions of Evans, Joubert, and Roberts, but reversed Brice's conviction.[118]

In light of the Tenth Circuit's heightened standard when analyzing conspiracy charges, one would have expected the court to explicitly state how Evans, Joubert, and Roberts were interdependent on each other and all of the other members of this massive drug conspiracy. Specifically, the court should have addressed how the success of the conspiracy relied on each defendant's actions. Instead, the court merely recited the evidence connecting Evans, Joubert, and Roberts to drug-related activities and the central figure, Walker.[119] For example, when analyzing Roberts's conviction, the court pointed to the following facts: (1) Roberts accompanied Walker (the "hub") to a meeting where various parties discussed a cocaine deal, but he did not participate in the conversation; (2) Roberts was involved in cocaine transactions with James Backward, a conspirator who pled guilty; (3) Roberts once gave cocaine to Eric Rentie, another conspirator who also pled guilty; and (4) a witness once heard Roberts arguing with a conspirator over money related to a drug transaction.[120] However, the court did not explain how Roberts's acts served as a keystone in this massive conspiracy involving all of the defendants and many unindicted conspirators.[121] The court performed a similarly lacking recitation of the facts for Joubert and Evans.[122]

113. *Id.* at 667.
114. *Id.* at 666.
115. *Id.* at 671.
116. *Id.*
117. *Id.* at 666.
118. *Id.* at 665.
119. *Id.* at 671–73.
120. *Id.* at 672.
121. *Id.*
122. *Id.* at 671–72.

After this discussion, the court held that "[the] evidence [was] sufficient to show that these defendants had knowledge of the general nature and scope of the illegal enterprise and that they all shared the distribution objective."[123] In every other federal jurisdiction, this analysis may have been sufficient.[124] The Tenth Circuit, however, purports to require more than just knowledge of the scope of the conspiracy and a common objective.[125] Yet, there was no mention of interdependence as applied to the specific facts. Instead, the court merely included an academic discussion of all of the elements of conspiracy, including interdependence.[126] It was during this abstract discussion that the court first announced the diluted standard that is now incorporated into the Tenth Circuit's jury instructions. The substantive factual analysis that affirmed the three defendants' convictions, however, *did not include a single reference to interdependence.*[127]

Instead of further diluting the interdependence standard, the Tenth Circuit should have applied a literal definition requiring mutual reliance. If the Tenth Circuit had enforced this literal standard of interdependence, it would have been difficult to show that every member of the huge drug ring *relied* on each defendant's minor role.

For example, Roberts was surely involved in some sort of drug distribution conspiracy. But the government should have prosecuted him for conspiring with the few defendants with whom he had narcotics connections. Instead, the court lumped him into a vast conspiracy with major players. The consequences of such a conviction can be severe. A defendant's sentence depends on the quantity of drugs that the defendant knew or should have known was involved in the conspiracy; in other words, the more drugs involved, the longer the defendant will be in prison.[128] Accordingly, Roberts could be punished for the crimes of the grand conspiracy—an unjust outcome given his minor role. Interdependence should limit this danger. However, in *Evans*, an imprecise definition—coupled with no

123. *Id.* at 673.

124. *See supra* note 20 (referencing the elements of conspiracy in every circuit besides the Tenth Circuit).

125. *See supra* note 7 (setting forth the Tenth Circuit's jury instructions for criminal conspiracy, which include the extra element of "interdependence").

126. *Evans*, 970 F.2d at 668–71.

127. *Id.* at 671–73 (this discussion in the opinion is found under the section entitled "B. Sufficiency of the Evidence").

128. *See* United States v. Williamson, 53 F.3d 1500, 1529 (10th Cir. 1995).

discussion of *any* definition as applied to the facts—frustrated this intended effect.

