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# Co-Conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective\*

by Paul Marcus\*\*

Perhaps the most important advantage available to a prosecutor in a criminal conspiracy case is the exception to the hearsay rule for co-conspirator declarations. The exception is widely used and is often a significant part of the government presentation.<sup>1</sup> In essence, it provides that otherwise inadmissible hearsay declarations of co-conspirators are admissible at trial against the defendant so long as they were made during the course and in furtherance of the conspiracy.<sup>2</sup> The exception typically arises when an alleged co-conspirator-declarant tells the witness (often an undercover police officer) all about the conspiracy, perhaps in the hope of attracting a buyer or a seller of drugs. During the conversation the defendant is identified as a member of the group. The witness then is called to testify at trial about this conversation.

Numerous judges and commentators have explored why the exception is so important in a case like this. Basically it is because the declarant is often not available for cross-examination, and the witness is now specifically naming this defendant as having participated in the conspiracy.<sup>3</sup> During the last several years, major changes have taken place which have affected the exception itself, its general application, and proof problems in connection with specific types of conspiracies. While some of these issues have been addressed previously,<sup>4</sup> they have been viewed primarily from the vantage point

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1. Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEORGETOWN L. J. 925, 941 (1977) [hereinafter cited as *Criminal Agreement*].

2. *Anderson v. United States*, 417 U.S. 211 (1974).

3. See generally, P. MARCUS, *THE PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES* (Matthew Bender and Co., 1978, 1979 Supplement) at Section 5.02 [hereinafter cited as *PROSECUTION AND DEFENSE*].

4. See, e.g., Bergman *The Co-Conspirators Exception: Defining the Standard of the Independent Evidence Test under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99

of persons with expertise in the area of evidence law. Rarely, however, have these problems been analyzed in terms of general criminal law issues such as the quantum of proof required at trial or the procedures to be employed at a conspiracy trial.

This article will focus attention on five major aspects of the co-conspirator exception shaped considerably by recent events: the structure of the exception, the three elements of the exception, trial procedures utilized in connection with it, confrontation clause challenges to it, and the scope of the conspiracy. Numerous other problems are related to the hearsay exception and indeed can be vital to the trial and appellate practice in conspiracy cases.<sup>5</sup> Nevertheless, such problems have been omitted here either because there have been few recent developments of significance, or because the relation is not close.<sup>6</sup>

## THE HEARSAY EXCEPTION

### *The Rationale*

The co-conspirator declaration is a well-established exception to the hearsay rule. Indeed, the co-conspirator exception is so well-established that the co-conspirator's statements are allowed in even if no conspiracy is charged so long as there is evidence supporting a conspiracy theory.<sup>7</sup> The exception has been severely criticized by

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(1976); Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back into the Co-conspirator Rule*, 5 HOFSTRA L. REV. 77 (1976).

5. These problems involve a wide range of issues: general proof questions—see, e.g., *United States v. Bufalino*, 285 F.2d 408 (2nd Cir. 1960), the state of mind requirement of defendants—see, e.g., *United States v. Feola*, 420 U.S. 671 (1975) and issues combining both double jeopardy questions and the traditional Wharton's Rule contention—see, e.g., *Iannelli v. United States*, 420 U.S. 770 (1975); *Jeffers v. United States*, 432 U.S. 137 (1977).

6. One recurring trial matter worthy of note is the general practice of naming unindicted co-conspirators in the indictment. This is coming under attack throughout the country. This problem is, of course, related to the hearsay exception question, for while the original declarant may be an unindicted co-conspirator, the presence of the co-conspirator's name in the indictment or in the bill of particulars will not determine the admissibility of the declaration. In *United States v. Briggs*, 514 F.2d 794, 805 (5th Cir. 1975), the two appellants were not charged but were named in the indictment, while other persons were alleged to be conspirators but their names were not given in the indictment. The court concluded that due process required that the indictments be expunged so that all references to the appellants were deleted, and suggested the use of a bill of particulars as a suitable alternative for the government. Most courts to consider the question since *Briggs* have followed its lead and ordered the names of unindicted co-conspirators to be expunged from the indictment. *United States v. Chadwick*, 556 F.2d 450 (9th Cir. 1977); *State v. Porro*, 152 N. J. Supr. 179, 377 A.2d 909 (1977), *appeal dismissed*, 391 A.2d 517 (1978). For a particularly good discussion of the problem, see *Application of Jordan*, 439 F. Supp. 199, 204 (S.D. W. Va. 1977).

7. See, e.g., *United States v. Craig*, 522 F.2d 29, 31 (6th Cir. 1975).

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commentators and particularly defense counsel. Nevertheless, it is relied upon by prosecutors in a rather remarkable number of cases.<sup>8</sup> The rationale normally given for the hearsay exception is Learned Hand's view of the conspiracy as an agency relationship.

Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made "a partnership in crime." What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.<sup>9</sup>

While this agency theory has been the subject of some considerable criticism,<sup>10</sup> it remains the chief rationale for the exception and has been consistently relied upon.<sup>11</sup> So long as the prosecution demonstrates that the co-conspirator declaration was made during the course of the conspiracy and in furtherance of the conspiracy, the co-conspirator's declaration is admissible.<sup>12</sup>

### *The Federal Rules of Evidence*

Federal Rule of Evidence 801(d)(2)(E) essentially retains the traditional elements of the co-conspirator's declaration exception. The rule states, in material part, that such statements are admissible if they are made "by a co-conspirator of a party during the course and in furtherance of the conspiracy."<sup>13</sup> The major change in substance is that co-conspirator's declarations are now explicitly listed by the rule as not being hearsay.<sup>14</sup> While defense counsel may well argue that the elimination of the declaration as hearsay precludes argument to the jury that such declarations are unbelievable and

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8. *See Criminal Agreement* at 948.

9. *Van Riper v. United States*, 13 F.2d 961, 967 (2nd Cir. 1926).

10. "The agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." *Advisory Committee's Notes to Proposed Federal Rules of Evidence*, Commentary to § 801(d)(2)(E).

11. The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime. As such, the law deems them agents of one another. And just as the declarations of an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner. (Citations omitted)

*Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974).

12. *Id.*

13. These elements have basically remained unchanged for decades. *See generally*, Levie, *Hearsay and Conspiracy*, 52 MICH. LAW REV. 1159 (1954).

14. This is as opposed to the procedural rules governing the admissibility of evidence, such as questions to be resolved by the judge or jury, the quantum of evidence required, and so forth. *See*, text accompanying notes 56-91, *infra*.

"rank hearsay", the courts apparently believe that no significant change has been wrought by the rule. Judge Heaney made this point very clearly in a recent case:

We recognize that Fed. R. Evid. 801(d)(2)(E) provides that a statement by the defendant's co-conspirator during the course and in furtherance of the conspiracy is not hearsay. The distinction between a statement which is not hearsay and a statement which is an exception to the hearsay rule is semantic and is not determinative of the outcome of this case.<sup>15</sup>

### THE THREE COMPONENTS

Whether under the Federal Rules or not, declarations of co-conspirators are admissible against the defendant only if three elements are satisfied: 1) the statement was made in furtherance of the conspiracy 2) it was made during the course of the conspiracy and 3) there is independent evidence to establish the conspiracy.<sup>16</sup> A good deal has been written generally about the interplay of these three elements and the nature of the evidence required to prove them.<sup>17</sup> At this point, however, I will turn to those issues which are currently being pursued by prosecutors and defense counsel in connection with the three elements.

