THE LONE CONSPIRATOR, CRIMINAL LAW'S OXYMORON—IN DEFENSE OF THE RULE OF CONSISTENCY IN FEDERAL CONSPIRACY CASES

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For a defendant to be convicted of conspiracy under federal law, two or more people must agree to commit an unlawful act and the defendant must knowingly and intentionally join the agreement. By definition, it would seem the offense does not allow for the conviction of a lone conspirator. Yet, most federal courts permit lone conspirator convictions.

This note examines the conundrum of the lone conspirator. At common law, a defendant's conspiracy conviction had to be reversed if all the defendant's coconspirators were acquitted on the same conspiracy charges. Over the years, however, federal courts have eroded this so-called rule of consistency to the point of threatening its existence altogether. The author argues that the federal courts' modern position of allowing lone conspirator convictions is misguided. Tracing the roots of this position, he suggests that federal courts' gradual movement away from the rule of consistency is a result of their misapplication of Supreme Court precedents allowing inconsistent jury verdicts in cases involving compound offenses and multiple-defendant crimes other than conspiracy. In particular, the author notes that Dunn v. United States *and* United States v. Powell*, Supreme Court cases allowing inconsistency between jury convictions for predicate and compound offenses, do not address factual situations requiring the culpability of one person as a condition precedent to the conviction of a second. Therefore, the author argues, they cannot be validly extended to eliminate the consistency requirement in conspiracy cases. In the same regard, the author contends that the Supreme Court's decision to uphold inconsistent jury verdicts as to a principal and an aider/abettor in* Standefer v. United States *was*

* *The author would like to thank Bates McIntyre and Justin Schwartz, former law clerks for the Honorable Elaine Bucklo, United States District Court for the Northern District of Illinois, who suggested the idea for this note; Professor Eric Muller, whose article in* The Harvard Law Review *provided a substantial springboard for the topic; Professor Andy Leipold, for his thoughtful comments throughout the writing process; and Professor Laurie Reynolds for her continued guidance. The author would also like to thank his parents, Nicholas and Barbara Schuler, for their love and support. Last but not least, the author thanks his sister, Mary Schuler, for her inspiration and unwavering patience.*

based on Congress's intent to eliminate the common-law rule requiring the conviction of a principal prior to the conviction of an aider/abettor. The case does not support elimination of the rule of consistency in conspiracy cases because Congress has not indicated a similar intent to eliminate the culpability of another as a prerequisite for a federal conspiracy conviction.

By way of resolution, the author suggests that federal courts should not extend the holdings of Dunn*,* Powell*, and* Standefer *to justify lone conspirator convictions. The author also suggests that the rule of consistency should not be abandoned in the absence of congressional legislation to the contrary. Finally, the author notes that federal courts already may consider conspiratorial behavior as an aggravating factor in determining sentences under the Federal Sentencing Guidelines, and argues that making such a consideration in conjunction with applying the rule of consistency effectively punishes criminal behavior and preserves individuals' constitutional rights.*

"What pray is a conspirator—someone who conspires all by himself? . . . Is there anyone out there who adheres to a lone conspirator theory?"[1]

Consistency, thou art a rare jewel indeed.—Anonymous

I. INTRODUCTION

On March 20, 2002, an attorney for Darnyl Parker, a Buffalo, New York police narcotics officer, asked a federal judge to throw out three of Parker's ten convictions, describing them as "repugnant and lawless."[2] He objected to the logical inconsistency of the jury's verdict finding Parker guilty of a narcotics conspiracy, while simultaneously acquitting the only other alleged conspirators, three of his former colleagues, of that same conspiracy.[3] "Clearly, the jury did not follow the judge's instructions," he argued.[4] If the jury is finding Parker guilty of conspiracy, "they have to find that he conspired with one of the other defendants. He can't

1. E.J. Dionne Jr., *Chattering Class*, WASH. POST, Sept. 29, 1996 (Magazine), at 4.

2. Dan Herbeck, *Parker Wants 3 of 10 Felony Convictions Thrown Out*, BUFF. NEWS, Mar. 21, 2002, at C5 (internal quotations omitted). *See generally* United States v. Parker, 165 F. Supp. 2d 431 (W.D.N.Y 2001).

3. Herbeck, *supra* note 2.

4. *Id.* (internal quotations omitted). Federal jury instructions for conspiracy require that the jury find beyond a reasonable doubt that a "conspiracy, agreement, or understanding" was formed by two or more people. KEVIN F. O'MALLEY ET AL., FEDERAL PRACTICE AND JURY INSTRUCTIONS § 31.03 (5th ed. 2000).

conspire with himself."[5] The jury's verdict left Parker as the lone convicted defendant in a criminal conspiracy.[6]

For a defendant to be convicted of conspiracy under federal law, (1) two or more people must agree to commit an unlawful act and (2) the defendant must knowingly and intentionally join in the agreement.[7] Therefore, Parker's argument seems simple, natural, and intuitive—a conspiracy requires at least two people. Logically, it would seem that if a jury finds one conspirator guilty and acquits all other coconspirators, then the conviction should be inappropriate because the essential requirement of an agreement between at least two people is not met.[8] Surprisingly,[9] however, most federal courts consistently rule that such "lone conspirator" convictions are legal, abolishing a common-law rule requiring consistent verdicts in conspiracy trials.[10]

Although abuses of public trust by sworn officials should never be tolerated, cases in which the government accuses police officers of conspiracy provide an excellent arena for analyzing the problems of lone conspirators. First, police officers—especially in major metropolitan ar-

5. Herbeck, *supra* note 2, at C5 (internal quotations omitted). A government agent cannot be a conspirator. *See, e.g.*, United States v. Escobar de Bright, 742 F.2d 1196, 1198 (9th Cir. 1984) (holding no conspiracy when an individual conspires with only one other person and that person is a government agent).

6. Herbeck, *supra* note 2. The jury convicted Parker for conspiracy to violate civil rights, conspiracy to steal from the federal government, and conspiracy to obstruct commerce. *Id.* The jury acquitted Parker's codefendants on conspiracy charges, but convicted them for theft. *Id.* The jury also convicted Parker for conspiracy to distribute cocaine, money laundering, theft, extortion, and attempting to obstruct justice, but those convictions involved a separate conspiracy not involving the three acquitted codefendants. *Id.*

7. 18 U.S.C. § 371 (2000); United States v. Gardner, 238 F.3d 878, 879 (7th Cir. 2001).

8. The very notion of a lone conspirator is problematic to those outside the legal field. *See, e.g.*, Peter H. Dreyer, *We Uncover a Plot Against Good Grammar*, CHRISTIAN SCI. MONITOR, Mar. 27, 2002, at 22. "A shady character is skulking around the language of media: the co-conspirator . . . . To conspire literally means to 'breath together.' It conjures up an image of plotters in a tight huddle, their breaths blending. 'Conspirator' thus implies accomplices, or at least one other comrade in crime." *Id.* Therefore, the term "lone conspirator" is a contradiction in terms. *Id.*

9. *See generally* Jannea S. Rogers, Comment, United States v. Andrews*: Conspirators May Go It Alone These Days*, 12 AM. J. TRIAL ADVOC. 549 (1989) (noting the counterintuitive acceptance of lone conspirator convictions).

10. Six circuits have expressly rejected the rule of consistency in lone conspirator cases. United States v. Zuniga-Salinas, 952 F.2d 876, 878 (5th Cir. 1992) (en banc); United States v. Bucuvalas, 909 F.2d 593, 597 (1st Cir. 1990); United States v. Thomas, 900 F.2d 37, 40 (4th Cir. 1990); United States v. Dakins, 872 F.2d 1061, 1065 (D.C. Cir. 1989); United States v. Andrews, 850 F.2d 1557, 1561 (11th Cir. 1988); United States v. Valles-Valencia, 823 F.2d 381, 382 (9th Cir. 1987). Three circuits have expressed doubts about the rule of consistency. *See* United States v. Acosta, 17 F.3d 538, 545 (2d Cir. 1994); United States v. Mancari, 875 F.2d 103, 104 (7th Cir. 1989); Gov't of the V.I. v. Hoheb, 777 F.2d 138, 140 n.4 (3d Cir. 1985). Only two circuits continue to support the rule. United States v. Suntar Roofing, Inc., 897 F.2d 469, 475 (10th Cir. 1990) (calling the rule of consistency the "traditional rule"); United States v. Sachs, 801 F.2d 839, 845 (6th Cir. 1986). *See generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.10(b) (2d ed. 1999) (noting the decline of support for the rule of consistency in federal courts); Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 786–89 (1998) (critiquing the current judicial response to inconsistent verdicts).

eas[11]—typically have powerful legal representation,[12] and juries often harbor sympathy for the perceived dangers officers face and may therefore refuse to convict officers.[13] If police officers, possessing strong legal defense and public perception advantages, face the risk of a lone conspirator conviction, then poor, minority, and otherwise disadvantaged defendants arguably face a much greater risk of wrongful conviction.