B. United States v. Ivy

The Tenth Circuit issued another puzzling decision in *United States v. Ivy*.[129] There, a group of defendants was convicted of a conspiracy to distribute cocaine.[130] In this chain conspiracy, Samuel Norwood was the main supplier, Raymond Hickman acted as an intermediary, and Kenny Taylor was a street dealer who received his supply from Hickman.[131] On appeal, Taylor challenged the sufficiency of the evidence with respect to his conspiracy conviction.[132] While he did receive cocaine from Hickman, Taylor argued that this was not enough to show that he was part of the larger conspiracy involving Norwood as the chief supplier and Hickman as a primary buyer.[133] Taylor pointed to the fact that he had no connection to Norwood; as a low-level street dealer, he dealt only with Hickman.[134]

Ivy forced the court to address a "recurring problem in [its] drug conspiracy jurisprudence: how involved a low-level dealer must be in order to be considered a member of a conspiracy to distribute drugs."[135] It reiterated a major point from *Evans*: in order to prove a common distribution objective, the government must show more than casual transactions between the parties.[136] The court also stated that proof of a buyer-seller relationship between the defendant and a conspirator alone is insufficient to establish a common conspiratorial objective to distribute drugs.[137]

The *Ivy* court then further explained this buyer-seller maxim by distinguishing end-users (i.e., buyers intending to use the drugs themselves) from individuals who planned to redistribute the drugs for profit.[138] The end-users could not be properly convicted as members of a conspiracy to *distribute*

129. 83 F.3d 1266 (10th Cir. 1996).
130. *Id.* at 1284.
131. *Id.*
132. *Id.*
133. *Id.* at 1284–85.
134. *Id.*
135. *Id.* at 1285.
136. *Id.* at 1286.
137. *Id.*
138. *Id.* at 1285–86.

drugs because their transactions were purely for personal use.[139] However, if the buyer instead sold those drugs to another person, that evidence would be enough to show that the buyer was part of the distribution conspiracy.[140] Since the government presented evidence that Taylor redistributed drugs for profit, he did not fall into the end-user category.[141] Thus, the court held that a reasonable jury could have found a common distribution objective.[142]

While this evidence could have linked the street dealer, Taylor, to his immediate supplier, Hickman, the court recognized that this did not necessarily prove that "Taylor's activities were interdependent with the larger Norwood/Hickman conspiracy."[143] But, as in *Evans*, the court found that interdependence existed by applying a more relaxed definition of the element, stating that it is satisfied when the prosecution proves that the defendant "facilitated the endeavors of other alleged conspirators or facilitated the venture as a whole."[144]

To establish interdependence in the *Ivy* case, the court relied on the following evidence: (1) the drugs that Taylor bought from Hickman came from the top distributor, Norwood; and (2) Taylor's transactions benefitted not only himself and Hickman, but Norwood as well.[145] It was essential that the government connected Taylor's drugs to Norwood.[146] However, the court did not point to any evidence showing that Taylor had any knowledge of Norwood's drug distribution scheme.[147] Instead, it merely relied on a transitive relationship: the prosecution proved that Taylor sold drugs that he bought from Hickman and that Hickman probably got those drugs from Norwood.[148] This "support[ed] an inference that the majority of the crack cocaine Mr. Hickman redistributed to others, including Mr. Taylor, came from Norwood."[149]

If interdependence can be established by merely showing a connection through the chain of supply, then that reasoning di-

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1286.
144. *Id.* (quoting United States v. Horn, 946 F.2d 738, 740–41 (10th Cir. 1991)).
145. *See id.*
146. *See id.*
147. *See id.*
148. *Id.*
149. *Id.* at 1286–87

rectly contradicts an enlightening hypothetical presented, ironically,[150] by the *Evans* court.[151] *Evans* stated that a small-time drug dealer who knew that his supply could be traced back to the Medellín cartel could not be held responsible for all of the drugs originating from the Colombian enterprise.[152] "Such an approach would pervert the concept of conspiracy. Mere knowledge of illegal activity, even in conjunction with participation in a small part of the conspiracy, does not by itself establish that a person has joined in the grand conspiracy."[153] The court was concerned with the potential problem of holding a minor street-level dealer "responsible for all of the drugs originated by the cartel for sentencing purposes, resulting in a guaranteed life sentence."[154] Interdependence, in theory, should be the element that prevents this small-time dealer from being convicted as a conspirator in such a vast scheme.[155]