#### *The In Furtherance Requirement*

Of the three elements, this requirement creates the least difficulty in actual practice. Despite some proposals for removing the in furtherance requirement,<sup>18</sup> the Supreme Court continues to rely on it<sup>19</sup> and the Federal Rules expressly retain it. In light of proposals to eliminate the requirement, however, and Congress' rejection of such proposals, a number of courts are beginning to take a closer look at the in furtherance requirement in actual cases. Agreeing with one commentator, these courts indicate that the Congressional action "should be viewed as mandating a construction of the 'in furtherance' requirement protective of defendants . . . ."<sup>20</sup>

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15. *United States v. Smith*, 578 F.2d 1227, 1231 n.6 (8th Cir. 1978).

16. *Anderson v. United States*, 417 U.S. 211 (1974).

17. See, e.g., C. McCORMICK, EVIDENCE; WEINSTEIN'S EVIDENCE; PROSECUTION AND DEFENSE, *supra*.

18. See, e.g., MODEL CODE OF EVIDENCE rule 508(b) (1942) and *United States v. Moore*, 522 F.2d 1068, 1077 n.5 (9th Cir. 1975).

19. *Anderson*, *supra* n.16.

20. WEINSTEIN'S EVIDENCE, *supra* at 801-147, quoted in *United States v. Lang*, 589 F.2d 92, 100 (2d Cir. 1978).

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A recent Second Circuit analysis of the in furtherance requirement is illustrative of this protective stance. In *United States v. Lang*,<sup>21</sup> the defendant was arrested knowing full well he was in possession of counterfeit bills. The government, however, had to establish that he was in possession of the money with an intent to defraud. The only proof offered by the government that the defendant intended to pass the money and hence defraud was a taped telephone conversation between the defendant's supplier of the bills, Carey, and an undercover agent. This conversation took place three days after Lang's arrest. It consisted primarily of statements by Carey that Lang had certain money with him when he was arrested. When the government sought to introduce this conversation at trial (through a tape recording of the conversation) it had to make it fall within the co-conspirator declaration rule. Without the rule, the statement would be inadmissible hearsay, being an out-of-court statement offered to prove the truth of the matter asserted, i.e., that Lang had the money with him and thus was in the business of passing the money with intent to defraud.

The Second Circuit quite properly found that there was insufficient evidence to establish that this statement was made in furtherance of the conspiracy. The government had argued that it was in furtherance because it somehow "advanced the interest of the alleged conspiracy between Lang and Carey . . . that it was in Lang's interest to have Carey in business."<sup>22</sup> The problem with the government's argument, as the court found, was that Lang was under arrest when the statement was made so that a conversation with the government agent could do nothing to advance any venture in which Lang himself was concerned. Thus even if the statement could have furthered a conspiracy that Carey was involved with, it was impossible to see how it could further a conspiracy that Lang was involved with. Considering that there was no evidence that Lang had any interest in any other business with Carey, and at most was involved with the transaction for which he was arrested, the statement simply was not in furtherance of the conspiracy. Without the statement, there was no evidence that Lang was in business to make a profit and hence its admission was reversible error.<sup>23</sup>

The Ninth Circuit also took a close look at the prosecution's in furtherance argument within the past year. In *United States v. Eu-*

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21. 589 F.2d 92, 100 (2d Cir. 1978).

22. *Id.* at 100.

23. *Id.*

*banks*,<sup>24</sup> the defendants were part of a drug distribution ring. One of the members of the ring, the deceased Gonzales, was living in a common-law marriage relationship with the witness. This witness told at trial of three sets of conversations involving the conspirators. The first set included conversations between the conspirators which were clearly in furtherance of the conspiracy because "they set in motion transactions that were an integral part of the heroin distribution scheme."<sup>25</sup> The second set of conversations was more difficult. These were conversations between the witness and Gonzales where Gonzales told her of his plans to go to a city to pick up heroin for the group. Because Gonzales was not attempting to persuade the witness to join the group at that time, the statement was not in furtherance of the conspiracy. It was "at best, nothing more than [a] casual admission of culpability to someone he had individually decided to trust."<sup>26</sup> The final declaration was the most difficult of all, as these incriminating statements by Gonzales were made to the witness *after* she had joined the conspiracy. Yet the court quite properly analyzed the statements for what they were: simple statements to that woman of the plans of the group and not statements designed to aid the ring. Hence, her "participation in the conspiracy did not convert Gonzales' statements to her into declarations in furtherance of the conspiracy."<sup>27</sup>

The disposition of the government's arguments in *Lang* and *Eubank* is a refreshing and tough review of the in furtherance requirement. While the statements in those cases were, without doubt, generally connected with the conspiracy, they did not truly further the conspiracy with which the defendants were associated. Hence, despite the statements by some commentators that the in furtherance language may be viewed "without much regard to whether [the statement] in fact furthered the conspiracy,"<sup>28</sup> the adoption of the re-

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24. 591 F.2d 513 (9th Cir. 1979).

25. *Id.* at 520. In these conversations the conspirators discussed plans of the group regarding distribution of the heroin, such as the parties to handle the sales, some specific purchases, etc.

26. *Id.*, quoting *United States v. Moore*, 522 F.2d 1068, 1077 (9th Cir. 1975).

27. *Id.* The court went on to state:

There is no indication in the record that these statements were any more than conversations between conspirators that did nothing to advance the aims of the alleged conspiracy. The incriminating references to absent persons were not designed to induce . . . [the woman's] continued participation in the conspiracy or to allay her fears.

*Id.* at 521.

28. C. MCCORMICK, EVIDENCE, § 267 at 645 (2d Ed. 1972) quoted in *United States v. Moore*, *supra*, 522 F.2d at 1077 n.5.

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quirement by Congress now makes clear that the requirement is to be taken seriously indeed.

### *During the Course*

In recent years, there has been considerable activity at the trial court level concerning the requirement that the declaration be made during the course of the conspiracy. Most of this activity has been in two particular types of cases: first, those conspiracies which are said to have phases generally involving concealment and which therefore continue after the primary objective of the argument has been met, and second, those conspiracies where the government charges that the conspiracies continued "up to and including the date of return of the indictment."

The Supreme Court, in a series of three cases, established the rule that there is not always a separate, implied conspiracy to conceal which survives the major conspiracy.<sup>29</sup> This rule applies both for purposes of the hearsay exception (whether the statement was made *during the course* of the conspiracy) and for statute of limitations purposes. As stated by Mr. Justice Harlan in the last of the three cases:

By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.<sup>30</sup>

The Court was careful, however, to note that there are certain kinds of cases which inherently involve concealment,<sup>31</sup> cases where "the successful accomplishment of the crime necessitates concealment."<sup>32</sup>

The problem the courts have been grappling with in recent years is identifying cases which inherently involve concealment and which would therefore allow the conspiracy period to be extended.

