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## Criminal Conspiracy and Lesser Included Offense Jury Instructions: *United States v. Lapointe*, 690 F.3d 434 (6th Cir. 2012)

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CRIMINAL CONSPIRACY AND LESSER INCLUDED OFFENSE  
JURY INSTRUCTIONS: *UNITED STATES V. LAPOINTE*, 690 F.3d  
434 (6TH CIR. 2012)

*Nicholas F. Caprino\**

I. INTRODUCTION

Enforcement of criminal conspiracy laws is only effective if supported by a proficient understanding of the laws' underlying policies and purposes in the United States' crime prevention framework. Criminal conspiracy convictions should not be imposed to punish or prevent the substantive crimes they facilitate.<sup>1</sup> Rather, they are meant to deter the collaborative acts and preparation that make the commission of a crime more efficient, effective, and likely to succeed.<sup>2</sup> It is the *agreement* between multiple actors to support various objectives necessary to complete a crime that enhances the danger to society beyond a lone actor preparing for criminal activity.<sup>3</sup> Only once attorneys and judges understand the policy behind conspiracy can they correctly apply it to lesser included offense jury instructions.

In *United States v. LaPointe*, the defendant, James LaPointe, was accused of involvement with an oxycodone distribution ring.<sup>4</sup> At the end of the trial, he requested an instruction that would allow the jury to convict on the lesser included offense of conspiracy to possess oxycodone (without intent to distribute).<sup>5</sup> The jury would only be able to convict on conspiracy to possess (the lesser included conspiracy) if it found that he satisfied the elements of conspiracy to possess, but not the elements of conspiracy to possess with intent to distribute (the greater conspiracy).<sup>6</sup> The district court denied the request, and the jury convicted LaPointe of conspiring to possess with the intent to distribute.<sup>7</sup> The Sixth Circuit reversed, holding that the lower court

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\* Associate Member, 2012–2013 *University of Cincinnati Law Review*. I would like to thank my wife, Laura Caprino, for all the support she has given me throughout law school.

1. See *United States v. Rabinowich*, 238 U.S. 78, 86 (1915).

2. See *id.* at 88; Neal Kumar Katyal, *Conspiracy Theory*, 112 *YALE L.J.* 1307, 1309–10 (2003); see generally Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 *J. CRIM. L. & CRIMINOLOGY* 147, 169–70 (2007) (providing a comprehensive overview of criminal conspiracy law).

3. See Ohlin, *supra* note 2, at 169–70.

4. *United States v. LaPointe*, 690 F.3d 434, 438 (6th Cir. 2012).

5. *Id.* at 438–39.

6. *Id.* at 439.

7. *Id.* at 438–39. LaPointe was also convicted of attempting to possess, which he challenged separately on the basis that he failed to take a “substantial step” towards possession. *Id.* at 443–44. The Appeals court affirmed the district court’s conviction on this count. *Id.* at 444.

should have granted the defendant's request for a jury instruction because conspiracy to possess is a lesser included offense of conspiracy to possess with intent to distribute.<sup>8</sup> In doing so, the Sixth Circuit explicitly pointed out the split between the First and Tenth Circuits and adopted the First Circuit's approach.<sup>9</sup>

Part II of this note will outline the standards and elements of criminal conspiracy as applied to *LaPointe* and will also introduce the requirements for a lesser included offense instruction. Part III will outline the opinion of *LaPointe*, and Part IV will discuss the Circuits' analyses of conspiracies with multiple objectives, the intent required to convict on conspiracy, as well as the issue of avoiding injustice in lesser included conspiracy scenarios. Finally, Part V will conclude, finding that while the Sixth Circuit may have reached the appropriate disposition, the court mischaracterized the nature of the circuit split and failed to solidify a clear and definitive break from the Tenth Circuit's incorrect analysis of the issue.

## II. STATUTORY PROVISIONS AND RELATED CASES

### *A. Conspiracy in Federal Drug Cases*

21 U.S.C. § 846 governs conspiracy in federal drug trafficking cases and simply states: "Any person who attempts or conspires to commit any offense defined in this title 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." What constitutes conspiracy under § 846 is left to federal courts' common law interpretation.<sup>10</sup> Generally, the elements of conspiracy include 1) an agreement between two or more people, 2) the accused's knowledge of the conspiracy and intent to join, and 3) the accused's voluntary participation in the conspiracy.<sup>11</sup> While some laws require an overt act to prove the agreement element, courts have held that § 846 does not require such proof; instead, the government need only prove the agreement itself.<sup>12</sup> The prosecution

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8. *Id.* at 443.

9. *Id.* at 441–42.

10. *See, e.g.,* United States v. Bland, 653 F.2d 989, 996 (5th Cir. 1981); United States v. Turner, 319 F.3d 716, 721 (5th Cir. 2003).

11. *Turner*, 319 F.3d at 721.

12. United States v. Shabani, 513 U.S. 10, 15 (1994). For example, 18 U.S.C. § 371 explicitly requires an overt act to demonstrate agreement to join a conspiracy, while 21 U.S.C. § 846 requires no such proof. United States v. Rabinowich, 238 U.S. 78, 86 (1915) (holding an overt act is required under § 37 of the Criminal Code); *Statute of Limitations in Prosecution for Conspiracy to Commit Offense Against or to Defraud United States 18 U.S.C.A. § 371*, 68 A.L.R. FED. 628, § 3 (2011) [hereinafter *Statute of Limitations*] (stating that the statute addressed in *Rabinowich* (§ 37) is a predecessor to 18

does not need to demonstrate a formal agreement. For example, “a tacit or mutual understanding to engage in a common plan is sufficient” to prove an agreement,<sup>13</sup> as opposed to an overt act symbolizing the agreement.

Intent to conspire is necessary to convict on conspiracy, but this does not mean that proof of specific intent to distribute drugs is required.<sup>14</sup> If a defendant agrees to a conspiracy with knowledge of the distribution and intent to be part of the conspiracy to distribute, that defendant may be guilty of conspiracy to possess with intent to distribute even if the defendant did not intend to actually distribute or possess.<sup>15</sup> The defendant does not have to actively distribute or intend to actually distribute.<sup>16</sup> Rather, he must simply intend to join and further a conspiracy that has an objective of distribution.<sup>17</sup> Although knowledge of the conspiracy’s primary objective is required to show intent, knowledge alone does not necessarily equate to intent to join the conspiracy.<sup>18</sup> For example, “mere knowledge” by a defendant that other actors intend to *actively* distribute drugs is not enough to demonstrate intent to join a *conspiracy* to distribute drugs.<sup>19</sup>

Further, a single conspiracy may have multiple objectives.<sup>20</sup> The U.S. Supreme Court, in *United States v. Ingram*, solidified this concept in U.S. conspiracy law.<sup>21</sup> There is a difference between a conspiracy with multiple objectives and separate conspiracies with different objectives.<sup>22</sup> If the conspiracy sets out to complete a primary objective, and more minor objectives are completed for the furtherance of the primary objective, this constitutes a conspiracy with multiple objectives.<sup>23</sup> For instance, possessing a drug is a necessary minor objective to achieve the greater objective of distributing that drug. This scheme illustrates a single conspiracy with the objectives of possession

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U.S.C. § 371).

13. *United States v. Collins*, 78 F.3d 1021, 1037 (6th Cir. 1996) (citing *United States v. Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989)).

14. *See Bland*, 653 F.2d at 996; *United States v. Diaz*, 655 F.2d 580, 584 (5th Cir. 1981).

15. *See Bland*, 653 F.2d at 996; *Diaz*, 655 F.2d at 584.

16. *See Bland*, 653 F.2d at 996; *Diaz*, 655 F.2d at 584.

17. *See Bland*, 653 F.2d at 996; *Diaz*, 655 F.2d at 584.

18. *Ingram v. United States*, 360 U.S. 672, 678 (1959) (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711–12 (1943)) (finding that a conspiracy to primarily conceal a crime may have a minor objective to evade federal taxes); *Diaz*, 655 F.2d at 584.

19. *United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009).

20. *Ingram*, 360 U.S. at 679–80 (citing *United States v. Rabinowich*, 238 U.S. 78, 86 (1915)).