However, the *Ivy* court affirmed defendant Taylor's conspiracy conviction by pointing to evidence that the drugs went from Norwood (the main supplier) to Hickman (the intermediary) to Taylor (the street dealer), and that Taylor's transactions benefitted the Norwood/Hickman conspiracy.[156] In other words, the proof came from the mere chain of transactions, and the fact that those transactions furthered the conspiracy's general goal of distribution. If this line of reasoning is correct, there would be nothing to stop the government from charging both the street-level dealer and the Colombian drug lords with the same conspiracy.[157] If the street-level dealer knew that the drugs were from the Medellín cartel, then the prosecution could also show that the street-level dealer's actions benefitted the cartel by increasing its distribution and profit. According to the *Ivy* court, this knowledge is enough to convict a lower-level dealer in a drug chain conspiracy prosecution.[158] Again, the court seems to conflate actions that *benefit* a conspiracy with actions that are *relied on* for the conspiracy to succeed.[159]

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150. *See supra* Part II.D.
151. United States v. Evans, 970 F.2d 663, 670 (10th Cir. 1992).
152. *Id.*
153. *Id.*
154. *Id.*
155. *See id.*; *see also supra* Part II.B.
156. *See* United States v. Ivy, 83 F.3d 1266, 1286 (10th Cir. 1996).
157. *See Evans*, 970 F.2d at 670.
158. *See Ivy*, 83 F.3d at 1286.
159. *See id.*; *see also supra* Part II (discussing the literal versus relaxed standards of interdependence in the Tenth Circuit).

Indeed, the Tenth Circuit has continued to make assumptions that contradict the Medellín cartel warning in *Evans*: "[w]here large quantities of drugs are being distributed, each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know."[160] This type of distinction relies on ambiguous, malleable terms, such as "large quantities of drugs" and "major buyer," which are left undefined and do not give courts or defendants any real guidance.[161] By requiring interdependence in every conspiracy prosecution, the Tenth Circuit presumably provides a check on prosecutors who try to implicate defendants in conspiracies that are beyond the scope of their involvement. However, there is so much contradictory precedent and unclear case law that this protection simply does not exist.

C. Other Factors Affecting Interdependence

The Tenth Circuit has even drawn distinctions that affect the interdependence analysis based on the type of conspiracy that is charged. For instance, in a drug conspiracy, "because the manufacture, sale, and use of drugs [are] illegal, essentially every aspect of the drug distribution business is illegal. Each participant is presumptively aware of the illegal nature of the activity and of the existence of the illegal venture."[162] Combine this presumption with the *Evans* "mutual benefit" standard of interdependence,[163] and a street-dealing drug conspiracy defendant is almost automatically implicated with any supplier whose stash can be traced to the street dealer's drugs, no matter how many degrees of separation exist. Conversely, if the underlying purpose of the conspiracy's activity is lawful—e.g., securing a real estate loan from the FHA, as was the case in *United States v. Kotteakos*[164]—"interdependence must be proved more precisely."[165] Therefore, not only are there vary-

160. United States v. Small, 423 F.3d 1164, 1183 (10th Cir. 2005) (quoting United States v. Watson, 594 F.2d 1330, 1340 (10th Cir. 1979)).

161. *See id.*

162. United States v. Carnagie, 533 F.3d 1231, 1239 n.5 (10th Cir. 2008).

163. The government proves interdependence by showing "that [the conspirators] intended to act together for their shared mutual benefit within the scope of the conspiracy charged." United States v. Evans, 970 F.2d 663, 670 (10th Cir. 1992).

164. 328 U.S. 750, 752 (1946).

165. *Carnagie*, 533 F.3d at 1293 n.5.

ing definitions of interdependence that the court can use to assess a case, but there are also certain crimes that require those varying definitions to be proved more precisely than others. The result is an unpredictable and incoherent area of law.