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29. The three cases are *Krulewitch v. United States*, 336 U.S. 440 (1949); *Lutwak v. United States*, 344 U.S. 604 (1953); and *Grunewald v. United States*, 353 U.S. 391 (1957). For an excellent discussion of these issues as they relate to recent California law, see Oakley, *From Hearsay to Eternity: Pendency and the Co-conspirator Exception in California—Fact, Fiction, and a Novel Approach*, 16 SANTA CLARA L. REV. 1 (1975).

30. *Grunewald*, 353 U.S. at 405.

31. The Court itself indicated that crimes inherently involving concealment would include kidnappers who were in hiding, waiting for ransom, or repainting a stolen car. 353 U.S. at 405.

32. *Id.*

For instance, in *United States v. Del Valle*,<sup>33</sup> the government proved the existence of a widespread fraud ring involving an attorney, a secretary, an office manager, two runners, a practicing physician, and that physician's secretary. Through various ploys these parties submitted fraudulent medical bills to insurance companies. The defendants were indicted for this offense soon after one of the defendants, the attorney, had attempted to influence witnesses who were to appear before a grand jury. At trial the government introduced testimony about the grand jury incidents and also offered the attorney's statement made at that time. It justified this on the ground that the statements were made during the course of and in furtherance of the conspiracy. Citing the Supreme Court cases, the defendants argued that the act of the attorney in attempting to conceal the conspiracy was not a main part of the conspiracy and hence was not during the course of it. The court rejected this reasoning, finding that the nature of the conspiracy here was not aimed at accomplishing a single objective, but had a "continuing sequence of objectives."<sup>34</sup> Moreover, the declarant in this case was the attorney who had, at least as part of his function, the role of protecting the conspiracy "from those investigative agencies which threatened its continuation." Therefore, the court concluded, his attempts to influence witnesses, and his statements at that time, were not acts of concealment related only to a past objective. "They were parts of continuing activity that was essential to . . . the survival of an ongoing operation."<sup>35</sup>

The opinion in *Del Valle* may well be sound as a means of construing the Supreme Court decisions on concealment. It was a far-reaching conspiracy there, and the conspirators were on notice as to the broad nature of the business. Nevertheless, the attorney's statements must certainly be approaching the outer limits of admissibility. While it was a wide-ranging conspiracy, there was no evidence to indicate that individual members of the conspiracy had ever discussed or even foreseen that influencing witnesses before a grand jury would be a part of the "concealment phase" of the conspiracy. Indeed, it was not shown that the parties had agreed that the attorney would take it upon himself to further goals of the conspiracy by engaging in any such activities. Still, because of the nature of the operation, it is difficult to conclude that such activities were not dur-

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33. 587 F.2d 699 (5th Cir. 1979).

34. *Id.* at 704.

35. *Id.*

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ing the course of the conspiracy. After all, this was a business whose sole purpose was to engage in fraud. It is hard to believe that the attorney, among others in the group, did *not* possess inherent powers to do precisely what he did. Without such a large and sophisticated operation, perhaps such activities would not be considered part of the course of the conspiracy; in *Del Valle*, however, the operation no doubt contemplated precisely what took place—active concealment of the defendants' crimes.

A similar situation is found in *United States v. Mackey*.<sup>36</sup> In *Mackey*, a complicated scheme involving tax evasion and conspiracy to evade taxes was charged. In addition, the government indictment alleged that the conspiracy continued until the date of the filing of the indictment. Testimony before a grand jury investigating the scheme proved to be incriminating to a number of the conspirators. This testimony was then offered at trial as an exception to Rule 801(d)(2)(E). The court quite properly stated that whether or not such statements were made during the duration of the conspiracy would depend "upon the scope of the agreement entered into by its members and is therefore dependent on the facts in each case."<sup>37</sup>

In order to demonstrate that, as claimed, the conspiracy continued up to the time of the grand jury proceeding and indictment, the government must use more than circumstantial evidence that some conspirators attempted to cover up their illegal venture.<sup>38</sup> In *Mackey*, strong proof of concealment was present. The scheme was a broad effort to evade taxes, and that type of activity by its very nature required substantial concealment efforts. Moreover, because the government's efforts at collecting taxes were continuing, the concealment efforts would have to be continuing as well. Finally, because concealment of taxes was such an inherent part of evading the payment of taxes, the concealment phase of the conspiracy was during the course of the major portion of the conspiracy. As a consequence, the conspiracy did in fact exist up to the filing of the indictment and statements to the grand jury were made during the course of the conspiracy.

The *Mackey* decision makes a good bit of sense in light of the context of the opinion. It *was* a widespread operation involving, inherently, concealment. When one fails to pay taxes and attempts to evade the payment of taxes, concealment is a necessary requirement.

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36. 571 F.2d 376 (7th Cir. 1978).

37. *Id.* at 383.

38. *Id.*

Therefore, until the parties are arrested, unless there is some clear break from the agreement, it would appear that the conspiracy does continue. No broad rule can be taken from *Mackey*, however, regarding the continuation of the conspiracy up to the filing of an indictment. Simply because one conspirator attempts to cover up by giving false testimony to the grand jury does not mean that such concealment attempts are part of the conspiracy. Truly, the determination must be on a case-by-case method with close scrutiny given to government claims that concealment is an inherent part of the conspiracy and continues to the time the indictment is returned.

### *Independent Evidence*

The traditional rule has been that when the government attempts to establish the existence of the conspiracy for the purpose of proving the two elements of "in furtherance" and "during the course," it must do so by using independent evidence other than the hearsay declaration itself.<sup>39</sup> Without proof independent of the hearsay statement itself, "hearsay would lift itself by its own bootstraps to the level of competent evidence."<sup>40</sup> This rule of independent evidence has survived without change through most of the century.

After the adoption of the Federal Rules of Evidence, however, some courts doubted whether the independent evidence rule was still viable. Chief among these courts was the First Circuit beginning with *United States v. Petrozziello*.<sup>41</sup> Because the Rules allowed the question of admissibility in this area to be determined by the judge,<sup>42</sup> the court permitted "a trial judge to base his 'determination' on hearsay and other inadmissible evidence."<sup>43</sup> Without discussing the point in detail, the court conceded that:

The use of inadmissible evidence to determine the existence of a conspiracy seems to contradict the traditional doctrine that conspiracy must be proved by independent nonhearsay evidence. It suggests that a conspiracy may be proved by the very statement seeking admittance. While the logic of the new rule may permit bootstrapping of this sort, earlier case law rejects it.<sup>44</sup>

Before *Petrozziello* was decided, but after it had been argued,

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39. The independent proof element is often referred to as "proof aliunde."

40. *Glasser v. United States*, 315 U.S. 60, 75 (1942).

41. 548 F.2d 20 (1st Cir. 1977).

42. See text accompanying notes 81-91 *infra*.

43. 548 F.2d at 23.

44. *Id.* n.2, citing *Glasser v. United States*, 315 U.S. 60 (1942).

