Memorandum

TO: Leon Jaworski

FROM: Philip A. Lacovara

SUBJECT: Criminal Responsibility for Joining Ongoing Conspiracy

Some question has been raised about the criminal liability of a person who learns about a criminal conspiracy that is already in being and then gives some encouragement to it but may not personally perform any subsequent overt act.

As the attached memorandum from Peter Rient demonstrates, it is hornbook law that a person who attaches himself to a pre-existing conspiracy, has some stake in its continuation, and makes it his own, becomes fully liable as a co-conspirator. To the extent that the advice of the neophyte member of the conspiracy is subsequently followed, his culpability is even more clear.

Attachment

cc: Mr. Ruth
    Mr. Ben-Veniste
    Mr. Rient
Memorandum

TO: Philip A. Lacovara

FROM: Peter F. Rient

DATE: January 3, 1974

SUBJECT: Hypothetical Conspiracy Case

You have asked me to assess the possible criminal liability, under federal conspiracy law, of a person in the following hypothetical situation:

D, the subject of this discussion, is an elected official in charge of a government organization. During an election year, Group A, supporters of D, engage in criminal conduct, believing that they are assisting D's re-election. When Group A is caught, Group B, subordinates and close associates of D, engage in a variety of efforts to prevent the members of Group A from revealing that Group A's criminal activities had been sanctioned by Group B. To this end, the members of Group B, who are motivated by self-protection and by a desire to ensure D's re-election, proceed to make periodic cash payments to the members of Group A to procure their silence in the face of official investigations and a criminal trial.

The conspiracy to obstruct justice proceeds smoothly for a number of months until A1, a knowledgeable member of Group A, threatens to talk unless he receives an additional substantial cash payment. At this point, B1 goes to D, who has been re-elected in the meantime and who is unaware of the existence of the conspiracy. B1 informs D of the existence and nature of the conspiracy and of the roles of the various conspirators. B1 further explains to D that in order for the conspiracy to continue successfully it is necessary to pay a large sum of money to A1 who is threatening to talk and who can implicate a number of D's close associates in criminal activities, with consequent embarrassment to D. D commends A1 on his efforts to prevent the scandal from affecting the outcome of the election, but agrees that a new plan is needed to deal with the situation in the future so that it does not come to rest on D's doorstep. D also states that he does not want any
criminal liability for his close associates, and agrees with Bl that the payment should be made to Al to "buy time" until a new plan can be formulated to meet the desired objectives. Finally, D directs Bl to meet with D and certain members of Group B for the purpose of discussing how the situation should be handled. Shortly thereafter, the payment is made to Al by B2, on instructions from B3, and the meeting ordered by D takes place.

As to whether given this hypothetical scenario D has knowingly joined a conspiracy to obstruct justice, one starts from the premise that "once the existence of a conspiracy is established, slight evidence may be sufficient to connect a defendant with it." Nye & Nissen v. United States, 168 F.2d 846, 852 (9th Cir. 1948), aff'd, 336 U.S. 613 (1949). Since the existence of a conspiracy to obstruct justice is undisputed in our hypothetical situation, the question is whether it can fairly be concluded that D became a knowing participant. As to this question, it is obvious that D had knowledge of the nature and scope of the conspiracy as a result of his conversation with Bl. This, however, is not sufficient to make D a member of the conspiracy -- something more is required. United States v. Potash, 118 F.2d 54 (2d Cir. 1941). The "something more" is generally described as having "a stake in the success of the venture." United States v. Pino, 100 F.2d 401 (2d Cir. 1938); United States v. Falcone, 109 F.2d 579 (2d Cir.)*, aff'd, 311 U.S. 205 (1940); United States v. DiRe, 159 F.2d 818 (2d Cir. 1947); United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963). Although the "stake" need not be financial, United States v. DeSapio, 435 F.2d 272, 282 (2d Cir. 1970), it must be such as to demonstrate that the defendant "cast in his lot with the conspirators." United States v. Cianchetti, supra. Finally, although at least one member of the conspiracy must commit an overt act in furtherance of the conspiracy, it is not necessary that the defendant whose participation is in question be the one to do so. Bannon v. United States, 156 U.S. 464, 468 (1895).

Applying these basic principles of conspiracy law to the hypothetical facts recited above, there can be precious little room for doubt that D threw in his lot with the conspirators. With full knowledge of the conspiracy's essential contours and awareness of the problems in making it continue to succeed, D

*The defendant "must in some sense promote [the] venture himself, make it his own, have a stake in its outcome." 109 F.2d at 581.
advised one of the conspirators how to proceed, i.e., to "buy time" so that a new plan could be devised to avoid criminal liability for his associates, and ordered a meeting between himself and several of the conspirators to discuss their strategy. Nor was this gratuitous advice by a disinterested bystander. D's "stake" in the success of the venture, while not monetary, was nonetheless substantial, as both D and Bl recognized during their conversation. If the conspiracy to obstruct justice were to come to light, not only would D's close associates be subject to criminal liability, (a matter of grave concern to D) but D himself would be seriously affected since he must shoulder ultimate responsibility (in a moral, if not a legal sense) for their actions. Thus, D could expect that failure of the conspiracy to continue successfully would jeopardize his ability to continue in office and to discharge his obligations effectively. The course of action he advised and which was, in fact, followed was plainly intended to ensure that the conspiracy did not fall apart. Accordingly, it is only fair to conclude that D knowingly, deliberately, and for his own benefit adopted and promoted the unlawful venture, thereby making it his own.