21. *Id.*

22. *See United States v. LaPointe*, 690 F.3d 434, 441 (6th Cir. 2012) (citing *Ingram*, 360 U.S. at 679).

23. *Ingram*, 360 U.S. at 679–80 (citing *Rabinowich*, 238 U.S. at 86); *LaPointe*, 690 F.3d at 441.

and distribution.<sup>24</sup> On the other hand, if a defendant's possession of drugs is wholly unrelated to any distribution, then the conspiracy to possess the drugs would be wholly separate from the conspiracy to distribute.<sup>25</sup>

Finally, actual possession or distribution does not automatically lead to guilt on conspiracy to possess or distribute.<sup>26</sup> It is not enough to commit the substantive offense. If a defendant is charged with conspiracy to possess, simple possession alone will not amount to conspiracy.<sup>27</sup> The defendant must agree to join, have knowledge of the conspiracy's objective, and intend to conspire. Only when those elements are met is the policy behind conspiracy law achieved.<sup>28</sup> Punishing the substantive crime does not go far enough to separately punish the agreements that potentially make the crime more efficient, more successful, and more dangerous to society.<sup>29</sup> In *Rabinowich*, the Supreme Court demonstrated why punishment of the agreement, wholly separate from the substantive offense, is necessary.<sup>30</sup> The Supreme Court characterized an agreement to do a criminal act as "an offense of the gravest character" because of the enhanced injury to the public.<sup>31</sup> The coordinated action between co-conspirators makes conspiracy more difficult for the state to detect and prevent than crimes by sole actors.<sup>32</sup> In addition, conspiracies go further in "educating and preparing the conspirators for further habitual criminal practices."<sup>33</sup> The Supreme Court understood the importance of the distinction between the substantive crime and the conspiracy to commit that crime in *Rabinowich*, and that distinction continues to be an integral part of courts' conspiracy analysis today.<sup>34</sup>

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24. See *LaPointe*, 690 F.3d at 441.

25. See *id.* (quoting *United States v. Garcia*, 27 F.3d 1009, 1015 (5th Cir. 1994)); *infra* text accompanying notes 140–141.

26. See *United States v. Boidi*, 568 F.3d 24, 29 (1st Cir. 2009).

27. See *id.*

28. See *id.* See generally Katyal, *supra* note 2, at 1309–10.

29. See *Ohlin*, *supra* note 2, at 169–70; Katyal, *supra* note 2, at 1309–10.

30. *United States v. Rabinowich*, 238 U.S. 78, 88 (1915) (ruling on a conspiracy to conceal property from a bankruptcy trustee).

31. *Id.*

32. See *id.*

33. *Id.*

34. See *id.* It should be noted that *Rabinowich* does not directly analyze conspiracy as it is put forth in the statute at issue in this Note (i.e., 21 U.S.C. § 846). Rather, the case addresses conspiracy in § 37 of the Criminal Code, which is a predecessor to 18 U.S.C. § 371. See *Statute of Limitations*, *supra* note 12, at 3. Section 37 does differ from § 846. For example, § 371 requires the government to prove an overt act of an agreement, while § 846 does not. Despite this fact, the reasoning behind conspiracy, especially the need to distinguish it from the substantive offense, remains constant. Compare *Rabinowich*, 238 U.S. at 88, with *United States v. Shabani*, 513 U.S. 10, 15 (1994) (*Shabani* directly interprets § 371 while *Rabinowich* does not).

*B. Standard for Lesser Included Offense Instructions*

It is not unusual for a defendant to request a lesser included offense instruction when charged with conspiracy to possess with the intent to distribute.<sup>35</sup> A court will instruct the jury that it is allowed to convict the defendant of simple conspiracy to possess if the jury finds that the elements of the lesser offense are met and if the prosecution does not prove all of the elements of the greater offense.<sup>36</sup> The standards for requiring the instruction for a lesser included offense are relatively the same in each circuit.

The First Circuit mapped out the elements required to allow a lesser included offense instruction in *United States v. Boidi*.<sup>37</sup> To allow the instruction, 1) the lesser offense must be included in the offense charged, 2) “a contested fact must separate the two offenses, and 3) the evidence would permit a jury to rationally find [the defendant] guilty of the lesser included offense and acquit him of the greater.”<sup>38</sup> The Tenth Circuit uses the same prongs and elaborates by explaining that a lesser offense is included in a greater when the lesser has “some but not all of the elements” of the greater.<sup>39</sup> It also rephrases the second prong, requiring a contested fact to separate the offenses by holding that “the elements differentiating the two offenses are in dispute.”<sup>40</sup> Although the phrasing of the circuits is varied, the meaning behind the elements is virtually the same.<sup>41</sup> For the purpose of clarity, this Casenote will refer to the prongs as 1) the “lesser offense included within the greater” prong, 2) the “contested fact in dispute” prong, and 3) the “rational jury” prong.

The Sixth Circuit has similar elements in a slightly reorganized way that should not substantially affect a court’s analysis.<sup>42</sup> The Sixth Circuit’s first requirement is that “the elements of the lesser offense are

35. See, e.g., *United States v. Boidi*, 568 F.3d 24, 27 (1st Cir. 2009); *United States v. Gilmore*, 438 Fed. App’x 654, 657 (10th Cir. 2011); *United States v. LaPointe*, 690 F.3d 434, 438–39 (6th Cir. 2012).

36. See *LaPointe*, 690 F.3d at 439.

37. *Boidi*, 568 F.3d at 27.

38. *Id.* (alteration in original) (citation omitted) (citing *United States v. Ferreira*, 625 F.2d 1030, 1031 (1st Cir. 1980)) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973) (internal quotation marks omitted)).

39. *Gilmore*, 438 Fed. App’x at 657 (citing *United States v. Mullins*, 613 F.3d 1273, 1284 (10th Cir. 2010)).

40. *Gilmore*, 438 Fed. App’x at 657 (citing *Mullins*, 613 F.3d at 1284). The court also adds an element to the beginning of its analysis by requiring a proper request for a jury instruction.

41. The lesser included offense prongs can be traced back to the United States Supreme Court case, *Sansone v. United States*. Therefore, the analysis in every circuit should track *Sansone*’s. See *Sansone v. United States*, 380 U.S. 343, 349–50 (1965).

42. See *United States v. LaPointe*, 690 F.3d 434, 439 (6th Cir. 2012).

identical to part of the elements of the greater.”<sup>43</sup> This is a variation on the First and Tenth Circuits’ phrasing of the first prong, but this prong holds the same meaning among the three circuits. The Sixth Circuit also requires that “the evidence would support a conviction on the lesser offense . . . .”<sup>44</sup> This is simply a way of stating that the jury could find the defendant guilty on the lesser offense. It is the same as the First and Tenth Circuits’ third prongs, except that, on its own, it does not require the jury’s ability to acquit on the greater offense.<sup>45</sup> That aspect is included in the Sixth Circuit’s next prong: “the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser.”<sup>46</sup> This combines the First and Tenth Circuits’ second and third prongs.<sup>47</sup> Although there is a difference in language, all of the versions can be traced back to a 1965 Supreme Court case that interpreted Federal Rule of Criminal Procedure 31(c) and should have the same application.<sup>48</sup> For this reason, when addressing the three prongs, this Casenote will refer to the organization adopted in the First and Tenth Circuits.<sup>49</sup>

### C. Boidi: *Requiring Lesser Included Offense Instruction*

Scott Boidi was convicted on criminal charges of embezzlement; Racketeer, Influenced, and Corrupt Organizations Act (RICO) violations; and conspiracy to possess with intent to distribute.<sup>50</sup> At trial, the United States presented testimony that the defendant had shared the drugs with his wife and “uneven testimony” on whether the defendant shared them with his other friends.<sup>51</sup> At the appellate level, the defendant challenged the district court’s denial of his request for a lesser included offense jury instruction.<sup>52</sup> The First Circuit held that “conspiracy to possess” is a lesser included offense of “conspiracy to

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43. *Id.* (quoting *United States v. Colon*, 268 F.3d 367, 373 (6th Cir. 2001)). Like the Tenth Circuit, the Sixth Circuit also adds an element at the beginning of their analysis requiring a defendant to properly request the jury instruction.