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the court heard argument in *United States v. Martorano*.<sup>45</sup> The court indicated in *Martorano* that after the issuance of its opinion, it received a petition for rehearing which had been granted on the precise issue of whether the new Federal Rules altered the independent evidence rule.<sup>46</sup> The court relied heavily on the express language of Rule 104(a) in reaffirming *Martorano*. This rule provides:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subdivision (b). In making his determination he is not bound by the rules of evidence except those with respect to privileges.

In finding that the trial judge could “base his determination on hearsay and other inadmissible evidence, including perhaps the very statement seeking admission,”<sup>47</sup> the First Circuit once again recognized the impact of its holding on *Glasser* and the independent evidence rule generally. The court’s conclusion as to this impact was as follows:

The new rules, however, explicitly contemplate the consideration of such hearsay evidence in making preliminary findings of fact. We believe the new rules must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered in making the determination whether a conspiracy exists.<sup>48</sup>

The First Circuit was not yet finished with this matter, because it granted leave to file briefs on the issue of the independent evidence rule. The court felt that the rule was “in some doubt,” but it did not have to face the question squarely because it found that, even under the independent evidence rule, the statement was properly admissible.<sup>49</sup> While seemingly stepping back from its earlier clear holding concerning the overruling of *Glasser*,<sup>50</sup> the court did mention in its final opinion that even if the statements were otherwise inadmissible, “the question here is whether such reliable evidence may be considered by the district court in determining the preliminary fact whether

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45. 557 F.2d 1 (1st Cir. 1977).

46. *Id.* n.\*.

47. *Id.* at 11.

48. *Id.* at 12.

49. 561 F.2d 406 (1st Cir. 1977).

50. The court was careful not to express its views as a holding.

We emphasize that our opinions in this case should not be understood as deciding anything about the continued viability of *Glasser*. We intend to have done no more than indicate the basis for our doubts. Our decision in this case rests solely upon our view that the “independent” evidence established the existence of a concerted mutual venture.

*Id.* at 409.

a conspiracy exists.”<sup>51</sup> This question was answered in the affirmative.

Unlike the First Circuit, other federal courts that have dealt with the reliable evidence issue have answered the above question in the negative. For the vast majority of courts, the independent evidence rule is still the law and the hearsay statement itself may not be used by the trial judge in determining whether a conspiracy existed or whether the declarant or the defendants were part of it. Most circuit courts have been quite direct in disagreeing with the First Circuit’s position. For instance, the Seventh Circuit remarked that it remained “[m]indful of our duty to strictly scrutinize the sufficiency of the nonhearsay evidence establishing the conspiracy’s existence and linking each defendant to it.”<sup>52</sup> The Eighth Circuit was even more direct:

We are aware that the First Circuit has recently suggested by way of dictum that under Federal Rule of Evidence 104 the out-of-court statement itself may be considered by the trial judge in determining its admissibility. . . . We feel that this “bootstrapping” procedure is unwarranted and was not contemplated in the enactment of Rule 104; we thus adhere to our prior decisions requiring *independent* evidence of a conspiracy.<sup>53</sup> (emphasis in the original)

The most recent retention of the independent evidence rule is found in the Fifth Circuit en banc decision in *United States v. James*.<sup>54</sup>

Although Rule 104(a) provides that the court “is not bound by the rules of Evidence except those with respect to privileges” we do not construe this language as permitting the court to rely upon the content of the very statement whose admissibility is at issue. We adhere to our requirement established in *Apollo* that fulfillment of the conditions of admissibility must be established by evidence independent of the co-conspirator statement itself. This construction of Rule 104(a) comports with earlier Supreme Court pronouncements that admissibility must depend upon independent evidence in order to prevent this statement from “lift[ing] itself by its own bootstraps to the level of competent evidence.”<sup>55</sup>

Little pause is necessary in reaching agreement with the majority position. To use the conspirator statement itself in determining

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51. *Id.* at 408.

52. *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977).

53. *United States v. Macklin*, 573 F.2d 1046, 1048 n.2 (1978).

54. 590 F.2d 575 (5th Cir. 1979). For further discussion of this case, see text accompanying note 66, *infra*.

55. 590 F.2d at 581.

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its admissibility is to render the conviction process meaningless. The requirement of independent proof comes from a deep and very legitimate concern that the declaration may be unreliable but also exceedingly prejudicial to the defendant's case. Allowing the statement itself to establish its own admissibility would result in effectively eliminating the defendant's ability to screen inappropriate declarations in a good many cases. No policy can be served by such a process.

### TRIAL PROCEDURES FOR CO-CONSPIRATOR DECLARATIONS

We now begin an analysis of the trial procedures utilized in connection with the co-conspirator declarations, the kinds of day-to-day issues attorneys actually face. Three particular procedural aspects of the problem have been drawn out: the standard of proof for co-conspirator declarations; the order of proof in conspiracy cases; and the question of whether it is the judge or the jury who determines the admissibility of the declarations.

#### *Standard of Proof*

For a long time prior to the adoption of the Federal Rules of Evidence there was no consistent pattern in the courts concerning the standard of proof for the admissibility of co-conspirator declarations. Circuits differed and panels within circuits differed.<sup>56</sup> Since the adoption of the Rules, though, the federal courts have been somewhat more circumspect in their analysis of the standard. Within the past several years, four primary standards have been mentioned as the basis for admitting co-conspirator declarations. In the 1976 edition of his widely respected treatise, Judge Weinstein urged a very high standard indeed as a prerequisite for admission of a co-conspirator declaration.

The better practice would be to require a very high degree of proof before admitting the statement. Only if the court is itself convinced beyond a reasonable doubt—considering hearsay as well as non-hearsay evidence—of the conspiracy, defendant's membership, and that the statement was made in furtherance thereof, should it admit.<sup>57</sup>

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56. Indeed, in one case the Fourth Circuit noted that the " 'substantial, independent evidence' test . . . [is] expressed . . . in terms of 'prima facie proof of the conspiracy,' or proof by a 'fair preponderance' of independent evidence." *United States v. Strobe*, 538 F.2d 1063, 1065 (4th Cir. 1976).