D. United States v. Caldwell: *A Glimmer of Hope*

There is, however, more recent case law that might indicate that the Tenth Circuit is returning to its more literal standard of interdependence.[166] In *United States v. Caldwell*, the court reviewed a conspiracy conviction of an Oklahoma marijuana dealer, Michael Caldwell.[167] At trial, the government framed the case as a tripartite conspiracy between Caldwell, David Anderson, and Samuel Herrera, the goal of which was to distribute 100 kilograms of marijuana over a two-year period.[168]

Herrera was an intermediate supplier who distributed drugs to street-level dealers such as Caldwell and Anderson.[169] These two street dealers were friends, and prior to the conspiracy, Anderson occasionally sold drugs to Caldwell.[170] When Anderson's normal supplier was unable to provide drugs, Anderson got in touch with Caldwell, who referred Anderson to Herrera as a new source of marijuana.[171] Caldwell then set up a drug deal between Anderson and Herrera.[172] After Caldwell arranged the initial meeting, Anderson and Herrera did subsequent business without Caldwell's further assistance.[173] During this same time, Herrera routinely supplied Caldwell with marijuana as well.[174]

After the government indicted Caldwell as a member of this tripartite conspiracy, it reached plea agreements with Herrera and Anderson.[175] In exchange for these pleas, both men testified against Caldwell at trial, where he was found guilty for his involvement in the three-party conspiracy.[176] On

166. *See,* United States v. Caldwell, 589 F.3d 1323 (10th Cir. 2009).
167. *Id.* at 1326–27.
168. *Id.* at 1327.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1329.
175. *Id.* at 1328.
176. *Id.*

appeal, Caldwell challenged the sufficiency of the evidence, arguing that there was a variance between the conspiracy that the government charged (i.e., a three-party conspiracy between Caldwell, Anderson, and the supplier, Herrera) and the conspiracy that the facts actually proved (i.e., a smaller conspiracy between Caldwell and his supplier, Herrera).[177]

The *Caldwell* court properly acknowledged that the "focal point of the [single conspiracy] analysis is whether the alleged coconspirators' conduct exhibited interdependence."[178] It then dismissed the government's argument that, merely because Anderson and Caldwell bought from the same supplier (i.e., Herrera), there was interdependence between all three dealers.[179]

The government also tried to establish the cohesive three-party conspiracy through evidence that Anderson had once sold two-to-three kilograms of marijuana to Caldwell, and that Caldwell introduced Anderson to Herrera, thus initiating the dealings between them.[180] The court then addressed a "question of first impression for the Tenth Circuit: Is the mere introduction of a common supplier, made by one drug dealer to another, sufficient to create a single conspiracy among all the dealers?"[181] The court held that evidence of such an introduction, taken alone, was insufficient to demonstrate interdependence among all three dealers.[182]

In reaching this conclusion, however, the court made a peculiar distinction: it noted that in *Ivy*, the government properly used evidence that a street-level dealer (Taylor) introduced a customer to his supplier (Hickman) to prove interdependence among Taylor, Hickman, and Hickman's supplier, Norwood.[183] According to the court, this was proper because Taylor arranged an introduction between Hickman and a party outside of the alleged conspiracy.[184] In *Caldwell*, however, the introduction was insulated among the alleged conspirators, and did not involve a party outside of the tripartite conspiracy.[185]

177. *Id.* at 1327–28.
178. *Id.* at 1329 (quoting United States v. Edwards, 69 F.3d 419, 432 (10th Cir. 1995) (internal quotations omitted)).
179. *Id.* at 1329–30.
180. *Id.* at 1330.
181. *Id.* at 1331.
182. *Id.* at 1331–32.
183. *Id.*
184. *Id.*
185. *Id.*

This evidence, according to the court, meant that *Ivy* did not govern the *Caldwell* case.[186] The court concluded that the introduction in *Caldwell* was "friendly rather than conspiratorial,"[187] and therefore did not serve as evidence of interdependence.[188] In further support of its conclusion that the *Caldwell* introduction was not evidence of interdependence, the court noted that Caldwell received no apparent economic benefit from helping out his friend Anderson,[189] that Caldwell had no further drug dealings with Anderson after the initial introduction,[190] and that Anderson and Caldwell did not depend on each other's actions to further their own independent drug operations.[191] The court held that a variance occurred between the conspiracy the government charged and the conspiracy the government proved.[192]