Second, Darnyl Parker's case and other public corruption lone conspirator police cases[14] focus attention on several important systemic questions. These inquiries cut to the foundations of United States criminal law. To what extent does a jury have exclusive power to determine the facts of a case? What remedy is needed when a jury verdict is clearly erroneous or disobedient of a judge's instructions? Does the "beyond a reasonable doubt" standard of proof in criminal trials[15] mean anything in the face of internally inconsistent jury logic?

Part II of this note defines lone conspirator cases,[16] explores a line of Supreme Court cases used by federal appellate courts to abolish a common-law rule requiring consistency in conspiracy trials,[17] and outlines the differing state approaches regarding lone conspirator convictions.[18] Part III narrows Professor Eric Muller's seminal critique[19] of inconsistent jury verdicts in all types of criminal cases by focusing on whether Supreme Court precedent supports inconsistent verdicts in conspiracy cases.[20] Part IV advances Professor Muller's discussion of inconsistent verdicts.[21] It points out that the unique problems[22] associated with conspiracy cases distinguish those cases from Supreme Court precedent al-

11. In most jurisdictions, statutes mandate that large municipalities provide counsel for police officers. Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2834 (1997).

12. *See* Richard Emery & Ilann M. Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 588 (2000) ("Police officers organize in very powerful unions . . . which in turn exert pressure on the mayor and the city's lawyer, the 'Corporation Counsel' to represent . . . the officers.").

13. *See, e.g.*, David Dante Troutt, *Screws,* Koon*, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 107 (1999) (noting public support for the police may provoke jury nullification).

14. *See, e.g.*, United States v. Patterson, 213 F. Supp. 2d 900 (N.D. Ill. 2002) (allowing a lone conspirator conviction of a police officer).

15. The Fifth Amendment allows criminal conviction only upon proof beyond a reasonable doubt. U.S. CONST. amend. V; *see also* Leland v. Oregon, 343 U.S. 790, 802–03 (1952) (holding that due process requires the reasonable doubt standard of proof in criminal cases). The Supreme Court has indicated that the proper standard for proof beyond a reasonable doubt should be the "kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act." Holland v. United States, 348 U.S. 121, 140 (1954).

16. *See infra* text accompanying notes 26–38.

17. *See infra* text accompanying notes 45–115.

18. *See infra* text accompanying notes 116–24.

19. Muller, *supra* note 10.

20. *See infra* text accompanying notes 125–217.

21. *See infra* text accompanying notes 218–50.

22. *See infra* text accompanying notes 218–34.

lowing inconsistent verdicts in other situations.[23] Part IV then suggests that the common-law rule should not be discarded in the absence of clear legislative intent.[24] Finally, Part IV argues that the common-law approach ensures the meaningful enforcement of the constitutional demand for proof beyond a reasonable doubt and prevents the jury trial from being transformed into an embarrassing, illogical mode of proof.[25]

II. BACKGROUND

A. Identifying Sole Conspirator Cases

Inconsistent jury verdicts come in two general forms: multiple-count and multiple-defendant inconsistencies.[26] Multiple-count inconsistencies occur in cases involving a single defendant charged with both an underlying predicate offense and a compound crime related to that offense.[27] In such cases, the judge instructs the jury that the underlying felony is an element of the compound offense and that the underlying felony must be proved before finding the defendant guilty of the compound crime.[28] Logical inconsistency results when a jury acquits the defendant of the underlying predicate charge, but simultaneously convicts the defendant of the compound crime.[29] *United States v. Powell*[30] provides an example of multiple-count inconsistency. In *Powell*, the jury acquitted the defendant of a narcotics felony—a predicate offense—but found the defendant guilty of the charge of using the telephone to facilitate that felony—a compound offense.[31] Although such an outcome is logically inconsistent,[32] the Supreme Court recognized the legality of multiple-count inconsistency in *Powell*.[33]

Multiple-defendant inconsistency, on the other hand, involves crimes requiring a minimum number of participants, such as federal con-

23. Muller, *supra* note 10, at 793 n.115. Professor Muller notes that the Eleventh Circuit attached little significance to a suggested conceptual difference between conspiracy cases and Supreme Court precedents allowing inconsistent jury verdicts. *Id.* (citing United States v. Andrews, 850 F.2d 1557, 1571–72 (11th Cir. 1988) (Clark, J., dissenting) (arguing that conspiracy is conceptually different)); *see also infra* text accompanying notes 219–34.

24. *See infra* text accompanying notes 239–50.

25. *See infra* text accompanying notes 235–38.

26. *See generally* Muller, *supra* note 10, at 778–80 (distinguishing multiple-count and multiple-defendant inconsistencies).

27. *Id.* at 778 (describing the compound crime as "piggybacking" on top of the predicate offense).

28. *Id.* at 778 n.26 (citing examples).

29. *Id.* at 778.

30. 469 U.S. 57 (1984).

31. *Id.* at 59–60.

32. Muller, *supra* note 10, at 778.

33. *Powell*, 469 U.S. at 69; *see also* Dunn v. United States, 284 U.S. 390, 393–94 (1932) (upholding inconsistency between a jury's acquittal of the predicate offense and conviction for the compound offense).

spiracy.[34] Inconsistency results when a *single jury* convicts fewer than the requisite number of defendants and acquits the rest.[35] The Supreme Court found no constitutional ban on multiple-defendant inconsistency when defendants are tried by *separate juries*, holding that nothing requires separate juries to reach the same conclusion on evidence presented in different trials.[36]

Lone conspirator cases represent a subset of all possible multiple-defendant situations. Lone conspiracies occur when a single jury convicts only one conspirator and simultaneously acquits all other participants in the conspiracy.[37] This note focuses on the legality of lone conspirator convictions.[38]

B. The Development of Federal Case Law

1. The Rule of Consistency at Common Law

In the early twentieth century, federal courts disagreed over whether justice demanded consistency in every type of criminal jury verdict.[39] Although the courts had not reached a consensus as to a general requirement of consistency, a long-recognized common-law exception had developed regarding inconsistent verdicts in conspiracy convictions.[40] That rule—the rule of consistency—"'requires the reversal of a defendant's conspiracy conviction if all his coconspirators are acquitted of the same conspiracy charges.'"[41] The rule of consistency developed as a safeguard against the significant and frequent risk of inconsistent verdicts posed by conspiracy.[42] The United States legal system adopted[43] the firmly established rule from the English legal system.[44]

34. Muller, *supra* note 10, at 779–80. The common-law crimes of riot, adultery, incest, fornication, bigamy, miscegenation, and dueling also require more than one participant. *Id.* at 779. The Model Penal Code rejects bilateral conspiracy, opting for a unilateral formulation. *Id.* at 780 n.37 (citing 1 MODEL PENAL CODE AND COMMENTARIES § 5.03, at 398 (1985)). Under the Model Penal Code approach, an inconsistent jury verdict presents no lone conspirator difficulties because the crime only needs one participant. *Id.* (citing United States v. Rosenblatt, 554 F.2d 36, 38 n.2 (2d Cir. 1977)).

35. *Id.* at 779.

36. Standefer v. United States, 447 U.S. 10, 25 (1980); *cf. infra* notes 50–57 and accompanying text (discussing inconsistency between multiple conspirators tried together).

37. *See, e.g.*, United States v. Patterson, 213 F. Supp. 2d 900, 909–10 (N.D. Ill. 2002) (upholding conviction of lone conspirator when only other possible coconspirator was acquitted).

38. Note that cases where the government alleges the existence of unindicted as well as indicted coconspirators and offers proof that a sole convicted conspirator conspired with the unindicted parties are distinguishable from lone conspirator situations. *See, e.g.*, United States v. Byerley, 999 F.2d 231, 234 (7th Cir. 1993) (holding the sole codefendant's acquittal does not require reversal of the defendant's conviction if evidence supports that the defendant conspired with uncharged persons, as alleged in the indictment). This approach assumes that conspiracy requires at least two people, but finds no technical inconsistency because the conspiracy could have been formed with the unindicted parties. *Id.*

39. Muller, *supra* note 10, at 786 n.77 (describing the split between different federal circuits).

40. *Id*. at 780 (noting that conspiracy cases presented a great enough and frequent enough risk of inconsistent verdicts that common-law courts developed a rule for resolving challenges to inconsistent verdicts).