57. WEINSTEIN'S EVIDENCE (1976) ¶ 104(05) at 104-44, as discussed in *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978). See also, Bergman, *The Co-conspirators Exception*:

This standard of "beyond a reasonable doubt" would be nonsensical if applied to juries, yet many juries were given just that standard and told they would have to find beyond a reasonable doubt that all elements of the conspiracy were present and that the defendant and the declarant were members of the group before the statement could be considered.<sup>58</sup> With the application of the standard to judges,<sup>59</sup> the proposition makes a good deal more sense, particularly in light of the widespread use of the hearsay exception.<sup>60</sup> No circuit opinion has been found, however, adopting the reasonable doubt standard for judge determinations. Most courts to consider the point have agreed in essence with the Seventh Circuit's opinion in *United States v. Santiago*.<sup>61</sup> There, the court rejected the reasonable doubt standard, contending that the judge was ruling not on guilt or innocence but only on admissibility; hence, the government's burden need not be so onerous. Moreover, even "on the issue of the voluntariness of a confession the Supreme Court in *Lego v. Twomey* . . . found that a preponderance of evidence was sufficient to permit the introduction of the questioned confession."<sup>62</sup>

The second standard suggested is a more troublesome one, finding its origin in dicta in the Supreme Court's famous decision in *United States v. Nixon*.<sup>63</sup> In discussing the admissibility of subpoenaed tapes, the Court discussed, as an example of admissibility, declarations of co-conspirators. In a footnote the Chief Justice stated that in such cases, "there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury."<sup>64</sup> While most courts have not found this dicta to be binding on them in co-conspirator cases, the Fifth Circuit adopted it fully in its recent en banc decision in *United States v. James*.<sup>65</sup> In specifically relying on *Nixon* the court reiterated that "as a preliminary matter, there must be *substantial, independent* evidence of a conspiracy, at least enough to take the question to the jury."<sup>66</sup> (The court applied the emphasis.) Apart from the fact that neither court has seriously defined such a

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*Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99, 106-07 (1976).

58. See *United States v. James*, 590 F.2d 575, 580 (5th Cir. 1979).

59. See text accompanying notes 82-92, *infra*.

60. See generally *Criminal Agreement*, *supra*.

61. 582 F.2d 1128 (7th Cir. 1978).

62. *Id.* at 1135. See also *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977).

63. 418 U.S. 683 (1974).

64. *Id.* at 701 n. 14.

65. 590 F.2d 575 (5th Cir. 1979).

66. *Id.* at 581.

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standard, one difficulty with it is its lack of true historical definition or application. The court in *James* stated that it is more appropriate to adopt a substantial evidence rule than one which requires a preponderance of the evidence. Nevertheless, it is not entirely clear what the requirements of the substantial evidence standard are, nor how it differs from other standards of proof.

Most courts to consider the standard of proof question have not followed the Fifth Circuit. Rather, these courts have held either that there must be sufficient evidence of a prima facie case or that there must be proof of the conspiracy by a preponderance of the evidence. As to the application and definitions of these two standards, it is generally conceded that the prima facie standard is a lesser requirement.

The requirement of prima facie proof is less stringent than that of a preponderance of the evidence. The former requires only enough evidence to take the question to the jury, whereas the latter requires "proof which leads the jury to find that the existence of the contested fact is more probable than its non-existence".<sup>67</sup>

Despite this lower quantum of proof, or perhaps because of it, relatively few courts have adopted the prima facie evidence test.<sup>68</sup> Without question, the most popular standard to be applied, by an overwhelming majority of the circuits, is the standard which allows the declaration to be heard by the jury if the judge finds that the conspiracy and the declarant's and the defendant's part in it were proved by a preponderance of the evidence.<sup>69</sup>

Although the prima facie standard is no longer appropriate, we see no reason to require that a conspiracy be proved beyond a reasonable doubt. That is the standard the jury will apply to the evidence as a whole. The judge is ruling on admissibility, not guilt or innocence; the government's burden need not be so great. The ordinary civil standard is sufficient; if it is more likely than not the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of a conspiracy, the hearsay is admissible.<sup>70</sup>

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67. *United States v. Trotter*, 529 F.2d 806, 812 n. 8 (3rd Cir. 1976).

68. *See, e.g., United States v. Dixon*, 562 F.2d 1138, 1141 (9th Cir. 1977).

69. *See, e.g., United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978); *United States v. Smith*, 578 F.2d 1227 (8th Cir. 1978); *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978).

70. *Petrozziello, supra*, 548 F.2d at 23. For a good discussion of this point, *see Saltzburg, Standards of Proof and Preliminary Questions of Fact*, 27 *STANFORD L. REV.* 271, 303-04 (1975).

*Order of Proof*

In most jurisdictions, the order of proof rule was consistent regardless of whether the judge or jury determined the admissibility of the declaration. The co-conspirator declaration could be received in evidence "subject to being connected up." That is, the jury could be instructed that admissibility had not yet been resolved and the declaration was simply offered at an early point in the trial for clarity in the prosecution's case. Of course, if the declaration was not connected up, i.e., if it was later found that the statement was inadmissible, the testimony could be stricken or the judge could grant a motion for a mistrial.<sup>71</sup> In only the rarest of cases was the broad discretion of the trial judge to deal with the order of proof in the co-conspirator declaration situation seriously challenged.<sup>72</sup> With the advent of the Federal Rules of Evidence, however, some courts began to question the broad discretionary power regarding the order of proof. The most striking example of this is found in the Fifth Circuit's panel and en banc decisions in *United States v. James*.<sup>73</sup>

While the panel decision by Judge Tuttle recognized the broad discretion in proof generally available under the Federal Rules of Evidence,<sup>74</sup> the court concluded that the trial judge could not admit a conspirator's declarations until the judge had determined that the government had made the required "threshold showing."

[T]he judge cannot allow the jury to hear a co-conspirator's declaration until he has determined admissibility by a preponderance of the evidence. If the prosecution should seek to introduce a co-conspirator's declaration early in the trial, sufficient evidence to support the threshold finding may not have come in. Thus, the government must either develop its proof of conspiracy and the defendant's and the declarant's connection with it before tendering a co-conspirator's statement or make such proof at an extra jury hearing.<sup>75</sup>

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71. See generally, *Apollo v. United States*, 476 F.2d 156 (5th Cir. 1973).

72. See discussion in PROSECUTION AND DEFENSE, *supra*, at § 5.05[3][b].

73. The panel decision is reported at 576 F.2d 1121 (5th Cir. 1978). The en banc decision is reported at 590 F.2d 575 (5th Cir. 1979).

74. Rule 611(a) provides: "The judge shall exercise reasonable control over the mode and order of interrogating witnesses in presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of proof, (2) avoid consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

75. 576 F.2d at 1131. The court's mention of the "extra jury hearing" led to considerable fears in the Fifth Circuit of *required* pre-trial hearings on the admissibility of a conspirator's declaration. As indicated below, however, the en banc decision obliterated any "requirement" for extra jury hearings.

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Judge Tuttle was most concerned with the prejudicial impact on the jury of the common "connecting up" situation. As he stated,

[T]he judge would have to instruct the jury to perform the intellectually difficult task of deciding the case while disregarding prejudicial evidence of striking relevance . . .<sup>76</sup>

The court en banc reconsidered this strict order of proof ruling. In an opinion by Judge Clark, the full court conceded "the danger to a defendant in a conspiracy trial when the government tenders a co-conspirator's statement before laying the foundation for its admission."<sup>77</sup> The court backed away, however, from the panel's ruling. Instead, it discussed a "preferred order of proof."

The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.<sup>78</sup>

The en banc court's decision makes a good deal of sense. It seeks to avoid the connecting up problem whenever possible, but leaves enough discretion for the trial judge to allow the early statement in a complex matter where the sequence of testimony may well be highly important. Even this preferred order of proof, rather than the required one in the panel decision, goes well beyond the usual order of proof procedure adopted by most courts after the Federal Rules. Most courts still talk in terms of "the procedure of provisionally admitting a co-conspirator's statements."<sup>79</sup> Because it allows for discretion, while encouraging the elimination of serious prejudice in many cases, the "preferred order of proof" standard set out in *James* as well as elsewhere should be widely adopted.<sup>80</sup>

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76. *Id.*

77. 590 F.2d at 581.