This holding is admirably more in line with a literal definition of interdependence. That being said, *Caldwell's* distinction between the two different types of introductions is unfounded. It is unclear why the introduction among three conspiring "friends" in *Caldwell* could not serve as a basis for interdependence, yet a street-level dealer who introduced his supplier to someone outside the conspiracy could serve as a basis for interdependence in *Ivy*.[193] In *Ivy*, the introduction was used not only as evidence of the conspiracy between Taylor (the street dealer) and Hickman (Taylor's supplier whom Taylor introduced to a customer), but also as evidence of a conspiracy between Taylor, Hickman, *and* Hickman's supplier, Norwood—someone who Taylor had no direct connection with.[194] Norwood, the top supplier in the conspiracy's chain, was not even involved in the introduction that Taylor set up for Hickman.[195] Similar to the *Caldwell* case, Taylor received no economic benefit from the introduction; yet, the introduction was used to prove interdependence in a conspiracy with connections that were far more tenuous than the alleged conspiracy in *Caldwell*, and Taylor's conspiracy included a third party (Norwood) who

186. *Id.*
187. *Id.* at 1332.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 1332–33.
193. *See* United States v. Ivy, 83 F.3d 1266, 1286 (10th Cir. 1996).
194. *Id.*
195. *Id.*

was not even involved in the introduction.[196] Furthermore, in *Ivy*, there was no evidence that the introduction furthered the alleged conspiracy.[197] It is unclear why the insulated introduction among conspirators did not prove interdependence in *Caldwell*, while a conspirator introducing a fellow conspirator to someone outside the conspiracy was a proper basis for interdependence in *Ivy*.

The *Caldwell* court's reasoning further illustrates the Tenth Circuit's inconsistent standards.[198] While the court may have reached the correct decision by holding that interdependence did not exist between Caldwell, Anderson, and Herrera, it did so by making an illusory and irrelevant distinction between *Caldwell* and *Ivy*.[199] The Tenth Circuit's varying standards and confusing distinctions continue to produce unpredictable and inconsistent verdicts in Tenth Circuit conspiracy cases.

IV. A PLEA FOR CONSISTENCY AND COMMON SENSE IN THE TENTH CIRCUIT

The Tenth Circuit should use a uniform standard for interdependence based upon the word's literal definition. The court distinguishes itself from the other circuits in an apparent effort to "be particularly vigilant when the government seeks to bring many individuals under the umbrella of a single conspiracy."[200] This noble effort attempts to mitigate the "risk . . . that a jury will be so overwhelmed with evidence of wrongdoing by other alleged coconspirators that it will fail to differentiate among particular defendants."[201]

The court would most faithfully serve these principles by consistently applying its most literal standard of interdependence. Under this standard, the prosecution must show that "each alleged coconspirator . . . depend[s] on the successful operation of each 'link' in the chain to achieve the common goal."[202] Reasserting this standard as the circuit's benchmark would produce several desirable consequences: (1) it would guard against the Medellín hypothetical described above; (2) it

196. *Id.* at 1286–87.
197. *See id.*
198. United States v. Caldwell, 589 F.3d 1323, 1328–33 (10th Cir. 2009).
199. *Id.* at 1331.
200. United States v. Evans, 970 F.2d 663, 674 (10th Cir. 1992).
201. *Id.*
202. United States v. Dickey, 736 F.2d 571, 581 (10th Cir. 1984).

would give prosecutors a clearer sense of what conspiracy charges to bring; (3) it would ensure that conspiracy prosecutions—which involve a charge "so vague that it almost defies definition"[203]—are more focused and comprehensible for juries; and (4) it would force the government to specifically prove every element of its case, thus upholding a defendant's right to due process.