41. *Id.* (quoting United States v. Abbott Washroom Sys., Inc., 49 F.3d 619, 622 (10th Cir. 1995)).

42. *Id.* at 775.

2. The Supreme Court Allows Multiple-Count Inconsistency

In the 1932 case of *Dunn v. United States*,[45] the Supreme Court addressed the disagreement among the federal circuits as to whether the Constitution required consistency in jury verdicts. The jury in *Dunn* convicted the defendant of the compound offense of maintaining a common-law nuisance by keeping alcohol for sale at a specified place, but acquitted him on the predicate charge of unlawful possession and sale of the alcohol.[46] The facts of *Dunn* represent an example of multiple-count inconsistency.[47] The Court held that consistency in the verdict is "not necessary," and each count in the indictment should be regarded as a separate indictment.[48] The Court reasoned that the verdict may have been the result of a compromise or of a mistake on the jury's part, but that verdicts cannot be upset by "speculation or inquiry" into such possibilities.[49]

3. The Rule of Consistency Following Dunn

Although *Dunn* set out the general rule that consistency in criminal jury verdicts is not required, the facts of *Dunn* did not involve conspiracy.[50] Significantly, in *Hartzel v. United States*,[51] decided twelve years after *Dunn*, the Supreme Court reversed a conspiracy conviction on the basis of inconsistency.[52] *Hartzel* involved a situation where the trial judge set aside the jury's conspiracy conviction of two of three alleged con-

43. Chad W. Coulter, Comment, *The Unnecessary Rule of Consistency in Conspiracy Trials*, 135 U. PA. L. REV. 223, 229 (1986) (citing United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980)).

44. *Id.* at 227 n.16 (citing The Queen v. Manning, 12 Q.B.D. 241, 245 (1883)). Mr. Coulter traces the origins of the rule as far back as 1599. *Id.* at 227 n.17 (citing Marsh v. Vauhan, 78 Eng. Rep. 937, 937 (Q.B. 1599) (holding that the crime of riot required three participants and that a conviction of only one was not legal)).

45. 284 U.S. 390 (1932).

46. *Id.* at 391–92.

47. *See supra* notes 27–33 and accompanying text.

48. *Dunn*, 284 U.S. at 393.

49. *Id.* at 394. The Supreme Court supported its argument by reasoning that if the government presented separate indictments for the predicate and compound offenses that it tried separately, then "the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other." *Id.* at 393. "Where the offenses are separately charged in the counts of a single indictment the same rule must hold." *Id.* The *Dunn* opinion, however, preceded the Supreme Court holding that collateral estoppel was a basic element of the double jeopardy clause of the Fifth Amendment. *See* 5 LAFAVE ET AL., *supra* note 10, § 24.10(b), at 615 (citing Ashe v. Swenson, 397 U.S. 436, 445–47 (1970)). After *Ashe*, any attempts to reprove the same facts already tried and rejected through an acquittal at an earlier trial became illegal. 5 *id.* Thus, the holding in *Ashe* placed the holding of *Dunn* in question, but the Supreme Court later upheld the *Dunn* opinion on independent grounds. United States v. Powell, 469 U.S. 57, 64–65 (1984).

50. *Dunn*, 284 U.S. at 391–93.

51. 322 U.S. 680 (1944).

52. *Id.* at 682 n.3.

spirators because of a lack of evidence.[53] The trial judge, however, allowed the conviction of the lone remaining defendant to stand.[54]

The Supreme Court disagreed with the trial judge's ruling, holding that under such circumstances it would be impossible to sustain the lone defendant's conspiracy conviction.[55] One commentator suggests, however, that *Hartzel* may not represent an actual application of the rule of consistency—a reversal based on an inconsistent jury verdict—but merely a reversal of the conviction because all of the other codefendants could not have been guilty as a matter of law.[56] Although the holding in *Hartzel* did not explicitly adopt the rule of consistency, the Supreme Court did not expressly foreclose the application of the rule in conspiracy cases.[57]

4. Extending Dunn *to Multiple-Defendant Inconsistency Resulting from Separate Trials*

Thirty-six years after its ruling in *Hartzel*, the Supreme Court upheld multiple-defendant inconsistent jury verdicts in *Standefer v. United States*.[58] The defendant in *Standefer* had been convicted of aiding and abetting a principal offender, an Internal Revenue Service ("IRS") agent, in accepting unlawful compensation by authorizing payments for illegal vacations.[59] The IRS agent had previously been acquitted in a separate trial of the underlying charges of accepting the payments.[60] The defendant claimed that he could not be convicted of aiding and abetting a principal when the principal had been acquitted in a previous trial.[61] The Court upheld the conviction despite the inconsistency in the verdicts, citing two reasons: (1) a change in the existing common law regarding aiding and abetting, as evidenced by legislative intent,[62] and (2) the fact that the rules of evidence may require different evidence to be offered in separate trials.[63]

The Court observed that, at common law, the rules regarding principals and accessories were "riddled" with intricate distinctions.[64] One of these rules held that an accessory—an aider and abettor—could not be

53. *Id.*
54. *Id.*
55. *Id.*
56. Coulter, *supra* note 43, at 230 n.40.
57. *Id.* at 230.
58. 447 U.S. 10, 20 (1980).
59. *Id.* at 11–14.
60. Both defendants in the case were charged with other counts; however, the Court's ruling only dealt with three counts of aiding and abetting. *Id.* at 12–14.
61. *Id.* at 14.
62. *Id*. at 12–19.
63. *Id.* at 24. The Court added that "'different juries may reach different results under any criminal statute.'" *Id.* at 25 (quoting Roth v. United States, 354 U.S. 476, 492 n.30 (1957)).
64. *Id.* at 15.

convicted without the prior conviction of the principal offender.[65] In other words, if the principal died before trial, was acquitted or pardoned, or had his or her conviction reversed on appeal, then the accessory's conviction could not stand.[66]

To overcome this common-law rule, a legislative reform movement that began in England[67] and spread to the United States[68] changed the status of an aider and abettor from an accessory to a principal.[69] The Court in *Standefer* noted that the enactment of the aiding and abetting statute in question[70] was part of the same reform movement that abolished the distinction between principals and accessories and made all aiders and abettors principals.[71] The Court also noted that the legislative history of the aiding and abetting statute confirmed abolition of the common-law distinctions.[72] The change made common-law accessories principal offenders.[73]

5. *Solidifying and Reaffirming the Court's Position Regarding Inconsistent Verdicts in* Powell

Four years after its decision in *Standefer*, the Supreme Court decided *United States v. Powell*.[74] *Powell* involved a defendant originally facing multiple counts of violating federal narcotics law.[75] A jury acquitted Powell of conspiring with her husband, her seventeen-year-old son, and others to intentionally possess cocaine with an intent to distribute it.[76] The jury also acquitted her on a count of possession of a specific quantity of cocaine with the intent to distribute it.[77] That same jury, however, convicted her on three counts of the compound offense of using a telephone to facilitate the same drug conspiracy for which she was acquitted.[78] Despite the multiple-count inconsistency between the jury's

65. *Id.* At common law, principals actually perpetrated the crime, and accessories before the fact aided or abetted the crime without being present at its commission. *Id.*

66. *Id.*

67. *Id.* at 16.

68. *Id.* at 17–18.

69. *Id.*

70. *Id.* at 18 (referring to 18 U.S.C. § 2 (1909)).

71. *Id.*

72. *Id.* at 19 (citing 1 FINAL REPORT OF COMMISSION TO REVISE AND CODIFY THE LAWS OF THE UNITED STATES 118–19 (1906)).

73. *Id.*

74. 469 U.S. 57 (1984).

75. *Id.* at 59–60.

76. *Id.*

77. *Id.* at 60.