44. *Id.* at 439 (quoting *Colon*, 268 F.3d at 373).

45. *See id.* at 439; *United States v. Boidi*, 568 F.3d 24, 27 (1st Cir. 2009); *Gilmore*, 438 Fed. App’x at 657.

46. *LaPointe*, 690 F.3d at 439 (quoting *Colon*, 268 F.3d at 373).

47. *See id.* at 439; *Boidi*, 568 F.3d at 27; *Gilmore*, 438 Fed. App’x at 657.

48. *Sansone*, 380 U.S. at 349–50.

49. This Note will continue to use the shortened descriptive names used above. Again, they are 1) the lesser offense included within the greater prong, 2) the contested fact in dispute prong, and 3) rational jury prong.

50. *Boidi*, 568 F.3d at 26–27.

51. *Id.* at 26.

52. *Id.* at 27.

possess with intent to distribute,” and the district court erred in not granting the instruction request.<sup>53</sup> As a result, the convictions for conspiracy to possess with intent to distribute were vacated.<sup>54</sup>

In *Boidi*, the government did not dispute that the substantive offense of possession is a lesser included offense of possession with intent to distribute, but instead argued that conspiracy to do so was entirely distinguishable.<sup>55</sup> The United States asserted that the agreement to possess a drug is a wholly different agreement than one to possess with intent to distribute, and therefore, conspiracies to do either are completely different crimes.<sup>56</sup>

The First Circuit, rejecting the prosecution’s argument, initially pointed out that the government’s stance on the issue had been inconsistent, citing an instance where the prosecution had conceded that the lesser conspiracy was included in the greater.<sup>57</sup> The First Circuit also recognized that several courts, including their own, had assumed that such a lesser included instruction may be granted but had not issued a formal holding on the point.<sup>58</sup>

In addressing the substance of the issue, the First Circuit held that the elements of the lesser offense were included in the greater, meeting the first prong of the lesser included offense instruction analysis.<sup>59</sup> The court found that “‘conspiracy to possess drugs with intent to distribute’ can easily be said to be a ‘conspiracy to possess drugs’ with one added element, namely, that the parties also shared aim that the possessed drugs then be distributed.”<sup>60</sup> But the court elaborated on this factor, requiring that the core facts of the lesser and greater offenses derive from a common scenario.<sup>61</sup> In other words, while a lesser included instruction was proper here, it would not be proper in cases where a defendant charged with conspiracy to possess with intent to distribute requests an instruction for conspiracy to simply possess based on an agreement with different people at a different time.<sup>62</sup>

The government contended that the core facts were different and not

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53. *Id.* at 29.

54. *Id.* at 32.

55. *Id.* at 27.

56. *See id.*

57. *Id.* at 27–28 (citing *United States v. White*, 972 F.2d 590, 596 (5th Cir. 1992)).

58. *Id.* at 28 (citing *United States v. Arroyo*, 546 F.3d 54, 56 (1st Cir. 2008)).

59. *See id.* at 28.

60. *Id.*

61. *Id.*

62. *Id.* (using the example “[i]f the government charges . . . conspiracy to possess with intent to distribute heroin in New York in 2004 but the evidence arguably showed only a conspiracy to possess in San Francisco in 2007, this would call only for an instruction that the jury not convict if the government proves a conspiracy different than that charged”).



overlapping because different witnesses would be required to prove the lesser conspiracy.<sup>63</sup> The court again rejected the government's argument holding that "the lesser . . . offense has to be a version of . . . the same factual scenario as the greater offense" and the only difference is that the added element distinguishing the greater need not be proved.<sup>64</sup> The core facts that the government presented included Boidi buying drugs from the dealer and sharing them with others.<sup>65</sup> Although these facts were meant to prove conspiracy to distribute, by their nature, they were also sufficient to prove conspiracy to possess.<sup>66</sup> For that reason, the court declared that "[t]he witnesses that the government chose to prove the greater offense *are* the proof of the lesser included one."<sup>67</sup>

The First Circuit then took on the final rational jury prong and asked whether a jury could reasonably convict on the lesser offense while acquitting on the greater.<sup>68</sup> The government argued that the fact that the defendant shared drugs with his wife was enough for a reasonable jury to find that he conspired to distribute.<sup>69</sup> The court agreed that the defendant did indeed share the drugs with his wife, but concluded that *conspiracy* to distribute is not that same as the substantive offense.<sup>70</sup> While the defendant sharing drugs with his wife may have easily proved actual distribution, it did not automatically follow that the defendant was guilty of conspiracy to distribute.<sup>71</sup> Despite carrying out the substantive act, the defendant must agree to join, know of, and intend to participate in the conspiracy before being convicted of conspiracy.<sup>72</sup> Entirely different elements are required to prove conspiracy as opposed to the substantive crime, and a jury could find that the defendant did not *conspire* to distribute, despite the fact that he *actually* distributed.<sup>73</sup> Further, according to the court, it would not be unreasonable for a jury to find that the defendant did not conspire to distribute, but did conspire to possess based on these facts.<sup>74</sup>

The court then combined the above legal analysis with several policy

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63. *Id.* at 28–29.

64. *Id.*

65. *See generally id.* at 25–26.

66. *See id.* at 29.

67. *Id.* (emphasis in original).

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *Id.*

concerns.<sup>75</sup> First, courts are typically wary of imposing conspiracy on low-level members of top-down organizations.<sup>76</sup> The First Circuit found the government's argument particularly suspect in cases such as this, where the prosecution could have more easily charged the substantive crime alone, but opted for conspiracy to gain certain advantages.<sup>77</sup> The court then addressed the purpose of conspiracy laws, reasoning that the purpose is not met when the intent to support a conspiracy is absent.<sup>78</sup> The lesser included instruction should be allowed to ensure that the defendant is being charged with a conspiracy that he indeed had the requisite intent to commit.<sup>79</sup> Finally, the court recognized the policy of avoiding injustice by illustrating that when a lesser included offense is not allowed, the jury may be faced with the choice of convicting a defendant on a greater conspiracy that he was not a part of, or complete acquittal, neither of which may be the appropriate outcome.<sup>80</sup>

#### *D. Gilmore: Not Requiring Lesser Included Offense Instruction*

In *United States v. Gilmore*, the Tenth Circuit reviewed a district court's decision denying defendant Jerry Gilmore's request for a jury instruction on a lesser included offense.<sup>81</sup> He was a low-level agent in a complicated hierarchical drug distribution organization.<sup>82</sup> The defendant admitted to sharing the drugs he received with friends and admitted knowing he was transporting others to solicit drugs.<sup>83</sup> The Tenth Circuit held that the instruction for a lesser included offense was not required where the dispute does not concern the elements that differentiate the lesser and greater offenses.<sup>84</sup> In other words, the

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75. *Id.* at 29–30.

76. *Id.* at 29. The court refers to these types of conspiracies as vertical conspiracies. These conspiracies involve members at the top making final decisions, and the lower members executing those decisions. This is opposed to horizontal conspiracies, where the decision making is more equally shared among the members. Ohlin, *supra* note 2, at 190, 192, 194.

77. *Boidi*, 568 F.3d at 29. The court does not elaborate on these advantages, but they can be implied. There are perceived advantages in the admissibility of hearsay evidence and the admissibility of coconspirator acts. Also, many defense attorneys would argue that conspiracies are more likely to confuse the trier of fact to the advantage of the prosecutor. See Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 940–41 (1977). In addition, “one of the more common ways to use RICO is to charge a conspiracy to commit a RICO violation under 18 U.S.C. [§] 1962(d)(2000).” Kataly, *supra* note 2, at n.112.

78. *Boidi*, 568 F.3d at 30.

79. *Id.*

80. *Id.*

81. *United States v. Gilmore*, 438 Fed. App'x 654, 655 (10th Cir. 2011).

82. *Id.* at 656.

83. *Id.* at 657.