78. *Id.* at 582.

79. *United States v. Phillips*, 577 F.2d 495, 502 (9th Cir. 1978).

80. The new rule requiring a specific determination of the existence of a conspiracy by the court on the record does not alter the traditional discretion of the trial judge to allow the government to place the statement into evidence on the condition that it be later shown by sufficient independent evidence that a conspiracy existed. It is preferable whenever possible that the government's independent proof of the conspiracy be introduced first, thereby avoiding the danger, recognized in *Petrozello*, of injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes. (citation omitted)

*United States v. Macklin*, 573 F.2d 1046, 1049 n.3 (8th Cir. 1978).

*Admissibility, A Judge or Jury Question?*

Prior to the adoption of the Federal Rules, the circuits were divided on the question of who was to determine the admissibility of co-conspirator declarations. Some courts took the position that the judge alone would determine the admissibility of co-conspirator declarations. As stated by Judge Friendly, it is "for the judge to determine whether there was sufficient evidence that the defendant against whom the declarations were offered had engaged in a 'concerted mutual venture' with the declarant."<sup>81</sup> Other courts, however, followed the lead of the Fifth Circuit and allowed for participation by the jury. As explained by the Fifth Circuit in *James*:

[T]he judge's role is to make a preliminary determination whether the government has presented sufficient evidence, independent of the hearsay itself, to support a finding by the jury that the alleged conspiracy existed and that the declarant and the defendant against whom the statement is offered were members of that conspiracy . . . .

If the judge is satisfied that this test has been met, then under existing law the jury is instructed, both when the hearsay is introduced and at the final charge, that it may consider the hearsay against a particular defendant only if it first finds that the conspiracy existed, that the declarant and the defendant were members of it, and that the statement was made during the course of and in furtherance of the conspiracy.<sup>82</sup>

With the adoption of the Rules, the debate on the subject became more precise and pronounced. Rule 104, in particular, was the focal point for discussion.

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hear-

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81. *United States v. Geaney*, 417 F.2d 1116, 1119 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

82. 590 F.2d at 578, citing *Apollo*, *supra*.

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ing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused be a witness, if he so requests.

Because Rule 801, which defines the co-conspirator declaration principle, gives no guidance with respect to whether the judge or the jury determines admissibility, Rule 104 becomes the key. Yet, viewing the precise language of Rule 104 also offers little guidance. As explained in some detail by Judge Weinstein, this admissibility problem could legitimately be seen as falling within either subsection (a) or subsection (b), depending on the characterization of the problem; the admissibility question could then be resolved by either the judge or the jury.

The problem can, on the one hand, be characterized as a matter of competence of the evidence—i.e., is the probability of its reliability sufficiently great to make it admissible? Viewed from this perspective the preliminary issue of the existence of the conspiracy and the objecting defendant's part in it are questions for the judge to decide like any other question of hearsay or privilege.

But, on the other hand, the issue can be framed in relevancy terms where the question of admissibility turns on the relevancy of the evidence. Thus declarations of a co-conspirator, while often interesting, are largely irrelevant to any issue of defendant's guilt unless he is first shown to be connected with the conspiracy. Preliminary questions regarding relevance are frequently held to be for the jury after the introduction of sufficient evidence to justify a jury finding the existence of the preliminary fact.<sup>83</sup>

This discussion is directly on point. One can forcefully argue that co-conspirator declarations raise the greatest question of reliability; therefore, a judge ought to hear the issue. Yet one can also argue that because the existence of the conspiracy must first be proven, the relevancy of this evidence depends on a condition of fact; therefore, it is a matter for a jury, with proper instructions as previously done in the Fifth Circuit and elsewhere.<sup>84</sup>

Some commentators have argued rather strenuously that the jury should retain its involvement in the admissibility questions for co-conspirator declarations. As is pointed out in the McCormick Treatise,<sup>85</sup> the conspiracy findings appear to be in the traditional

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83. M. BERGER and J. WEINSTEIN, *WEINSTEIN'S EVIDENCE*, ¶ 104[5] at 104-40 (1975), as discussed in *James*, *supra*, 576 F.2d at 1128-29.

84. See text accompanying note 82 *supra*.

85. C. MCCORMICK *HANDBOOK OF THE LAW OF EVIDENCE*, 2nd Ed. § 53 at 19 (Supp. 1978).

mold of findings to be determined by the jury:

More specifically, under the Federal and revised Uniform Rules, declarations of co-conspirators are expressly removed from the category of hearsay and are placed in the nonhearsay category of admissions. Thus rather than being a "technical" question of hearsay, the preliminary question is analogous to other cases of vicarious admissions. Was there an agency (conspiracy with defendant and declarant as members), and did the agent (declarant member of the conspiracy) make the statement? The questions are the kind that traditionally has been submitted to juries after a preliminary screening by the trial judge, as set forth in Rule 104(b), and this view finds substantial support in recent decisions. This solution is consistent with the commonly stated requirement that the existence of the conspiracy be established by "independent" evidence and lays at rest any uneasiness lest the foundation be furnished by the "hearsay" statement itself, since under Rule 104(b) the rules of evidence are applicable. (Footnotes omitted)

Additionally, another commentator has taken the position that to apply Rule 104(b), retaining the jury's involvement, would actually aid the defendant.

The revisionist's concern about the confusion and futility of asking the jury to twice decide the same fact is similarly an insufficient basis to justify taking the issue from the jury. As already indicated, this is no more futile than telling the jury to ignore testimony that has been stricken. But a far more important reason exists for submitting both preliminary and ultimate issues to the jury, despite the possible futility of the act. By charging the jury that they may not consider the co-conspirator statements until they have found independent proof of the existence of the conspiracy, the policy that led to the existence of this corroboration requirement is fulfilled. The charge communicates to the jury the reluctance that exists, as a matter of law, in crediting this evidence. It tells them that the courts recognize its potential unreliability. It alerts them to the danger of unduly trusting the statements.<sup>86</sup>

Despite these contentions, the courts which have evaluated the argument have rejected the Rule 104(b) analysis and have instead indicated that the judge alone is to make determinations with regard to the declaration's admissibility.<sup>87</sup> This article adopts that view. As

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86. Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back in the Co-conspirator Rule*, 5 HOFSTRA L. REV. 77, 96 (1976).

87. The circuits are cited in the 1978 edition of WEINSTEIN'S EVIDENCE. For a representative sample, see, *United States v. Petrozziello*, *supra*; *United States v. Santiago*, *supra*;

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the Fifth Circuit in *James* pointed out, “[A] rule that puts the admissibility of co-conspirator statements in the hands of the jury does not avoid the danger that the jury might convict on the basis of these statements without first dealing with the admissibility questions.”<sup>88</sup> The kinds of questions encompassed by Rule 104(b) should be questions which do not pose the danger of substantial prejudice to the defendant. Yet, conspiracy declarations are the kind which ought not to be considered on a preliminary basis by the jury.