78. *Id.* The defendant was convicted based on conversations obtained in a wiretap operation. *Id.* at 59. A potentially confusing issue deserves clarification at this point. Although the indictment charged the *Powell* defendant with conspiracy to possess and distribute cocaine, *Powell* was not a case of jury inconsistency between conviction of a lone conspirator and acquittal of all remaining conspirators. Rather, *Powell* only involved inconsistency regarding one charged defendant—multiple-count rather than multiple-defendant inconsistency. In this case, "conspiracy" was the substantive or underlying charge and "telephone facilitation" was the compound offense. *Id.* at 60.

acquittal of the defendant for the predicate offenses and its conviction of the defendant for three counts of the compound offense, the Supreme Court upheld the convictions.[79]

In *Powell*, the Court relied on its precedent cases of *Dunn v. United States*,[80] *United States v. Dotterweich,*[81] and *Standefer v. United States*.[82] In *Dotterweich*, the Court upheld the conviction of a corporate president on charges of introducing adulterated drugs into commerce even though the corporation had been acquitted of that charge.[83] The *Powell* Court stated that *Dunn* and *Dotterweich* established "'the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons.'"[84] Additionally, the *Powell* opinion expressly disapproved of federal appellate courts that attempted to "carve out exceptions" to the *Dunn* rule.[85] The Court rejected suggestions that, where the predicate felony count and the compound count are both submitted to a single jury, the counts are "interdependent," and acquittal on the predicate count serves to foreclose conviction on the compound counts.[86]

The Court identified several rationales for its holding in *Powell*.[87] First, the Court recognized that a case where the jury acquits on a predicate offense while convicting on the compound offense "should not necessarily be interpreted as a windfall to the Government."[88] The possibility exists that the jury was properly convinced of the defendant's guilt on the compound offense, but then through "mistake, compromise, or lenity arrived at the inconsistent conclusion" on the predicate offense.[89] The *Powell* Court emphasized that because lenity[90] serves a valid jury function by acting as a check against governmental abuse, inconsistent jury verdicts may actually represent a benefit to the defendant rather than a harm.[91]

79. *Id.* at 69.

80. *Id.* at 62–63 (citing Dunn v. United States, 284 U.S. 390 (1932)); *see also supra* text accompanying notes 45–49.

81. *Powell*, 469 U.S. at 62–63 (citing United States v. Dotterweich, 320 U.S. 277, 279 (1943)).

82. *Id.* (citing Standefer v. United States, 447 U.S. 10, 22–23 (1980)); *see also supra* text accompanying notes 58–63.

83. *Dotterweich*, 320 U.S. at 278.

84. *Powell*, 469 U.S. at 63 (quoting Harris v. Rivera, 454 U.S. 339, 346 (1981)).

85. *Id.* at 63–64 (citing United States v. Brooks, 703 F.2d 1273 (11th Cir. 1983) (requiring multiple-count consistency); United States v. Morales, 677 F.2d 1 (1st Cir. 1982) (same); United States v. Hannah, 584 F.2d 27 (3d Cir. 1978) (same)).

86. *Id.* at 64. Lower courts based this exception on a defect in a portion of *Dunn*'s rationale that the Supreme Court subsequently overruled. *See supra* note 49.

87. *See generally* Muller, *supra* note 10, at 789–93.

88. *Powell*, 469 U.S. at 65.

89. *Id.* Professor Muller identifies this line of reasoning as "the argument from uncertainty." *See* Muller, *supra* note 10, at 789–90.

90. Professor Muller describes lenity as the jury's discretionary power to acquit even though it is convinced of the defendant's guilt beyond a reasonable doubt. Muller, *supra* note 10, at 784.

91. *Powell*, 469 U.S. at 65 ("Thus, *Dunn* has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch.").

Second, the Court noted that the government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's double jeopardy clause.[92] Because it is impossible to tell exactly whether the defendant or the government has been harmed[93] and because the government is precluded by the double jeopardy clause from challenging the acquittal, "it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course."[94]

Third, the *Powell* Court rejected as "imprudent and unworkable" a rule that would allow defendants to challenge their convictions on the basis that the convictions were not the product of lenity.[95] The Court noted that such a rule would require an individualized assessment of the reason for the inconsistency.[96] Such an inquiry would be based on either "pure speculation or would require inquiries into the jury's deliberations that courts generally will not undertake."[97] The Court noted that deference to the jury brings with it both the "collective judgment" of the community and "an element of needed finality."[98]

Fourth, the Court in *Powell* maintained that the criminal defendant "already is afforded protection" against jury irrationality or error by the independent review of sufficiency of the evidence.[99] The Court explained that so long as review finds that the jury "could rationally have reached a verdict of guilty beyond a reasonable doubt," no other safeguard is necessary.[100]

6. Extending Dunn*,* Standefer*, and* Powell *to Lone Conspirator Cases*

Almost every federal circuit court has extended *Dunn*, *Standefer,* and *Powell* to prohibit or severely question the rule of consistency.[101] Those cases, however, did not involve lone conspirator inconsistency. Additionally, the Supreme Court has not acted under its supervisory power over the federal courts to expressly deny the application of the rule of consistency in conspiracy cases.[102] Indeed, two circuits have expressed continued support for the rule of consistency, citing it as the "traditional rule" or "traditional exception."[103] One court noted that

92. *Id.*
93. *Id.* (noting "it is unclear whose ox has been gored").
94. *Id.* Professor Muller identifies this as the "the argument from equity." Muller, *supra* note 10, at 790. For a discussion of the double jeopardy clause, see *supra* note 49.
95. *Powell*, 469 U.S. at 66.
96. *Id.*
97. *Id.*
98. *Id.* at 67.
99. *Id.*
100. *Id.*
101. *See* cases cited *supra* note 10.
102. Coulter, *supra* note 43, at 230.
103. *See* United States v. Suntar Roofing, Inc., 897 F.2d 469, 475 (10th Cir. 1990); United States v. Sachs, 801 F.2d 839, 845 (6th Cir. 1986).

Powell failed to "expressly overturn the traditionally recognized" rule of consistency.[104]

The federal appellate courts that have extended *Dunn*, *Standefer*, and *Powell* to abolish the rule of consistency in conspiracy cases equate all inconsistent jury verdicts, regardless of the underlying charge.[105] For example, in *United States v. Valles-Valencia*,[106] the Ninth Circuit focused on the lenity rationale offered by the Supreme Court in *Powell* in overturning the rule of consistency.[107] The Ninth Circuit held that acquittal of "all conspirators but one does not necessarily indicate that the jury found no agreement" between two people.[108]

Similarly, in *United States v. Mancari*,[109] the Seventh Circuit evaluated the need to maintain a distinction between verdicts resulting in multiple-count inconsistency and those resulting in multiple-defendant inconsistency.[110] The Seventh Circuit found the distinction irrelevant and discarded the rule of consistency.[111] The court observed that *Powell* and *Dunn* involved single-defendant inconsistencies,[112] but cited *Standefer*,[113] the multiple-defendant inconsistency case, for the proposition that *Powell* and *Dunn* applied with "undiminished force to a case in which the jury has treated codefendants inconsistently."[114] The Seventh Circuit stated that, after *Powell*, there could be no presumption that the jury acquitted one defendant because the government failed to prove the defendant guilty beyond a reasonable doubt, and convicted the other defendant lawlessly.[115]

104. *Suntar Roofing*, 897 F.2d at 475 (relying on Hartzel v. United States, 322 U.S. 680, 682 n.3 (1944)).

105. *See, e.g.*, United States v. Mancari, 875 F.2d 103, 104 (7th Cir. 1989); United States v. Valles-Valencia, 823 F.2d 381 (9th Cir. 1987).

106. 823 F.2d 381.

107. *Id.* at 381–82 (quoting United States v. Powell, 469 U.S. 57 (1984)).

108. *Id.* at 382.

109. 875 F.2d 103.

110. *Id.*

111. In *Mancari*, the government conceded the rule of consistency, but sought to uphold the conviction for conspiracy on the basis of "others known and unknown to the Grand Jury" who were not charged in the indictment. *Id*. at 104–05; *see also supra* note 38 (explaining that a jury may find a defendant guilty of conspiracy with unindicted conspirators). In dicta, however, the Seventh Circuit stated that the government concession was unwarranted in light of *Powell*, but overturned the conviction of the defendant on the basis of insufficient evidence of participation in the conspiracy. *Mancari*, 875 F.2d at 104, 107.

112. *Mancari*, 875 F.2d at 104.

113. *Id.* at 104 (citing Standefer v. United States, 447 U.S. 10 (1980)).