84. *Id.* at 658.

contested fact in dispute prong (the second prong) of the lesser included offense analysis was not met. The court also found that the third prong was not satisfied because a jury would not be able to reasonably convict on the lesser conspiracy while acquitting of the greater.<sup>85</sup>

In finding that the second prong was not met, the court determined that the elements differentiating the two offenses were not in dispute.<sup>86</sup> Rather, the disputed issue was “whether Mr. Gilmore was a member of the conspiracy or just a consumer.”<sup>87</sup> Had the dispute been whether the conspiracy’s goal was to distribute versus possess, the Tenth Circuit would have allowed the instruction.<sup>88</sup> Instead, the court determined that the dispute was whether the defendant was involved in the only alleged conspiracy, and the defendant was in essence asking for an instruction on a completely different conspiracy from the one charged.<sup>89</sup>

According to the Tenth Circuit, the defendant also failed to prove the third rational jury prong.<sup>90</sup> A jury could not rationally convict on the lesser conspiracy while acquitting on the greater because all of the evidence demonstrated that distribution was central to the conspiracy.<sup>91</sup> The court pointed to the fact that the defendant’s own testimony expressed that he shared the drugs with friends, “which bears on the distribution aspect of the conspiracy.”<sup>92</sup> As a result, the defendant’s convictions were affirmed in whole.<sup>93</sup>

### III. *LAPOINTE* OPINION

James LaPointe was part of an oxycodone trafficking organization that shipped pills from Florida to Tennessee.<sup>94</sup> Dustin Wallace received the pills in Tennessee and distributed them to buyers.<sup>95</sup> Law enforcement recordings showed LaPointe requesting oxycodone from Wallace, discussing potential buyers, and addressing the possibility of LaPointe selling Oxycontin to Wallace.<sup>96</sup> At trial, LaPointe denied involvement in the distribution conspiracy, explaining that the conversations were intended to deceive Wallace into providing larger

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85. *Id.*

86. *Id.*

87. *Id.* at 657–58.

88. *Id.* at 658.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 661.

94. *United States v. LaPointe*, 690 F.3d 434, 438 (6th Cir. 2012).

95. *Id.*

96. *Id.*

quantities of drugs for LaPointe's personal use.<sup>97</sup> LaPointe was charged with conspiring to possess oxycodone with intent to distribute.<sup>98</sup> At the end of the trial, LaPointe requested a jury instruction on the lesser included offense of conspiracy to possess.<sup>99</sup> The district court denied the instruction, and the court convicted LaPointe of conspiracy to possess with intent to distribute.<sup>100</sup> On appeal, the Sixth Circuit reversed.<sup>101</sup>

The organization of the Sixth Circuit's opinion differs from the First and Tenth Circuits' because it combines the analysis of the second contested fact in dispute prong and the third rational jury prong.<sup>102</sup> Rather than analyzing the two prongs separately, the court addressed whether the conspiracy's differentiating facts were in dispute in the same step of its analysis of whether a reasonable jury could convict on the lesser and not the greater conspiracy.<sup>103</sup>

The Sixth Circuit's first step was to ask whether the elements of the lesser conspiracy were included in the greater.<sup>104</sup> The court declared that it is well-settled that a conspiracy to possess is a lesser included offense of conspiracy to possess with intent to distribute.<sup>105</sup> The Sixth Circuit reasoned that the lower court placed too much emphasis on how the indictment was drafted because the district court based its holding on the idea that "[a]n offense can be charged conjunctively and proven disjunctively."<sup>106</sup> A prior Sixth Circuit case had held that governments have the right to charge in the conjunctive so the grand jury can find probable cause for all of the alternative theories that go forward to trial.<sup>107</sup> "Juries, on the other hand, may convict a defendant on any theory contained in the indictment. As a result, judges read jury

97. *Id.*

98. *Id.* He was also charged with attempt to possess oxycodone. *Id.* at 438–39.

99. *Id.* at 439.

100. *Id.* The conviction on attempt was affirmed. *Id.* at 444.

101. *Id.* at 444.

102. Compare *id.* at 439, with *United States v. Boidi*, 568 F.3d 24, 27 (1st Cir. 2009), and *United States v. Gilmore*, 438 Fed. App'x 654, 657 (10th Cir. 2011) (*LaPointe*, the Sixth Circuit opinion, combines the contested fact in dispute prong with the rational jury prong, while *Boidi* and *Gilmore*, the First and Tenth Circuit opinions respectively, do not).

103. See *LaPointe*, 690 F.3d at 441–43.

104. *Id.* at 439–40.

105. *Id.* at 440 (citing *Boidi*, 568 F.3d at 28). *Boidi* cites to several cases that have "concluded or assumed that a less serious conspiracy can be a lesser included offense of a similar but greater one." *Id.* See, e.g., *United States v. Carroll*, 140 F. App'x 168, 169 (11th Cir. 2005) (per curiam); *United States v. Ruhbayan*, 406 F.3d 292, 295–96 (4th Cir. 2005); *United States v. Vaandering*, 50 F.3d 696, 703 (9th Cir. 1995). For a list of several more, see *Boidi*, 568 F.3d at n.2.

106. *LaPointe*, 690 F.3d at 440 (alteration in original) (internal quotation marks omitted).

107. *Id.* (citing *United States v. McAuliffe*, 490 F.3d 526, 534 (6th Cir. 2006); *United States v. Cornell*, 162 F. App'x 404, 415 (6th Cir. 2006)).

instructions in the disjunctive.”<sup>108</sup> The reasoning for this doctrine is for societal reassurance in grand jury thoroughness, and that rationale does not follow in the reasoning behind lesser included offense instructions.<sup>109</sup> At trial, the prosecution must only succeed on one of the indictment’s theories, and not granting an appropriate lesser included offense instruction would improperly place a greater burden on the defendant.<sup>110</sup>

In the next step of the opinion, the Sixth Circuit held that evidence of the element differentiating the two crimes would support a conviction on the lesser offense and acquittal on the greater.<sup>111</sup> The government argued that the first prong was not met because no such lesser conspiracy existed, and the only issue at trial was whether the defendant was part of the conspiracy to possess with intent to distribute.<sup>112</sup> According to the government, because the prosecution only presented facts to show distribution, it was only alleging conspiracy to distribute. The argument followed that the only objective of the conspiracy was to distribute, and the objective of simple possession was not alleged. Therefore, the government’s stance was that there could be no dispute as to the differentiating elements because there was only one conspiracy: conspiracy to possess with intent to distribute.<sup>113</sup>

The Sixth Circuit reasoned that the government was inferring that conspiracy can only have one objective, and then recognized that it is well-settled law that a conspiracy can have multiple objectives.<sup>114</sup> The correct question for a court to ask is “whether there is ‘some core of facts that is common to the scenario that the government sought to prove and the one that the defendant claims to show only a lesser included offense,’” and not whether the conspiracy would be an entirely different charge.<sup>115</sup> In *LaPointe*, the only differentiating fact was whether the defendant shared the intent to distribute as part of the conspiracy.<sup>116</sup> The government is required to show that the defendant was more than just active in the conspiracy; it “must separately prove a defendant’s intention to join each objective of the conspiracy.”<sup>117</sup> In conclusion, because common core facts can prove the lesser and greater conspiracies, the lower court erred in not granting the instruction, and

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108. *LaPointe*, 690 F.3d at 440 (citing *Cornell*, 162 F. App’x at 415).

109. *Id.*

110. *Id.*

111. *Id.* at 441.

112. *Id.*

113. *Id.*

114. *Id.* (citing *Ingram*, 360 U.S. at 670).

115. *Id.* at 441 (quoting *Boidi*, 568 F.3d at 28).

116. *Id.* at 441–42.