The literal standard would require prosecutors in the Tenth Circuit to prove that each indicted conspirator's actions were essential to the success of the conspiracy. The prosecutor would have to be careful when framing his case, choosing to define the conspiracy's goal in terms of the criminal arrangement that each conspirator was actually involved in. For example, if the government tried to indict a wide-ranging interstate drug distribution conspiracy under the Controlled Substances Act, it would have to be sure that each member was integral to the conspiracy's success. For example, if a conspiracy's goal were defined as the distribution of over 1,000 kilograms of cocaine, it would be difficult to indict a low-level street dealer responsible for the distribution of only one kilogram alongside major suppliers who are situated higher on the food chain. Under the literal standard, the street dealer could not be convicted of the broad conspiracy even if he had a general knowledge of the origin of his narcotics. The lower-level dealer could only be indicted on separate charges for a smaller conspiracy—one that only involved those conspirators who were essential to the dealer's own personal distribution scheme. Thus, consistent application of the literal standard of interdependence would ensure that guilt remains a personal, individualized concept, while still holding conspirators accountable for group criminal activity when appropriate.

In the multi-level drug dealing example, a supplier might rely on various street dealers to distribute his product; but unless the government could prove that those street dealers worked together (e.g., reaching agreements on who would deal in particular neighborhoods, or selling to each other on short notice), it would be a stretch to say that the street-level dealers depended on each other to achieve the collective conspiratorial goal. This would truly create a split between the Tenth and the other circuits by requiring several prosecutions for certain drug distribution rings in the Tenth Circuit, when the other circuits

203. Krulewitch v. United States, 336 U.S. 440, 446 (1949).

would allow conspirators to be prosecuted together so long as they were aware of a vague common objective. It would be a major change, but it would create a working standard that allows prosecutors and juries to make accurate determinations regarding interdependence, instead of maintaining the chaotic and imprecise jurisprudence that exists in the Tenth Circuit today.

The literal standard would require a prosecutor to both pursue more cases via smaller, distinct conspiracies, and be more careful when indicting potential conspirators. However, these potential prosecutorial hardships are worth it. Applied in this literal way, interdependence would better serve the worthy goal of requiring proof of individual guilt when prosecuting a crime that has the natural tendency to create guilt by association. The Tenth Circuit chose to be different. Presumably, it made this choice to ensure that the government was prosecuting criminals for the appropriate crimes. The choice was admirable. It upholds due process protections.[204] But saying one thing and doing another is not enough. Fairness, justice, and due process require the Tenth Circuit to stand by its decision and interpret the interdependence element for what it literally is.

CONCLUSION

As the Supreme Court warned in *Kotteakos* over sixty years ago, courts must "scrupulously safeguard each defendant individually, as far as possible, from the loss of identity in the mass"[205] during conspiracy prosecutions. The Tenth Circuit furthered this ideal when it made the decision to stray from its sister circuits and add an additional element for conspiracy charges: interdependence.

This element should ensure that convicted conspirators were actually part of their alleged conspiracy. It should require evidence that each member of the conspiracy relied in some way on his fellow conspirators in order to achieve their collective criminal goal. Initially, the Tenth Circuit announced a standard that would result in a fairer application of a prosecution-friendly body of law. However, along the way, the court's clear and noble objective—to maintain individual guilt

204. *See supra* note 106.
205. Kotteakos v. United States, 328 U.S. 750, 776 (1946).

in conspiracy prosecutions—became vague due to differing standards that strayed from the literal definition of interdependence. This led to inconsistent and confusing decisions.

Quoting Judge Benjamin Cardozo, Justice Robert H. Jackson once said that the history of conspiracy jurisprudence "exemplifies the 'tendency of a principle to expand itself to the limit of its logic.'"[206] The Tenth Circuit has gone beyond that limit by removing all meaning from interdependence and turning it into a confusing afterthought for courts, juries, and prosecutors. While those parties may experience confusion, it is the defendants who experience the actual consequences. To correct this problem, the Tenth Circuit should return to its original, literal position. It should announce that, in a criminal conspiracy, interdependence between conspirators means exactly what one would think: that the conspirators relied on each other's participation in the conspiracy. This standard would ensure that defendants are convicted, not for being part of any criminal network, but for being part of the specific conspiracy that they chose to join.

206. *Krulewitch*, 336 U.S. at 445 (Jackson, J., concurring).