114. *Id.*

115. *Id.*

C. State Approaches

The overwhelming majority of states do not require consistency in multiple-count verdicts involving a single defendant.[116] The states, however, are much more evenly split in their treatments of multiple-defendant consistency.[117] Four states have rejected a requirement for multiple-defendant consistency by judicial decision,[118] and two states have rejected it by legislative action.[119] A few states have passed laws providing that a conspirator has no defense if another conspirator has been acquitted.[120] Professor Muller indicates that such laws may not abolish the rule of consistency because those laws do not explicitly apply to acquittals at a joint trial.[121] At least one state follows this interpretation.[122] Significantly, two states have expressly endorsed the rule of consistency in conspiracy by codifying the common-law approach,[123] and thirteen states maintain the rule through judicial approval.[124]

III. ANALYSIS

A. The Supreme Court Never Expressly Abolished the Rule of Consistency in Conspiracy Cases

The Tenth Circuit, in *United States v. Suntar Roofing, Inc.*,[125] proposed a simple and direct argument for limiting *Powell* and the related cases of *Dunn* and *Standefer* to their facts. In *Suntar Roofing*, the Tenth Circuit expressed continuing support for the rule of consistency because *Powell* did not expressly overrule the traditional rule requiring consistency in verdicts for sole conspirators that the Supreme Court recognized

116. Muller, *supra* note 10, at 787 & n.80. Only five states require consistency in multiple-count verdicts involving a single defendant. *Id.* at 787 & n.79 (Alaska, Florida, Illinois, Indiana, and New York).

117. *Id.* at 788 n.85.

118. *See id.* at 788 n.85 (Alabama, Florida, New Jersey, and Pennsylvania).

119. *See id.* (Arkansas and Maine). In his article, Professor Muller includes Illinois as a state that legislatively foreclosed the rule of consistency in conspiracy trials because an Illinois intermediate court determined that such an Illinois statute applied to acquittals at a joint trial, although the statute did not expressly state so. *Id.* (citing State v. Jayne, 368 N.E.2d 422, 432 (Ill. App. Ct. 1977) (applying former version 720 ILL. COMP. STAT. 5/8-2(b)(4) (West 1996) to joint trials)). The holding in *Jayne*, however, was possibly overturned by the Illinois Supreme Court. *See* People v. Klingenberg, 665 N.E.2d 1370, 1376 (Ill. 1996) (refusing to follow the United States Supreme Court's approach in *Powell* and holding that legally inconsistent verdicts cannot stand); *see also infra* text accompanying notes 129–44. Arguably, under *Klingenberg*, lone conspirator cases are legally inconsistent and the intermediate court's decision in *Jayne* is overruled.

120. Miller, *supra* note 10, at 788 n.85. (Alabama, Indiana, Montana, North Dakota, and Arizona).

121. *Id*.

122. *Id.* (Washington).

123. *Id.* (Kentucky and Texas).

124. *Id.* (California, Colorado, Connecticut, Georgia, Maryland, Massachusetts, Michigan, Nebraska, North Carolina, Rhode Island, Tennessee, West Virginia, and Wisconsin).

125. 897 F.2d 469 (10th Cir. 1990).

in *Hartzel*.[126] The Sixth Circuit, by implication, adopted this same argument in *United States v. Sachs*,[127] by expressing support for the "traditional rule" of consistency in conspiracy cases without mentioning any possible tension with *Powell*.[128]

B. Courts Do Not Universally Accept the Logic of the Powell *Decision*

In *People v. Klingenberg*,[129] the Illinois Supreme Court considered facts similar to those in the United States Supreme Court's decision in *Powell.* In *Klingenberg,* however, the Illinois court decided that *Powell* did not accurately reflect Illinois law.[130] The defendant in *Klingenberg*, a school superintendent, was indicted on one count of theft for submitting fictitious vouchers and on two counts of official misconduct based on the fact that he knowingly committed theft while acting in his official capacity.[131] Both official misconduct charges were related to the theft count.[132] The jury found the defendant guilty of one count of official misconduct and not guilty of the other offenses.[133] The question before the court was whether, after the *Powell* decision, the conviction for the compound offense of official misconduct was legal under Illinois law, despite the acquittal for the principal offense.[134]

In deciding the case, the Illinois Supreme Court first distinguished between legally and logically inconsistent verdicts, noting that "logically inconsistent verdicts may stand, while legally inconsistent verdicts cannot."[135] Generally, verdicts that acquit and convict a defendant of crimes having different elements, but arising out of the same facts are not legally inconsistent, although they may be legally inconsistent if the crimes concerned are predicate and compound offenses.[136] The court defined legally inconsistent verdicts as those in which the defendant is acquitted of the predicate offense and convicted of the compound offense on the same facts.[137] Although *Klingenberg* did not address the issue of lone conspirator cases, it did specifically address the issue of predicate and compound offenses and disagreed with the holding in *Powell*.[138]

126. *Id.* at 475 (citing Hartzel v. United States, 322 U.S. 680, 682 n.3 (1944)).
127. 801 F.2d 839, 845 (6th Cir. 1986).
128. *Id.*
129. 665 N.E.2d 1370 (Ill. 1996).
130. *Id.* at 1376.
131. *Id.* at 1372.
132. *Id.*
133. *Id.*
134. *Id.* at 1373.
135. *Id.*
136. *See id.*
137. *Id.*
138. *Id.* at 1374. The Illinois Supreme Court noted that the United States Supreme Court decided *Powell* under its supervisory powers and, therefore, the Illinois court was free to disagree with *Powell* because it was not a constitutional ruling. *Id.*

The Illinois Supreme Court expressly rejected the lenity argument offered in *Powell*.[139] The court also disapproved of *Powell*'s reasoning that because the double jeopardy clause precludes the government from appealing or upsetting acquittal, a defendant is precluded from appealing a conviction.[140] The *Klingenberg* court was not persuaded that the framers of the Constitution intended to achieve "the symmetry between defendants and the prosecution" that the *Powell* decision created.[141] The *Klingenberg* decision noted that disregarding the risk of unfair conviction by permitting legally inconsistent verdicts to stand could simply not be allowed on the basis of what it labeled "folk justice."[142] The Illinois Supreme Court's decision stressed that the defendant should not be made to bear the risk of error.[143] In summarizing its position, the court stated that legally inconsistent verdicts cannot stand because they are unreliable, they "suggest confusion" or "misunderstanding," and they suggest that the evidence failed to establish an "essential element" of the compound offense.[144]

The Illinois Supreme Court's decision in *Klingenberg* is significant for two reasons. First, the decision emphasizes the possibility of confusion and uncertainty that inconsistent verdicts inherently raise, rather than focusing on the arguably remote possibility of lenity, as the United States Supreme Court does.[145] The United States Supreme Court's lenity rationale assumes that the chance of conviction for an improper reason, no matter how great, does not matter as long as there is any chance of lenity, no matter how remote. By not favoring lenity, the Illinois Supreme Court stresses the importance of not convicting a person on the basis of improper reasons.[146] In this respect, the approach of the Illinois Supreme Court is in line with "the beyond a reasonable doubt" standard of proof,[147] which operates under the assumption that some guilty per-

139. *Id.* at 1375 ("Any attempt to reconcile verdicts such as those here, where the jury acquits the defendant of the predicate offense and convicts him of the compound offense, on the basis of jury lenity defies logic and common sense.").

140. *Id*.

141. *Id.*; *see also* Muller, *supra* note 10, at 796 (arguing that the double jeopardy clause was not intended to create symmetry at all, but rather an advantage to the defendant).

142. *Klingenberg*, 665 N.E.2d at 1375.

143. *Id.* ("The *Powell* decision requires the defendant to bear the consequences of an error properly attributed to the trial court.").

144. *Id.* at 1376. ("We can have no confidence in a judgment convicting the defendant of one crime when the jury, by its acquittal on another crime, has rejected an essential element needed to support the conviction.").

145. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 304 (1996) (arguing that for "every case where the jury extends mercy to a deserving defendant, there may well be another (or two, or five others) where the verdict is based on improper considerations").

146. Professor Muller frames the problem in the following manner: "[T]he Court assumes that the inconsistent verdicts invariably come from a jury that was persuaded of guilt but was moved to acquit, [but] it is equally possible that they came from a jury that was unpersuaded of guilt but was provoked to convict." Muller, *supra* note 10, at 802.

147. *See supra* note 15.

sons will go free from time to time, but failing to convict them is better than convicting an innocent person.[148]

Second, the *Klingenberg* decision shows that reasonable jurists can differ about whether inconsistencies between predicate and compound offenses are permissible. Because the difference between the holdings in *Powell* and *Klingenberg* demonstrates a point of contention in the law, application of the Supreme Court's holding in *Powell* should be limited to cases involving predicate and compound offenses. *Powell* should be viewed as the outer extent of law regarding the topic of inconsistent jury verdicts and not as a bedrock principle that decisively forecloses all demands for jury consistency, regardless of the facts or circumstances.