117. *Id.* at 442.

therefore the Sixth Circuit reversed the pertinent conspiracy counts.<sup>118</sup>

#### IV. DISCUSSION

##### *A. Conspiracies Can Have Multiple Objectives*

Although the Sixth Circuit was correct that conspiracies have multiple objectives, it mischaracterized the government and the Tenth Circuit's argument. In *Boidi*, *Gilmore*, and *LaPointe*, the government essentially argued that the elements differentiating the lesser and greater conspiracies were not in dispute because conspiracy to possess with intent to distribute was the only charged offense.<sup>119</sup> According to the government, any proposed agreement to simply possess is a totally separate agreement, and no dispute between agreements existed because no agreement to simply possess was charged or proven.<sup>120</sup> In *LaPointe*, the government asserted that “no evidence supports a conviction for conspiracy to possess because there was no such conspiracy. The only conspiracy [the defendant] could join was the one . . . to distribute drugs.”<sup>121</sup> The Sixth Circuit inaccurately characterized the government's position as an implication “that a conspiracy may only have one objective rather than multiple.”<sup>122</sup> Although this “multiple objective” aspect of conspiracy is extremely important to understand how to correctly enforce the law, the Sixth Circuit's characterization of the government's (and by implication the Tenth Circuit's) understanding of this issue is misleading.<sup>123</sup> This Part of the Casenote first discusses the importance of the multiple objective aspect of conspiracy and then addresses why the Tenth Circuit's position is not as simple as the Sixth Circuit interpreted it.

##### 1. The Sixth Circuit Correctly Analyzes Conspiracies' Multiple Objectives

Despite the mischaracterization of the government and the Tenth Circuit's argument, the Sixth Circuit correctly focused on the “multiple objective” aspect of conspiracy. As the court pointed out, the understanding of conspiracy is well-settled, as the Supreme Court ruled

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118. *Id.* at 443.

119. *Id.* at 441; *United States v. Boidi*, 568 F.3d 24, 28 (1st Cir. 2009); *United States v. Gilmore*, 438 Fed. App'x 654, 657–58 (10th Cir. 2011).

120. *LaPointe*, 690 F.3d at 441; *Boidi*, 568 F.3d at 28; *Gilmore*, 438 Fed. App'x at 657–58.

121. *LaPointe*, 690 F.3d at 441.

122. *Id.* at 441.

123. *See generally id.*

on the issue in *Rabinowich* and *Ingram*.<sup>124</sup> *Rabinowich* held that “a single conspiracy might have for its object the violation of two or more criminal laws . . .” even if the time limits of the substantive offenses vary.<sup>125</sup> This understanding is partly rooted in the policy behind conspiracy. As *Rabinowich* describes it:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and *adding to the importance of punishing it when discovered*.<sup>126</sup>

The fact that a defendant agreed to commit a lesser substantive offense required to commit the overall offense does not degrade the effects that *Rabinowich* details.<sup>127</sup> An agreement to aid in the possession of drugs still helps conspirators commit future crimes, “is characterized by secrecy,” and is much harder to prevent than the simple apprehension of a lone actor.<sup>128</sup> In *Ingram*, the Supreme Court expanded upon *Rabinowich* to solidify the understanding that a conspiracy may have multiple objectives and reinforced the idea that enhanced dangers of conspiracy are still present when a defendant conspires to commit a minor objective.<sup>129</sup> The heightened danger of conspiracy exists whether the defendant agrees to distribute the drugs or simply possess them.<sup>130</sup> Further, the agreement to possess aids the efficiency of the agreement of the greater conspiracy to distribute.<sup>131</sup> For these reasons, a defendant who is part of a larger conspiracy only because of his agreement to a smaller objective needed to facilitate the larger conspiracy is still considered a member of the conspiracy.<sup>132</sup> If the defendant who only agreed to a lesser objective is still part of the conspiracy, it naturally follows that the lesser conspiracy is a lesser included offense in the

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124. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915); *Ingram v. United States*, 360 U.S. 672, 677–80 (1959).

125. *Rabinowich*, 238 U.S. at 86.

126. *Id.* at 88 (emphasis added).

127. *See id.* at 86, 88.

128. *See id.* at 88.

129. *See Ingram*, 360 U.S. at 679–80.

130. *See Rabinowich*, 238 U.S. at 86, 88.

131. *See Ohlin*, *supra* note 2, at 169–70; *Katyal*, *supra* note 2, at 1309–10.

132. *See Rabinowich*, 238 U.S. at 86; *Ingram*, 360 U.S. at 678; *United States v. LaPointe*, 690 F.3d 434, 441 (6th Cir. 2012). This does not mean that such a defendant should be guilty of the overall conspiracy. Rather, they should be guilty of a lesser conspiracy. Intent is still required, and the defendant has intent for the lesser, not the greater conspiracy. *Supra* text accompanying notes 14–19.

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greater conspiracy, *not* a separate offense, as the Tenth Circuit asserted.<sup>133</sup>

Applying this understanding to the lesser included offense prongs, the multiple objective analysis described above can address whether elements differentiating the greater and lesser conspiracies are in dispute.<sup>134</sup> The Tenth Circuit held that there was no dispute in the contested facts that differentiated the lesser and greater offenses, so the second contested fact in dispute prong was not met.<sup>135</sup> To determine this, the court adopted the government's argument that because there was only one conspiracy alleged (the conspiracy to possess with intent to distribute), and this was the only objective charged.<sup>136</sup> According to the Tenth Circuit, the dispute in facts between the government and the defendant was whether the defendant committed the greater charged conspiracy, or committed no conspiracy at all.<sup>137</sup> "Because the dispute was not about the objective of the charged conspiracy," there was no contested fact between a lesser and greater offense.<sup>138</sup>

The Sixth Circuit held that because a conspiracy can have multiple objectives, and because possession is a lesser objective within distribution, the lesser conspiracy in *LaPointe* was within the greater.<sup>139</sup> That being said, it does not necessarily follow that a lesser conspiracy is always included within a greater. A lesser conspiracy instruction may not be granted if the lesser included offense is based on separate facts than the greater conspiracy charged.<sup>140</sup> For example, a defendant's instruction request should be denied "[i]f the government charges and seeks to prove a conspiracy to possess with intent to distribute heroin in New York in 2005 but the evidence arguably showed only a conspiracy to possess in San Francisco in 2007."<sup>141</sup> For this reason, the Sixth Circuit did not ask whether the different conspiracy was a separate crime. Instead, the court inquired "whether there [was] 'some core of facts . . . common to the scenario that the government sought to prove and one that the defendant claim[ed] to show . . .'"<sup>142</sup>

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133. See *LaPointe*, 690 F.3d at 441; *Unites States v. Gilmore*, 438 Fed. App'x 654, 657–58 (10th Cir. 2011). This concept that a conspiracy can have multiple objectives has its limits. *Kotteakos v. United States* held that "separate adventures of like character" cannot be put together in the same enterprise. *Kotteakos v. United States*, 328 U.S. 750, 769 (1946).

134. *LaPointe*, 690 F.3d at 441–42.

135. See *Gilmore*, 438 Fed. App'x at 658.

136. *Id.*

137. *Id.*

138. *Id.*

139. *LaPointe*, 690 F.3d at 441–42.

140. See *id.* at 441 (quoting *United States v. Garcia*, 27 F.3d 1009, 1015 (5th Cir. 1994)).

141. *United States v. Boidi*, 568 F.3d 24, 28 (1st Cir. 2009).

142. *LaPointe*, 690 F.3d at 441 (quoting *Boidi*, 568 F.3d at 28).



In asking whether the core facts of the conspiracies overlap, the court focused on the nature of the objectives of the conspiracy to see if the lesser objective was actually consumed in the greater objective of the conspiracy.<sup>143</sup> If the facts overlap, then a defendant only agreeing to a lesser objective in a greater conspiracy still perpetrates the dangers that *Rabinowich* sought to avoid and should be held accountable for his agreement.<sup>144</sup> For instance, if a defendant agrees to possess drugs for the purpose of completing the primary objective of distribution, then that defendant is making the commission of the crime more efficient, facilitating the criminal education of co-conspirators, and furthering the secrecy of the crime.<sup>145</sup> The policy behind conspiracy law necessitates treating this as one conspiracy.<sup>146</sup> If the core facts that the prosecution asserts to prove conspiracy to distribute can also prove conspiracy to possess, the lesser conspiracy to possess is inherently included in the greater conspiracy to distribute, and the defendant may request a lesser included offense instruction.<sup>147</sup> The defendant's guilt of the lesser or greater conspiracy turns on which objective the defendant agreed to, intended, and had knowledge of.<sup>148</sup> If the facts do not overlap, then the court is faced with two separate conspiracies, and the Tenth Circuit's approach would be correct.<sup>149</sup>

## 2. The Sixth Circuit Mischaracterizes the Tenth Circuit's Understanding of Multiple Objectives

The Sixth Circuit stated that the Tenth Circuit's and the government's arguments "implic[d] that conspiracy may have only one objective."<sup>150</sup> Although the Tenth Circuit did not adequately account for the "multiple objective" character of conspiracy, it is unlikely that the court consciously disregarded settled law on the issue.<sup>151</sup> More likely, the Tenth Circuit confused the second contested fact in dispute prong with the third rational jury prong.<sup>152</sup>

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143. See *LaPointe*, 690 F.3d at 441–42.