The admissibility of a co-conspirator’s declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. Such evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally. As a result, such statements should be evaluated by the trained legal mind of the trial judge.<sup>89</sup>

The problem in allowing the jury to engage in the traditional two-step analysis of admissibility is that jurors may well be swept up by the enormity and prejudicial impact of the statement and may use the hearsay statement itself to prove the guilt of the defendant initially. Considering the vast number of cases in which the declaration problem arises<sup>90</sup> and the heavy emphasis placed on it by prosecutors, the risk of serious and adverse impact on the jury will always be present in declaration cases, no matter who determines admissibility. While the risk will not be avoided in all cases, particularly where the traditional order of proof principle is retained, it can be lessened greatly by looking to the judge rather than to the jury to make the admissibility determination.<sup>91</sup>

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United States v. Macklin, *supra*; United States v. Mitchell, 556 F.2d 371, 377 (6th Cir. 1977), *cert. denied* 434 U.S. 925; United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979).

88. 590 F.2d at 579.

89. *Id.*

90. *See, Criminal Agreement, supra.*

91. *See, WEINSTEIN’S EVIDENCE* (1978) ¶ 104[05], 104-40:

To ask the jurors to consider highly prejudicial statements of co-conspirators only if they first find the existence of the conspiracy and the defendant’s participation in it, is to present them with too tricky a task. In cases where the conspiracy is charged, it creates the absurdity of asking the jury in effect to decide the issue of guilt before it may consider evidence which is probative of guilt. Giving these preliminary questions to the jury violates the spirit of rule 104, which calls for preliminary determinations by the judge in all cases involving a high potential for prejudice.

## THE CONFRONTATION CLAUSE ISSUE

"The Sixth Amendment's right of an accused to confront witnesses against him is a fundamental right . . . made obligatory on the States by the Fourteenth Amendment."<sup>92</sup> The Sixth Amendment dictates that only reliable evidence be admitted against the defendant; hence, the right of cross examination of witnesses is of paramount importance.<sup>93</sup> The reliability question is particularly difficult with co-conspirators' statements, since the impact on the defense case may be quite prejudicial although there is no opportunity to confront the original declarant. Surprisingly, the Supreme Court did not discuss the basic issue until 1970 when it decided the case of *Dutton v. Evans*.<sup>94</sup>

In *Dutton*, a four Justice plurality, (the Chief Justice and Justices White and Blackman, with Justice Stewart writing the opinion) held that the admission of hearsay declarations of co-conspirators did not, by themselves, violate the Sixth Amendment Confrontation Clause. While conceding that both the confrontation clause and the hearsay rule "stem from the same roots,"<sup>95</sup> the Court concluded that the two were not the same and ought not to be treated the same for constitutional purposes. Thus, even though the declaration would not have been admissible in the federal courts,<sup>96</sup> the Sixth Amendment would not necessarily be violated. The hearsay rules and the confrontation clause were similar in origin, but not identical in application. Without setting forth any clear rule for future adjudication of the problem, the Court's opinion focused on whether the evidence was crucial to the prosecution's case or devastating to the

92. *Dutton v. Evans*, 400 U.S. 74 (1970), quoting *Pointer v. Texas*, 380 U.S. 400 (1965), which had applied the confrontation clause to the states.

93. See generally Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecution: A Functional Analysis*, 85 HARV. L. REV. 1378, 1379 (1972).

94. 400 U.S. 74 (1970). The other major confrontation clause case of recent years is *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, however, the question centered on the confrontation challenge to the use in a joint trial of a confession of one of the co-defendants. Thus, the legal issues were quite different from those involved herein. For a broad discussion of *Bruton*, see PROSECUTION AND DEFENSE, *supra*, at § 5.06.

95. 400 U.S. at 86.

96. The Court stated in *Dutton*, *id.* at 81:

It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise. The hearsay exception that Georgia applied in the present case, on the other hand, permits the introduction of evidence of such out-of-court statement even though made during the concealment phase of the conspiracy. (citations omitted).

For a discussion of the concealment phase problem, see, text accompanying notes 29-39, *supra*.

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defendant.<sup>97</sup> Because the declaration was not that vital, and because there were “indicia of reliability” demonstrating that the statement should be placed before the jury, confrontation of the original declarant was not required.<sup>98</sup>

*Dutton* raised a good many problems which continue to plague the courts. Preliminarily, it is not clear what the *holding* is, for the opinion in *Dutton* was a plurality opinion, Justice Harlan joining the majority but writing a separate opinion.<sup>99</sup> In addition, there is genuine confusion concerning the problem of the availability of a witness who does not testify,<sup>100</sup> and the question of whether the trial court must make findings with regard to whether the declaration was crucial to the government case or devastating to the defense remains unanswered.<sup>101</sup>

In this article, however, attention will be focused on one relatively narrow question left open after *Dutton*, a question which is raised more often than any other confrontation issue in the federal courts. In *Dutton*, the Court was faced with evidence which clearly violated the federal co-conspirator exception, yet it allowed the evidence in considering the facts in that case. Does compliance with the federal exception establish that the confrontation clause has been “automatically” satisfied? The circuit courts have split in answering this question, and the Supreme Court in the period since *Dutton* has given no guidance. There are courts which take the position that compliance with the federal hearsay exception rule constitutes a *per se* validation under the confrontation clause. The Sixth Circuit very recently stated this without hesitation.

Where evidence comes within this exception, the confrontation right under the Sixth Amendment is not violated, even if a statement clearly implicates the defendant and the declarant is unavailable for cross-examination.<sup>102</sup>

Some courts do not even seriously address the question, simply con-

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97. This is a point well discussed by Davenport, *supra*, who attempts to formulate principles to govern the cases in this area.

98. 400 U.S. at 87.

99. Justice Harlan took a very limited view of the confrontation clause.

In general, he would strictly limit the role of the confrontation clause to a literal right of the defendant to be present and cross-examine those “witnesses” who actually testify against him, *i.e.*, not the declarants, but only the witnesses through whom the declarations are presented in court. Questions of abuse would then be left to the care of the due process clause, which he found unnecessary to invoke in *Dutton*.

Davenport, *supra*, 85 Harv. L. Rev. at 1380 n. 18.

100. Compare the panel opinion in *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974), with the en banc decision, 506 F.2d 849 (5th Cir. 1975) *cert. denied* 423 U.S. 824.