C. The Supreme Court's Lenity Rationale Fails to Meet the Unique Needs of Federal Conspiracy Cases

1. The Lenity Rationale Compromises the Constitutional Guarantee of Proof Beyond a Reasonable Doubt in Criminal Cases

In *Powell*, the Supreme Court stated that because the jury may have exercised its power of lenity, the possibilities of error or compromise in cases of inconsistent jury verdicts are to be discounted, and inconsistent verdicts should not be upset.[149] Professor Muller addresses the weakness of lenity as a justification for preserving both multiple-count and multiple-defendant inconsistency, generally.[150] As he explains, compromise "is invisible, it hides in the opacity of the general verdict."[151] Even if "logical inconsistency does not make a general verdict transparent, it does make it translucent, and what comes into view is the very real possibility of compromise."[152]

In *Powell*, the Supreme Court pointed out that a jury has the "historic" power of lenity.[153] The Supreme Court also indicated that this right is not a component of the constitutionally guaranteed jury trial.[154] The right to be convicted beyond a reasonable doubt, however, is a constitutional guarantee.[155] Accordingly, Professor Muller argues that the Supreme Court's decision in *Powell* manifests a willingness to protect the

148. In the words of Justice Harlan, "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

149. *See supra* notes 87–91 and accompanying text.

150. Muller, *supra* note 10, at 794–807.

151. *Id.* at 797.

152. *Id.*

153. United States v. Powell, 469 U.S. 57, 65 (1984) (citing Dunn v. United States 284 U.S. 390 (1932)).

154. *Id.* (citing Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968)); *see also* Muller, *supra* note 10, at 797 (arguing that lenity is not a constitutional right).

155. *See supra* note 15.

nonconstitutional function of lenity at the expense of the constitutional requirement of proof beyond a reasonable doubt.[156]

2. *The Lenity Rationale Poses Heightened Dangers of Constitutional Harm When Applied to Federal Conspiracy Cases*

The government often charges conspiracy defendants not only with participation in the actual conspiracy, but also with additional counts for other crimes related to a pattern of ongoing alleged criminal behavior.[157] These cases frequently result in situations where the jury convicts one defendant as a lone conspirator and additionally convicts the same defendant on all or most of the remaining crimes.[158] In these cases, however, the same jury frequently acquits the remaining defendants not only of the conspiracy, but of all other charges, or of all other charges except for minor or token charges.[159] A close examination of jury verdicts in police corruption cases that are not only inconsistent—resulting in a lone conspirator conviction—but also lopsided—heavily penalizing a single defendant—will illustrate that a highly particularized possibility of jury compromise exists in federal conspiracy cases.

Federal corruption cases charging police officers often involve one defendant who is the focus of the investigation[160] or even an official supervisor of the other defendants[161] at whom the government directs its efforts. In such cases, the jury commonly views one defendant—the leader—as primarily responsible for the general pattern of conduct for which all the defendants have been charged. Indeed, the leader is often convicted of all counts, including the conspiracy, and the other codefendants are acquitted.[162]

The possibility that the jury exercised lenity in this situation seems remote, if not absurd. Rather, when the jury's verdict is viewed as a whole and not in light of its individual outcomes regarding each count, the very real chance that the jury reached a compromise verdict regarding the lone conspiracy conviction emerges. The jury may have simply "lumped" an extra guilty verdict on the defendant, whom it saw as pri-

156. Muller, *supra* note 10, at 797.

157. *See, e.g.*, United States v. Patterson, 213 F. Supp. 2d 900, 903 (N.D. Ill. 2002) (involving defendants charged with conspiracy to possess and distribute cocaine, attempt to possess and distribute cocaine, carrying a firearm, and theft of government funds).

158. *See, e.g.*, *id.*

159. *See, e.g.*, *id.* (noting that the "[remaining defendant] was acquitted on all charges except for theft of government funds").

160. For example, in the case of four Buffalo, New York detectives charged with conspiracy and other crimes that resulted in a lone conspiracy conviction, one detective was obviously the "main target." Michael Beebe & Jay Rey, *Parker Guilty in Police Drug Trial; Rodriguez Is Exonerated; Two Other Detectives Convicted*, BUFF. NEWS, Mar. 16, 2002, at A1.

161. In one Chicago police corruption case that resulted in a lone conspiracy conviction, one defendant was the superior of the other. Matt O'Connor, *Ex-Cops Sentenced in Huge Drug Sting*, CHI. TRIB., Aug. 10, 2002, § 1, at 12.

162. *See supra* notes 157–61 and accompanying text.

marily culpable, to punish him in proportion to his perceived guilt. Under this possible approach, the jury could have assigned guilty verdicts according to overall perceived culpability without ever considering whether individual defendants were guilty of the specific counts of the indictment. An alternate but related possibility is that the jury was simply not convinced beyond a reasonable doubt regarding the existence of a conspiracy. Under this possibility, the jury might have simply shifted some of the weight of the incriminating evidence from the defendants it acquitted to the defendant it convicted.[163]

An examination of *United States v. Patterson*[164] helps demonstrate the real threat of compromise a perceived criminal leader faces in jury deliberation. *Patterson* involved two police officers, Patterson and Smith, each indicted on charges of conspiracy to possess with the intent to distribute cocaine, attempt to possess and distribute cocaine, carrying a firearm in relation to drug trafficking, and theft of government funds.[165] The defendants were arrested after a government tape showed them stealing money and "sham" bricks of cocaine planted by the government from an undercover "drug house."[166] Patterson, Smith's direct supervisor,[167] was convicted of all charges. Smith was acquitted on all charges except theft of government funds.[168]

The evidence offered at trial showed that Patterson contacted a drug informant, actually an undercover government agent,[169] and arranged to "rip-off" drug targets offered by the informant.[170] The evidence also showed that Patterson told the government agent that Smith agreed to participate in the plan.[171] The government also offered circumstantial proof that calls had been made from Patterson's cell phone to Smith's cell phone.[172] The only evidence of the content of the conversations between Patterson and Smith that the government offered was Patterson's descriptions of those conversations in his communications with the government agent.[173] All the evidence against Patterson tended to show that he initiated and planned the entire operation.[174]

On these facts, the jury convicted Patterson of all charges, including conspiracy, and acquitted Smith of all charges except theft of government

163. This "evidence-shifting" is particularly possible in cases where numerous defendants are acquitted and one defendant alone is convicted. *See e.g.*, Herbeck, *supra* note 2, at C5.

164. *Patterson*, 213 F. Supp. 2d at 903–07 (providing overview of factual history).

165. *Id.* at 903.

166. *Id.* at 906.

167. *See* O'Connor, *supra* note 161, at 12 ("Patterson was Smith's superior officer at the time of the robbery. . . .").

168. *Patterson*, 213 F. Supp. 2d at 903.

169. *Id.* A defendant cannot be convicted of conspiring with a government agent. *See supra* note 5.

170. *Patterson*, 213 F. Supp. 2d at 903.

171. *Id.* at 904.

172. *Id.*

173. *Id.* at 904–07.

174. *Id.* (describing the planning and coordination evidence offered against Patterson).

funds.[175] Overwhelming evidence of planning existed against Patterson, but little evidence of Smith's direct involvement existed until Smith actually appeared on the tape burglarizing the apartment.[176] On these facts, it is entirely probable that the jury was not convinced that Smith actually agreed to participate in the crime, but rather that he was merely "along for the ride" and acting under the influence of Patterson, who exercised command authority over him.

In *Patterson*, the jury convicted Smith on the charge of theft of government funds, presumably because his actions were caught on tape.[177] The jury acquitted Smith of conspiracy and all the narcotics-related charges where there was no proof of Smith's previous participation or knowledge other than what Patterson had told the government agent and the circumstantial evidence of the phone call.[178] The jury verdict regarding Smith appears legal and reasonable. The jury convicted on the strongest evidence and acquitted on the weaker evidence. The jury reasonably demonstrated that it knew how to acquit and how to convict according to the strength of the evidence presented. The argument that the jury exercised lenity by acquitting Smith after finding him guilty of the conspiracy and narcotics offenses makes little sense because the jury convicted Smith for the theft of the government funds, the count for which solid physical evidence existed.[179]

In analyzing the jury's verdicts regarding Patterson, however, it becomes clear that the jury may have viewed Patterson, the leader, as responsible for the entire situation. It, therefore, may have wanted to punish Patterson more harshly, without regard to the evidence. In this case, the evidence tended to show that Patterson planned to use Smith.[180] This fact explains Patterson's conviction and Smith's acquittal. The jury quite possibly held Patterson, as ringleader and mastermind, responsible for Smith's involvement—without finding the existence of a conspiracy beyond a reasonable doubt.

Whether consciously or unconsciously, juries in cases such as *Patterson* may utilize two different standards of proof.[181] It is quite possible that the jury in *Patterson*, seeing Patterson as more culpable, used something closer to a preponderance of the evidence standard for Patterson[182]

175. *Id.* at 903.