144. See *id.*; *United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

145. See *Rabinowich*, 238 U.S. at 88; Ohlin, *supra* note 2, at 169–70; Katyal, *supra* note 2, at 1309–10.

146. See *LaPointe*, 690 F.3d at 441–42.

147. See *id.*

148. See *United States v. Turner*, 319 F.3d 716, 721 (5th Cir. 2003).

149. See *LaPointe*, 690 F.3d at 441; *supra* text accompanying notes 140–141. See generally *United States v. Gilmore*, 438 Fed. App'x 654 (10th Cir. 2011).

150. *LaPointe*, 690 F.3d at 441.

151. E.g., *United States v. Rabinowich*, 238 U.S. 78, 86 (1915); *Ingram v. United States*, 360 U.S. 672, 678–79 (1959). See generally, *Gilmore*, 438 Fed. App'x 654.

152. See generally, *Gilmore*, 438 Fed. App'x at 657–58.

First, it should be noted that, on its facts, it is possible that *Gilmore* reached the correct conclusion. Even if the Tenth Circuit properly applied the second and third prongs, it could still have found against *Gilmore* and affirmed the denial of the instruction.<sup>153</sup> It could be argued that the facts of *Gilmore* are distinguishable from *Boidi* and *LaPointe* to the extent that a rational jury in *Gilmore* could be less able to reasonably convict on the lesser conspiracy and acquit on the greater.<sup>154</sup> The government possessed more evidence indicating the defendant's knowledge of, and intent to join, the conspiracy to distribute.<sup>155</sup> For instance, *Gilmore* repeatedly transported a drug dealer to distribute drugs to customers and even collected money from customers on one occasion.<sup>156</sup> This evidence could be extremely indicative of intent to conspire to distribute, although it would not necessitate such a finding.<sup>157</sup> The evidence of shared intent was less clear in *Boidi* and *LaPointe*. In *Boidi*, the defendant had shared the drugs with friends and talked about diluting the drugs for *potential* distribution, but these facts did not demand a finding that *Boidi* *agreed* to join a conspiracy to distribute.<sup>158</sup> In *LaPointe*, a reasonable jury could find that although *LaPointe* requested drugs for distribution, he was actually deceiving the dealer to give him drugs on credit for his own use.<sup>159</sup>

Although this distinction may justify the Tenth Circuit's result based on the third rational jury prong of the lesser included offense analysis, it should not be applied to the second contested fact in dispute prong.<sup>160</sup> When analyzing whether a contested fact may separate the two offenses, the Tenth Circuit should have focused only on whether the evidence proved the lesser conspiracy minus one element (that being the *intent* to conspire to distribute).<sup>161</sup> To answer the second contested fact in dispute prong, the court should have only asked whether the facts presented could show that *Gilmore* conspired to possess, no matter what the additional facts were that the prosecution put forth to prove conspiracy to distribute.<sup>162</sup> The likelihood that *Gilmore* actually

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153. *See generally id.* at 655–57.

154. *Compare id.*, with *United States v. Boidi*, 568 F.3d 24, 25–26 (1st Cir. 2009), and *LaPointe*, 690 F.3d at 438 (In *Gilmore*, the facts make it less likely than in *Boidi* and *LaPointe* that the defendant was only guilty of conspiracy to possess, rather than conspiracy to possess with intent to distribute).

155. *Gilmore*, 438 Fed. App'x at 656.

156. *Id.*

157. *See id.*; *Boidi*, 568 F.3d at 29 (holding that the substantive act and knowledge of the greater objective does not require a finding of intent to commit the greater conspiracy).

158. *Boidi*, 568 F.3d at 26. Keep in mind the difference between committing a substantive crime and a conspiracy to commit that crime. *See supra* text accompanying notes 26–29.

159. *See LaPointe*, 690 F.3d at 438.

160. *See generally Gilmore*, 438 Fed. App'x at 657–58.

161. *See Boidi*, 568 F.3d at 28–29.

162. *See id.*

conspired to distribute had no bearing on whether Gilmore disputed a fact that would determine whether he was guilty of conspiracy to distribute.<sup>163</sup> The court should not have focused on the likelihood that the facts may or may not have proven that element.<sup>164</sup>

The question of likelihood is reserved for the third rational jury prong. This third prong asks whether “the evidence would permit a jury to rationally find [the defendant] guilty of the lesser included offense and acquit him of the greater.”<sup>165</sup> In regard to conspiracy, the second contested fact in dispute prong asks: Does the defendant dispute a fact that determines whether he is guilty of the lesser or greater conspiracy?<sup>166</sup> Part of the analysis of this question lies in whether the lesser and greater conspiracies are rooted in the same core facts.<sup>167</sup> This question is not the same as whether the evidence would allow a rational jury to convict on the lesser conspiracy but not the greater.<sup>168</sup>

Incorrectly applying the rational jury prong analysis to the second contested fact in dispute prong may lead to incorrect results in future cases.<sup>169</sup> Future courts adopting the Tenth Circuit approach could deny a lesser included offense instruction on facts that resemble *Boidi* and *LaPointe* where a jury could reasonably convict on the lesser and acquit on the greater.<sup>170</sup> If the evidence infers that the defendant conspired to distribute, but does not necessitate that finding, a court could use the Tenth Circuit’s opinion in *Gilmore* to deny an instruction based on the idea that the defendant is alleging an entirely different offense and not a contested fact in dispute.<sup>171</sup> This court would find against the defendant’s request for an instruction before even addressing the rational jury prong.<sup>172</sup> Strict adherence to prong application is vital because of the complex nature of conspiracy.<sup>173</sup> Without courts’ relentless attention to detail, the intent requirement of conspiracy can become even more confused, resulting in unjust outcomes, as described below in Parts B and C.<sup>174</sup>

When the Sixth Circuit described the Tenth Circuit’s holding as one that simply ignores the concept that conspiracy can have multiple

163. *See id.* *See generally Gilmore*, 438 Fed. App’x at 655–59.

164. *See Boidi*, 568 F.3d at 28–31.

165. *Id.* at 27 (alteration in original) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)).

166. *See Boidi*, 568 F.3d at 28.

167. *See supra* text accompanying notes 140–141.

168. *See Boidi*, 568 F.3d at 27.

169. *See generally id.*

170. *See generally id.* at 25–26; *United States v. LaPointe*, 690 F.3d 434, 438 (6th Cir. 2012).

171. *See generally* *United States v. Gilmore*, 438 Fed. App’x 654, 657–58 (10th Cir. 2011).

172. *See generally id.*

173. *See Boidi*, 568 F.3d at 30.

174. *See infra* Part IV.B–C.

objectives, the Sixth Circuit missed the opportunity to correct the true misunderstanding of the Tenth Circuit. The Sixth Circuit's misunderstanding of the nature of the split set the opinion back.<sup>175</sup> The court should have explained that the Tenth Circuit inappropriately combined the second contested facts in dispute prong with the rational jury prong. The *LaPointe* opinion should have demonstrated the difference between asking whether the defendant disputes a fact that distinguished the lesser and greater conspiracies (second contested fact in dispute prong) and whether a jury could rationally convict on the lesser but not the greater conspiracy (third prong).<sup>176</sup> The Sixth Circuit failed to use *LaPointe* to clarify the correct lesser included instruction analysis, and as a result, failed to provide adequate guidance to future courts addressing this complex issue.

### *B. Requiring Intent for the Correct Conspiracy*

Although the Sixth Circuit accurately applies the intent requirement for conspiracy, the court does not adequately address the intent element to distinguish itself from the Tenth Circuit and provide guidance to other courts.<sup>177</sup> To be eligible for a lesser included offense instruction, the jury must be able to rationally convict on the lesser offense while acquitting of the greater, among other factors described above.<sup>178</sup> For a jury to convict on any conspiracy, lesser or greater, the jury must find intent to join the alleged conspiracy, among other factors.<sup>179</sup> Two *mens rea* issues can serve as red herrings of intent to conspire: intent to commit the substantive offense and knowledge of the conspiracy.<sup>180</sup> Neither can be equated to intent to conspire, and neither compels a finding of such intent.<sup>181</sup>

#### 1. The Tenth Circuit Misunderstands the Intent Requirement of Conspiracy

It is possible for a court to treat two conspiracies as separate crimes and still achieve the goal of punishing the conspirator who agreed to a lesser objective by convicting him on the greater conspiracy.<sup>182</sup> This is

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175. See generally *LaPointe*, 690 F.3d at 441.

176. See *supra* text accompanying notes 160–168.

177. See generally *LaPointe*, 690 F.3d at 439–443.

178. *LaPointe*, 690 F.3d at 439 (quoting *Colon*, 268 F.3d at 373); see *supra* text accompanying note 38.

179. *United States v. Turner*, 319 F.3d 716, 721 (5th Cir. 2003).

180. See *United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009).

181. See *id.*

182. *E.g.*, *Unites States v. Gilmore*, 438 Fed. App'x 654, 657 (10th Cir. 2011).

indeed what happened in *Gilmore*.<sup>183</sup> Although the ends seem to comport with the underlying policy goal of conspiracy laws, this approach is an inadequate application of intent to conspire. Conviction under conspiracy requires at least the degree of intent to commit the substantive crime.<sup>184</sup> If the defendant only truly intended to join a conspiracy to commit a lesser objective, he did not possess the intent required to commit the greater conspiracy. While conviction on the greater conspiracy punishes the general membership to the conspiracy, it over convicts a defendant who did not intend to join a greater conspiracy, trampling the standard of *mens rea* in American criminal law.<sup>185</sup>

Intent to join a conspiracy can be easily confused with intent to commit the underlying substantive crime.<sup>186</sup> In *Boidi*, the First Circuit recognized that the defendant “clearly possesse[d] cocaine with intent to distribute,” but that does not necessitate a finding that the defendant *conspired* to distribute drugs.<sup>187</sup> Situations may easily arise in which a defendant may commit an act, such as distribution, without agreeing or conspiring to do such an act, and a court may mistake the intent to do the act for intent to conspire.<sup>188</sup>

The Tenth Circuit fell into this trap. Although some of *Gilmore*'s facts may be argued to indicate intent to conspire to distribute drugs, the court focused too much on the defendant's clear intent to distribute.<sup>189</sup> The court cited the defendant's own testimony when it asserted “that he obtained methamphetamine from [other conspirators] and ‘shared’ that methamphetamine with friends, which bears on the distribution aspect of conspiracy.”<sup>190</sup> As discussed earlier, conspiracy laws have a purpose wholly separate from the punishment of the underlying offense, and the Tenth Circuit ignored this by affirming the conviction for conspiracy based on intent to commit the substantive offense.<sup>191</sup> Although intent to commit a substantive crime may infer intent to conspire, that fact does not *compel* that finding, as the Tenth Circuit implies in *Gilmore*.<sup>192</sup>

The Tenth Circuit also appears to have inaccurately equated

183. *Id.*

184. *Ingram v. United States*, 360 U.S. 672, 678 (1959) (quoting *Developments in the Law of Criminal Conspiracy*, 72 HARV. L. REV. 920, 939 (1959)).

185. *See Id.* at 678–79.

186. *See United States v. Boidi*, 568 F.3d 24, 29 (1st Cir. 2009). *E.g.*, *Gilmore*, 438 Fed. App'x at 658.

187. *Boidi*, 568 F.3d at 29.

188. *Id.*

189. *Gilmore*, 438 Fed. App'x at 658.

190. *Id.*

191. *See United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

192. *See Boidi*, 568 F.3d at 29–30. *See generally Gilmore*, 438 Fed. App'x at 657–58.

knowledge of a conspiracy with intent to commit such conspiracy.<sup>193</sup> To prove intent, the government must prove the defendant has knowledge of the conspiracy, but it does not automatically follow that intent to join the conspiracy is necessarily implied from knowledge that the conspiracy exists.<sup>194</sup> Knowledge may bear on intent, but a reasonable jury could find that a defendant with knowledge of a conspiracy of an offense, and who committed that underlying offense, did not have the requisite intent to join the conspiracy.<sup>195</sup> “Evidence that a buyer intends to resell the product instead of personally consuming it does not necessarily establish that the buyer has joined the seller’s distribution conspiracy. This is so even if the seller is aware of the buyer’s intent to resell.”<sup>196</sup> In *Boidi*, the First Circuit accurately addressed the concerns with the confusion among intent to commit the substantive act, knowledge of the conspiracy, and intent to conspire, but the Sixth Circuit did not follow that lead.<sup>197</sup>

## 2. The Sixth Circuit Does Not Adequately Address Intent or the Tenth Circuit’s Misunderstanding

The First Circuit clearly recognized the inherent issues that may arise with intent in conspiracy.<sup>198</sup> First, the court accurately parsed out the intent to commit the underlying crime from the intent to commit the conspiracy.<sup>199</sup> Second, that court understood that while simple knowledge of co-conspirators’ acts may “*permit* a jury to infer . . . an agreement,” that knowledge does not *compel* such a finding.<sup>200</sup>

The Sixth Circuit did not fully address the tenuous issue of intent required to convict on conspiracy.<sup>201</sup> Rather, to determine whether the evidence could reasonably support a conviction on the lesser offense and not the greater, the court focused on the overlapping core facts.<sup>202</sup> The court did point out that the only differentiating fact between the two conspiracies would be the *intent* to distribute and stated that “[t]he prosecution must separately prove a defendant’s intention to join each

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193. *Gilmore*, 438 Fed. App’x at 657–58.

194. *See* *Ingram v. United States*, 360 U.S. 672, 677–78 (1959) (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711–12 (1943)); *Boidi*, 568 F.3d at 30 (citing *Direct Sales*, 319 U.S. at 711).

195. *See Boidi*, 568 F.3d at 29–30.

196. *Boidi*, 568 F.3d at 30 (quoting *United States v. Hawkins*, 547 F.3d 66, 74 (2d Cir. 2008)).

197. *See Boidi*, 568 F.3d at 30.

198. *See id.*

199. *Id.* at 29.

200. *Id.* at 29–30 (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711(1943)) (emphasis in original).

201. *See generally* *United States v. LaPointe*, 690 F.3d 434, 439–43 (6th Cir. 2012).

202. *Id.* at 441.

objective of the conspiracy.”<sup>203</sup> But this brief analysis of intent failed to point out the understandable confusion that courts have between intent to commit conspiracy and intent to commit the substantive act.<sup>204</sup> The Sixth Circuit also neglected to point out that knowledge of a conspiracy does not necessitate intent.<sup>205</sup> Not including these aspects does not necessarily make the Sixth Circuit’s application and analysis flawed, but their inclusion could have aided future courts to better understand the true flaws in the Tenth Circuit’s decision and enforce the need for lesser included conspiracies in such instances. Clarification on this complex issue is dire, and the Sixth Circuit missed its chance to provide adequate guidance.