176. In fact, Smith claimed in defense that he actually thought he was participating in a legitimate narcotics raid. *Id.* at 907.

177. *See supra* text accompanying note 166.

178. *See supra* text accompanying notes 169–74.

179. *See supra* text accompanying note 166.

180. *See supra* text accompanying notes 169–74.

181. *See* Muller, *supra* note 10, at 796 (noting that negotiated and compromise verdicts threaten the proof beyond a reasonable doubt standard).

182. The burden of a preponderance of evidence merely requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997).

and, seeing Smith as Patterson's pawn, enforced the proper beyond a reasonable doubt standard for Smith.[183]

In light of the strong possibility that leaders of a criminal enterprise may be convicted for conspiracy because of their perceived overall culpability rather than on a finding of an agreement with another, any presumption of lenity toward acquitted conspirators to justify lone conspirator verdicts risks unconstitutionally harming the lone conspirator. As Professor Muller observed, the Constitution "does not demand a jury that has the power to acquit against the [weight of the] evidence, [but] it does demand a jury that considers whether the government proved the defendant's guilt beyond a reasonable doubt."[184]

D. Conspiracy Demands That Failure of Proof As to Every Conspirator Except One Amounts to a Failure of Proof Against the Remaining Conspirator

In *Smith v. State*,[185] the Georgia Supreme Court announced that the rule of consistency is still viable when conspirators are jointly tried.[186] The court reasoned that proof of a conspiracy requires that identical evidence exist against at least two parties.[187] Lone conspirator convictions, therefore, are inconsistent because they reach different results regarding the existence of a conspiracy between two parties based on identical evidence.[188] When conspirators are tried separately, however, the rationale of *Smith* allows lone conspirator convictions to stand because different juries may reach different results on the same evidence.[189]

The reasoning of *Smith* focuses on conspiracy's requirement of at least two participants and does not allow the same fact-finding body to come to different conclusions about exactly the same evidence.[190] This rationale provides a strong basis for distinguishing lone conspirator cases from the United States Supreme Court's precedents in *Dunn* and *Powell*, which involved inconsistencies between predicate and compound offenses.[191] Predicate and compound offenses differ from each other be-

183. *See supra* note 15.

184. Muller, *supra* note 10, at 798.

185. 297 S.E.2d 273, 274 (Ga. 1982).

186. *Id.* (stating that "a failure of proof as to one conspirator would amount to a failure of proof as to both, the evidence presented being identical").

187. *Id.* ("In [a lone conspirator] situation, the verdicts are inconsistent because they reach different results regarding the existence of a conspiracy . . . on exactly the same evidence.").

188. *Id.*; *see also* People v. Rance, 386 N.E.2d 566, 572 (Ill. App. Ct. 1979) (finding illegal jury inconsistency where "'evidence given against all of the defendants is identical in all respects'" (quoting People v. Stock, 309 N.E.2d 19, 21 (Ill. 1974))).

189. *Smith*, 297 S.E.2d at 274. On this point, the Georgia court follows the approach of the Supreme Court by recognizing that separate juries may reach different results on the same evidence in separate trials. *See supra* notes 58–63 and accompanying text.

190. 297 S.E.2d at 274.

191. *See supra* text accompanying notes 75–86.

cause they constitute separate crimes.[192] Extending the Supreme Court's tolerance of inconsistent verdicts in situations where a jury considers different evidence, as in predicate and compound offenses, to lone conspirator cases is not warranted in light of the fact that conspiracy requires identical evidence against at least two participants.

E. Conspiracy Cases Require the Culpability of Another and Are Distinguishable from Supreme Court Precedent Allowing Inconsistency

In *United States v. Andrews*,[193] the Eleventh Circuit extended *Powell* to lone conspirator cases.[194] Judge Clark, in his dissent,[195] however, stressed that the case of the lone conspirator defendant[196] in *Andrews* was qualitatively different than the case of the defendant in *Powell*[197] and of the defendants in the cases on which the *Powell* court relied: *Harris v. Rivera*,[198] *United States v. Dotterweich*,[199] and *Dunn v. United States*.[200] The *Powell* defendant was convicted of using a telephone to facilitate a felony, but acquitted of the underlying felony.[201] *Harris* involved a defendant who was convicted of robbery, grand larceny, and burglary, while a codefendant implicated by the same witness was acquitted.[202] *Dotterweich* involved a defendant who, as president of a corporation, was convicted of introducing adulterated drugs into interstate commerce, although the corporation itself was acquitted.[203] *Dunn* involved a defendant who was convicted of maintaining a nuisance by selling liquor during prohibition, but was acquitted of possession and sale of liquor.[204]

Judge Clark recognized a critical factor in all these cases that distinguished them from conspiracy—namely, that the culpability of another individual in an illegal agreement was not necessary.[205] Judge Clark cited *Powell* as an example, noting that although the jury's verdicts appeared factually inconsistent, the conviction for using the telephone to facilitate a felony "did not *depend* on a finding that the felonies were committed."[206]

192. *See* Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 109 (1992) (noting that Congress intended compound and predicate offenses "to be separate offenses").

193. 850 F.2d 1557 (11th Cir. 1998).

194. *Id.* at 1561.

195. *Id.* at 1570 (Clark, J., dissenting).

196. The jury convicted the *Andrews* defendant for conspiracy to distribute cocaine. *Id.* at 1558.

197. *Id.* at 1570 (Clark, J., dissenting).

198. *Id.* (Clark, J., dissenting) (citing Harris v. Rivera, 454 U.S. 339 (1981)).

199. *Id.* (Clark, J., dissenting) (citing United States v. Dotterweich, 320 U.S. 277 (1943)).

200. *Id.* (Clark, J., dissenting) (citing Dunn v. United States, 284 U.S. 390 (1932)).

201. *Id.* (Clark, J., dissenting); *see also supra* notes 74–79 and accompanying text.

202. *Andrews*, 850 F.2d at 1570 (Clark, J., dissenting) (citing *Harris*, 454 U.S. 339).

203. *Id.* (Clark, J., dissenting) (citing United States v. Dotterweich, 320 U.S. 277 (1943)).

204. *Id.* (Clark, J., dissenting) (citing *Dunn*, 284 U.S. 390); *see also supra* note 46 and accompanying text.

205. *Andrews*, 850 F.2d at 1570–71 (Clark, J., dissenting).

206. *Id.* (Clark, J., dissenting) (emphasis in original).

Although Judge Clarke's reasoning is presented in a dissenting opinion, other courts have recognized critical differences between conspiracy cases and cases involving predicate and compound crimes that further justify limiting *Powell* to its facts.[207] In *Halberstam v. Welch*,[208] the Court of Appeals for the District of Columbia Circuit specifically considered the differences between aiding and abetting and conspiracy in civil law, finding a qualitative difference between proving an "*agreement to participate* in a tortious line of conduct, and proving *knowing action* that substantially aids tortious conduct."[209] The court added that a trier of fact cannot reasonably infer an agreement from substantial assistance or encouragement in every situation.[210]

Essentially the same argument has been made in at least one state criminal case. In *In re the Welfare of D.W.O.*,[211] a Minnesota appellate court found that conspiracy is more than merely aiding and abetting.[212] The Minnesota court reasoned that conspiracy requires that the defendant agree with someone else to commit the crime.[213] Aiding and abetting, on the other hand, requires only that the defendant contribute some knowing role in the offense.[214] More importantly, the court noted that, at least in Minnesota, the crimes of aiding and abetting and conspiracy have different elements and reflect different legislative intents.[215]

In light of the differences between conspiracy and crimes such as aiding and abetting, the need to limit *Powell* to its facts becomes clear. As one commentator has observed, criminal law never welcomed the theory of vicarious liability because criminal accountability has traditionally been based upon culpability for "one's own wrongful conduct."[216] In the case of the lone conspirator, a grave risk exists that a defendant may be held accountable for the wrongs of another.[217]

207. *E.g.,* Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983); *In re* the Welfare of D.W.O. Child, 594 N.W.2d 207 (Minn. Ct. App. 1999).

208. 705 F.2d 472.

209. *Id.* at 478.

210. *Id.*

211. 594 N.W.2d 207.

212. *Id.* at 210.

213. *Id.* (citing State v. Aviles-Alvarez, 561 N.W.2d 523, 526 (Minn. Ct. App. 1997)).

214. *Id.* (stating that knowing participation may be inferred from "presence, companionship, and lack of objection to the criminal conduct" (quoting State v. Pierson, 530 N.W.2d 784, 788 (Minn. 1995))).