### C. Avoiding Injustice

The Sixth Circuit reached a result that protected against injustice in *LaPointe* but did not adequately emphasize lesser included instructions’ underlying policy of avoiding injustice to help future courts reach proper results.<sup>206</sup> A major, if not primary, reason lesser included instructions are allowed is to ensure that the jury does not “stretch to convict the defendant of the greater crime.”<sup>207</sup> This danger arises when the jury may not be convinced that the prosecution has proved its presented charge, but still believes the defendant committed an illegal act.<sup>208</sup> It is likely that the jury may consider the conviction on the greater charge to be a lesser evil when compared to acquittal.<sup>209</sup> A lesser included offense instruction removes from the jury the choice between two wrongs and allows a conviction on the true acts of the defendant, leading to a truer sense of justice.<sup>210</sup> The Supreme Court has reinforced on multiple occasions the concept that a “third option” should be given to the jury to escape an “unwarranted conviction” of the defendant.<sup>211</sup>

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203. *Id.* at 442.

204. *See generally id.* at 441–43.

205. *See generally id.* at 441–43.

206. *See generally LaPointe*, 690 F.3d at 439–43.

207. *United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009) (citing *United States v. Flores*, 968 F.2d 1366, 1369 (1st Cir. 1992); *United States v. Balthazard*, 360 F.3d 309, 320 (1st Cir. 2004)).

208. *Flores*, 968 F.2d at 1369.

209. *See id.*

210. *See id.*

211. *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Schad v. Arizona*, 501 U.S. 624, 646 (1991); *Keeble v. United States*, 412 U.S. 205, 208 (1973). This “third option” is not solely a pro-defendant concept. It can work in the favor of the prosecution. Certain jury pools may be more likely to acquit than convict of the charged conspiracy if the prosecution is unable to prove the necessary elements of the charged crime, even if the jury believes the defendant is guilty of a lesser crime. In this scenario the prosecution may want to adopt the defense’s position in *LaPointe* to save a conviction by allowing a lesser included offense instruction to avoid acquittal.

The need to allow a lesser included offense instruction becomes more necessary when considering a charge of conspiracy.<sup>212</sup> As explained above, intent to commit the substantive act can be easily confused with intent to conspire, and the intent to agree to a lesser objective within the conspiracy may be muddled as well.<sup>213</sup> Allowing the lesser included offense instruction ensures that the prosecution proves the exact intent that is alleged to receive a conviction on the charged conspiracy.<sup>214</sup>

The need for proper lesser included offense instructions cannot be overstated. First, conspiracy to simply possess is a misdemeanor and conspiracy to possess with intent to distribute is a felony under federal law.<sup>215</sup> This alone can lead to drastic sentencing variations that could solely depend on whether the lesser included instruction is allowed. Secondly, a ruling on the issue can have implications far beyond the charged conspiracy.<sup>216</sup> In *Boidi*, the lower court's refusal to grant the instruction not only affected the conspiracy, but also convictions that required felony conspiracy as a predicate act.<sup>217</sup> The First Circuit did find that despite the lower court's error, there were still enough convictions on predicate acts to support the RICO conviction, but it vacated the defendant's "use of a communication facility to facilitate a drug crime" charge.<sup>218</sup>

The fact that the prosecution may gain "atmospheric advantages" from charging a conspiracy as opposed to a substantive crime requires courts to pay strict attention to jury instructions during conspiracy cases to ensure the appropriate adjudication.<sup>219</sup> In *Boidi*, the First Circuit realized that the government could have easily charged the defendant with the substantive crime without sacrificing the severity of the sentence for that particular offense.<sup>220</sup> Instead, the government charged conspiracy to gain advantages in RICO and communication facility charges.<sup>221</sup> For this reason, combined with the tenuous nature of intent in criminal conspiracy, "[t]he use of conspiracy doctrine in a vertical context has caused courts unease" and should lead all the circuits to be

212. See *United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009).

213. *Id.* at 29–30; see *supra* Part IV.B.

214. See *Boidi*, 568 F.3d at 30.

215. *Id.* at 31–32 (citing 21 U.S.C. §§ 843(b), 802(13); *United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1989)).

216. See *Boidi*, 568 F.3d at 31.

217. *Id.*

218. *Id.* ("In the indictment, the communications facility charge was tied to the conspiracy count, and the district court instructed the jury that it had to find that Boidi knowingly and intentionally used a communications facility to cause or facilitate the drug trafficking offense in count 5 (the conspiracy)").  
*Id.*

219. See *supra* note 77.

220. *Boidi*, 568 F.3d at 29.

221. *Id.* at 29, 31; see *supra* note 77.



especially skeptical to ensure the avoidance of injustice.<sup>222</sup>

Despite the First Circuit's explanation of all of the potential unjust results that could arise from mistreatment of the lesser included conspiracy issue in *Boidi*, the Tenth Circuit completely ignored the issue.<sup>223</sup> The Tenth Circuit's strict and terse approach to application of the lesser included offense prongs failed to take into account the nuanced reasons that a lesser included offense instruction is allowed and how those reasons are amplified by conspiracy's unusual nature.<sup>224</sup> The Sixth Circuit took a step in the right direction, as it referenced the desire to avoid "unwarranted conviction[s]" in its general discussion of lesser included offense instructions.<sup>225</sup> Unfortunately, the *LaPointe* opinion failed to go far enough to fully distinguish itself from *Gilmore*. Probably as a result of its failure to address the difficulties in proving intent of lesser and greater conspiracies, the Sixth Circuit was unable to point out the particularly unjust outcomes that could result from a misunderstanding of the lesser included offense instruction in conspiracy cases.<sup>226</sup> Although the court claimed to follow the First Circuit's model for the issue, the Sixth Circuit only truly adhered to one concept, that the core facts of the two conspiracies must overlap.<sup>227</sup> Although this point is important, it does not communicate the necessity for a liberal approach to allowing lesser included offense instructions in conspiracy cases. A more in-depth recognition of how the application of this issue can lead to grossly unjust results on the one hand, and true justice on the other, would have more adequately met this goal.

## V. CONCLUSION

The Sixth Circuit may have arrived at the correct outcome in its disposition, but it incorrectly analyzed the nature of the circuit split and did not fully address all of the reasons that the Tenth Circuit reached the incorrect result.<sup>228</sup> While the Sixth Circuit demonstrated an adept understanding of the concept that conspiracies can have multiple objectives and how that affects lesser included instructions, the court failed to correctly characterize the Tenth Circuit's stance on the issue

222. *Boidi*, 568 F.3d at 29.

223. *Id.* at 29–30. See generally *United States v. Gilmore*, 438 Fed. App'x 654, 657–58 (10th Cir. 2011).

224. See *Boidi*, 568 F.3d at 29–31. See generally *Gilmore*, 438 Fed. App'x at 657–58.

225. *United States v. LaPointe*, 690 F.3d 434, 439 (6th Cir. 2012) (quoting *Beck v. Alabama*, 447 U.S. 625, 637 (1980)).

226. See generally *LaPointe*, 690 F.3d at 439–43.

227. See *id.* at 441.

228. See generally *id.* at 439–43; *Gilmore*, 438 Fed. App'x at 658.

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and missed an opportunity to truly differentiate itself from *Gilmore*.<sup>229</sup> The tenuous nature of the intent element in criminal conspiracy laws makes its application to lesser included conspiracy all the more important, and the *LaPointe* opinion did not fully analyze that concept to highlight *Gilmore*'s avoidance of the issue.<sup>230</sup> Finally, in briefly addressing the overall justice concerns that lie behind the concept of lesser included offenses, the Sixth Circuit missed another chance to more adequately distance itself from the Tenth Circuit's opinion in *Gilmore*.<sup>231</sup>

When the Sixth Circuit is presented with the lesser included conspiracy question again, the court should definitively delineate the differences between the second contested fact in dispute prong and the third rational jury prong of the lesser included offense analysis. In addition, the court needs to solidify conspiracy laws' intent requirement and reinforce the purpose of avoiding injustice when addressing this topic. This will ensure that future courts more equitably distribute justice when dealing with this complicated conspiracy issue.

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229. See *LaPointe*, 690 F.3d at 441. See generally *Gilmore*, 438 Fed. App'x at 657–58.

230. See generally *LaPointe*, 690 F.3d at 439–43; *Gilmore*, 438 Fed. App'x at 657–58.

231. See *LaPointe*, 690 F.3d at 439 (quoting *Beck v. Alabama*, 447 U.S. 625, 637 (1980)). See generally *Gilmore*, 438 Fed. App'x at 657–58.