215. *Id.* (citing State v. Bellecourt, 152 N.W.2d 61, 63 (Minn. 1967)).

216. Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying* Pinkerton *Liability to RICO Actions*, 56 MO. L. REV. 931, 961 (1991).

217. *See supra* text accompanying notes 177–84.

IV. RECOMMENDATION

A. The Common-law Rule of Consistency in Conspiracy Cases Should Be Preserved to Protect Against Constitutional Harm

Lone conspirator cases represent a unique problem where a jury can reach completely opposite results regarding two defendants based on exactly the same evidence.[218] To protect against the threat of unlawful conviction posed by these inconsistencies, the analytical approach the Tenth Circuit applied in *Suntar Roofing*[219] should be adopted by other federal courts. Specifically, federal courts should not extend the holdings of *Powell*,[220] *Standefer*,[221] and *Dunn*,[222] cases which involved either inconsistencies between predicate and compound offenses or inconsistencies between principals and aiders and abettors, to conspiracy cases. Conspiracy cases have traditionally enjoyed an exception to the general rule that consistency in jury verdicts is not required.[223]

The extension of *Dunn* and *Powell* to conspiracy cases by most federal circuits[224] inaccurately equates all possible types of jury inconsistency, rather than focusing on the unique problems associated with conspiracy—most notably, its expressed requirement that at least two people are required for the commission of the crime.[225] Strikingly, the holdings of *Dunn*[226] and *Powell*[227] do not address factual situations requiring the culpability of another. Rather, they involve jury inconsistency regarding acquittal of a defendant for the predicate offense and conviction of the same defendant for the compound offense.[228]

As discussed above,[229] some federal appellate courts justify extending *Dunn* and *Powell* to lone conspirator cases on the basis of the Supreme Court's holding in *Standefer,* which allows multiple-defendant inconsistency. Even though *Standefer* may span the gap between single-defendant inconsistency and multiple-defendant inconsistency in cases of crimes that do not require the guilt of another for conviction, *Standefer* cannot span the gulf between multiple-defendant inconsistency in the case of a crime that does not require the culpability of another and the case of one that does, such as conspiracy.[230] The *Standefer* Court upheld the inconsistency between one jury's acquittal of a principal and another

218. *See supra* text accompanying notes 185–89.
219. *See supra* text accompanying notes 125–28.
220. *See supra* text accompanying notes 74–86.
221. *See supra* text accompanying notes 58–63.
222. *See supra* text accompanying notes 45–49.
223. *See supra* text accompanying note 40.
224. *See supra* note 10.
225. *See supra* note 7 and accompanying text.
226. *See supra* notes 45–49 and accompanying text.
227. *See supra* notes 74–86 and accompanying text.
228. *See supra* notes 45–49, 74–86 and accompanying text.
229. *See supra* notes 109–15 and accompanying text.
230. *See supra* text accompanying note 7.

jury's conviction of one who, at common law, would have been an accessory,[231] because Congress abolished the common-law distinction between principals and accessories. The *Standefer* holding rests on the Congress's recognized intent to change the status of accessories to principals.[232] *Standefer* involved a situation where Congress specifically eliminated the requirement of the culpability of another in crimes where the offender would have been an accessory at common law.[233] In stark contrast, no congressional act created a similar change in conspiracy law. Under federal law, a conspiracy conviction requires at least two participants,[234] and no law overrules recognition of the common-law rule of consistency in conspiracy trials.

That some states have settled the issue through legislation[235] supports the contention that if Congress did not want a consistency requirement in jury verdicts, then it could easily legislate such a rule. In the absence of legislation, federal courts of appeals should not ignore conspiracy's requirements—the proven culpability of at least one other person and proof of identical evidence against at least two people[236]—by equating predicate and compound offenses with conspiracy. Additionally, states are split almost equally between judicially abolishing the rule of consistency and retaining the rule.[237] This fact alone undercuts the argument that demanding consistency would be unworkable. The rule of consistency protects against the substantial risk of wrongful conviction in lone conspiracy without interfering with the jury's historic right of secrecy in its deliberations.[238]

B. A Combination of Existing Federal Sentencing Guidelines and the Rule of Consistency Would Both Preserve Constitutional Guarantees and Punish Criminal Behavior

As discussed above,[239] courts use the equity argument to extend *Powell* to lone conspirator cases—although it is clear the jury has erred, it is unclear whether a wrongful acquittal harmed the government or whether an unlawful conviction harmed the inconsistently convicted defendant. Professor Muller argues[240] that in the context of multiple-defendant inconsistencies the "argument from equity" is especially unfair because, under the Federal Sentencing Guidelines, an inconsistently con-

231. *See supra* text accompanying notes 58–73.
232. *See supra* text accompanying notes 58–73.
233. *See supra* text accompanying notes 58–73.
234. *See supra* text accompanying note 7.
235. *See supra* notes 118–24 and accompanying text.
236. *See supra* text accompanying note 7.
237. Muller, *supra* note 10, at 788 n.85.
238. *See* United States v. Powell, 469 U.S. 57, 67 (1984) ("Courts have always resisted inquiring into a jury's thought processes.").
239. *See supra* note 94 and accompanying text.
240. Muller, *supra* note 10, at 810 n.205.

victed defendant may still face sentencing not only for his own conviction, but also on the basis of the conduct of the acquitted conspirators.[241] This counterintuitive result occurs because, as Professor Muller notes,[242] the Federal Sentencing Guidelines allow for sentencing based on jointly undertaken criminal activity, regardless of whether that activity is charged as a conspiracy.[243] A court may consider the activities of acquitted conspirators because it uses a preponderance of the evidence[244] standard for sentencing, instead of the higher beyond a reasonable doubt standard used by the jury.[245]

Although the Federal Sentencing Guidelines may be unfair to a convicted lone conspirator, when the rule of consistency is applied, they actually protect a defendant's constitutional right to acquittal in the absence of proof of guilt beyond a reasonable doubt[246] and mitigate harm to the government by ensuring that culpable behavior is punished. As discussed above,[247] convicted lone conspirators in federal trials are often the "main targets" of government investigations or are the perceived "leaders" of ongoing criminal enterprises. As such, criminal leaders arguably face illegal conviction for conspiracy on something close to a preponderance of the evidence standard because juries may hold them responsible for the behavior of others without proving the existence of the conspiracy beyond a reasonable doubt.[248] The requirement of the rule of consistency in conspiracy cases would demand the acquittal of the lone conspirator, but in most cases, because the lone conspirator would be lawfully convicted on other charges,[249] a trial judge could still consider any evidence of conspiracy in sentencing.

This approach is superior for several reasons. First, it recognizes that two different standards of proof are appropriate when considering conspiratorial behavior. The beyond a reasonable doubt standard applies to juries deciding whether to convict a defendant for the crime itself. A preponderance of the evidence standard, however, is appropriate when a judge considers conspiratorial behavior as an aggravating factor in sentencing a defendant that has otherwise been lawfully convicted of crimes that represent a pattern of behavior. Second, application of the rule of consistency ensures that the jury will not wrongfully apply a preponderance of the evidence standard for conviction, but rather that only a judge will apply the standard *after* a lawful conviction. This approach serves as a reasonable alternative to the blind assumption of lenity in

241. U. S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B) (2002).
242. Muller, *supra* note 10, at 808 n.198, 810 n.205.
243. SENTENCING GUIDELINES § 1B1.3(a)(1)(B).
244. SENTENCING GUIDELINES § 6A1.3 cmt. For a discussion of the preponderance of evidence standard, see *supra* note 182.
245. *See supra* note 15.
246. *See supra* note 15.
247. *See supra* notes 160–61 and accompanying text.
248. *See supra* text accompanying notes 180–83.
249. *See supra* notes 157–59 and accompanying text.

every case,[250] while avoiding an invasion of the jury box and, at the same time, preserving the cherished United States ideal of proof beyond a reasonable doubt.

V. CONCLUSION

Neither Congress nor the Supreme Court has expressly abolished the common-law rule of consistency in conspiracy verdicts. When recognized, the rule stands as a powerful protector of the constitutional guarantee that a defendant may be convicted only upon proof of guilt beyond a reasonable doubt. Federal appellate courts that have extended Supreme Court precedents allowing inconsistent jury verdicts improperly discount conspiracy's requirement of at least two participants and wrongly equate all types of inconsistent verdicts. Additionally, the Supreme Court's precedents allow inconsistent verdicts between predicate and compound offenses. Enough substantive differences exist between conspiracy and predicate and compound offenses to limit the Supreme Court's precedents and preserve the rule of consistency.

250. *See supra* notes 88–91 and accompanying text.