101. See generally *United States v. Puco*, 476 F.2d 1099 (2nd Cir. 1973), *cert. denied*, 414 U.S. 844.

102. *United States v. Marks*, 585 F.2d 164, 170 n. 5 (6th Cir. 1978).

cluding that the confrontation argument is "frivolous"<sup>103</sup> or "clearly without merit."<sup>104</sup> While some of these opinions do discuss the potential for unusual circumstances which might raise confrontation questions,<sup>105</sup> there is a strong adherence to a "per se rule permitting the use of properly admissible extra-judicial statements of a co-conspirator who did not take the stand at trial without risk of a reversal for violation of his co-defendant's right to confrontation."<sup>106</sup>

Other courts, however, have been very concerned both with the confrontation clause rationale itself as well as the broad reaches of the Court's opinion in *Dutton*. The Second Circuit's recent five year odyssey in this area is instructive. In *United States v. Puco*,<sup>107</sup> the panel, in an opinion by Judge Feinberg, concluded that compliance with the traditional exception did not constitute per se compliance with the confrontation clause. Instead, the court discussed the meaning of *Dutton* and explored the questions of whether there were indicia of reliability and whether the co-conspirator's statement was "devastating" or "crucial".<sup>108</sup> When the government petitioned for a rehearing by the panel, Judge Feinberg clarified the opinion by stating that the district judge would not have to make a finding of whether the declaration was crucial to the government or devastating to the defendant before admitting the declaration. Nevertheless, according to Judge Feinberg, the government read "too little into *Dutton*." He concluded that "ignoring the implications of *Dutton* . . . [was] unwarranted and unwise."<sup>109</sup> Judge Lumbard, on the other hand, dissented from the opinion in *Puco* and himself cast doubt on the panel's opinion "casting doubt upon the rule regarding the ad-

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103. *United States v. Johnson*, 575 F.2d 1347, 1362 (5th Cir. 1978). In fairness to the Fifth Circuit, the precise question there was whether Rule 801(d)(2)(E) was unconstitutional because it violates the confrontation clause. The more difficult question is not whether the rule itself violates the clause, but whether in a given case evidence admitted under it would violate the confrontation clause. Nevertheless, *Johnson* has been seen by other circuits as following the automatic rule of compliance with the confrontation clause if the federal rule is satisfied. See, e.g., *United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978).

104. *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973).

105. *United States v. Hynes*, 560 F.2d 913, 916 (8th Cir. 1977). Interestingly enough, the court in *Hynes* cited one of its earlier opinions for the automatic or per se rule, *United States v. Kelley*, 526 F.2d 615 (8th Cir. 1975). Yet the court in *Kelley* actually stated that it construed *Dutton* "as requiring a case-by-case analysis in determining whether the application of an exception to the hearsay rule complies with the confrontation clause." *Kelley* at 620.

106. *United States v. Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977). See also, *United States v. Montgomery*, 582 F.2d 514, 518-19 (10th Cir. 1978).

107. 476 F.2d 1099 (2d Cir. 1973), cert. denied, 414 U.S. 844.

108. *Id.* at 1104.

109. *Id.* at 1107.

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mission of co-conspirator's statements."<sup>110</sup> Moreover, he was most concerned that the circuit was taking a position on this important issue without "positive en banc approval of a majority of the active judges of the circuit."<sup>111</sup> The entire court denied rehearing en banc and little else was heard on this point from the Second Circuit.<sup>112</sup> Within the past year, however, that court, in an opinion by Judge Smith, made clear that *Puco* was good law and "that *Dutton* mandates a case-by-case examination to determine whether the defendant's right of confrontation has been abridged."<sup>113</sup>

The Ninth Circuit, one of the circuits to reject the automatic compliance rule, has been particularly vigilant in its review of the confrontation clause challenge. For instance, in *United States v. Snow*,<sup>114</sup> the court explored in some detail the confrontation question, looked to four important factors from *Dutton* which were indicative of reliability,<sup>115</sup> and carefully weighed the arguments of both parties. As that court later succinctly stated:

The court must determine whether cross-examination of the declarant would be likely to show that the declarant's statements were unreliable. Another important determination is whether the evidence is "crucial" or "devastating" to the defense.<sup>116</sup>

Like Judge Feinberg, this article would emphasize that the "automatic compliance" circuits read too little into *Dutton*. To be sure, they tend to focus only on that portion of *Dutton* which indicates that "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."<sup>117</sup> As the Court in *Dutton* noted, however, this was only the converse of an equally correct proposition.

While it may readily be conceded that hearsay rules and

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110. *Id.* at 1109.

111. *Id.* at 1110.

112. Only Judges Friendly, Hays, Timbers and Mansfield dissented from the court's order.

113. *United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978).

114. 521 F.2d 730 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090.

115. The court set forth four factors indicative of reliability:

(1) the declaration contained no assertion of a past fact, and consequently carried a warning to the jury against giving it undue weight; (2) the declarant had personal knowledge of the identity and role of participants in the crime; (3) the possibility that the declarant was relying upon faulty recollection was remote; and (4) the circumstances under which the statements were made did not provide reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

*Id.* at 734.

116. *United States v. Weiner*, 578 F.2d 757, 772 (9th Cir. 1978). See also *United States v. Wood*, 550 F.2d 435 (9th Cir. 1976).

117. 400 U.S. at 82, *citing*, *California v. Green*, 399 U.S. 149 (1970).

the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; *indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.* (emphasis added)<sup>118</sup>

This statement is absolutely to the point. Simply because the hearsay exception has been complied with does not mean that the confrontation clause could not be violated. For instance, in a situation where the co-conspirator exception was satisfied but the declaration was crucial to the prosecution's case, devastating to the defense, and there were some indicia of unreliability, it is shocking to think that there could not be a serious confrontation clause question. While it is highly unlikely that there will be many cases in which the hearsay exception will be satisfied but the confrontation clause will be violated,<sup>119</sup> this does not speak in support of the automatic compliance rule. There are a good many rules of law governing situations which arise only rarely. Nevertheless, they are rooted in the sound principle that in a given case the violation may be proved and

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118. *Id.* The Supreme Court continues to make the point very clearly that, while the Confrontation Clause principles and the hearsay rules overlap, they are hardly identical. *Green v. Georgia*, — U.S. —, 99 S.Ct. 2150 (1979), for example, involved a twist on the usual situation. A first trial resulted in a jury verdict of guilty. At a second trial, to decide whether capital punishment would be imposed, defendant Green sought to introduce the testimony of a witness who had repeated the incriminating words of the co-defendant at the first trial. This testimony would have shown both that the co-defendant had committed the murder and that Green had not been present at the time of the killing. Because Georgia does not recognize declarations against penal interest as an exception to the hearsay rule, the testimony was not admissible. The Supreme Court held that the exclusion of the testimony violated the defendant's due process rights. The testimony was relevant, reliable and quite significant. Indeed, it had been used against the co-defendant at his own trial since confessions are admissible against the declarant. Quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, (1973), the Court noted, "The Hearsay Rule may not be applied mechanistically to defeat the end of justice" and vacated the defendant's sentence. He had been denied a fair trial on the issue of punishment because of the exclusion of testimony which was hearsay and which did not come within the state's recognized exceptions. (*See*, dissent of Mr. Justice Rehnquist, — U.S. at —, 99 S.Ct. at 2152.)

119. *But see* *United States v. Eubanks*, 591 F.2d 513, 521 n. 8 (9th Cir. 1979):

In holding Gonzales' statements inadmissible under Rule 801(d)(2)(E), we are mindful of the fact that a contrary holding would raise serious questions about whether appellants were denied their Sixth Amendment confrontation rights by the introduction of the Gonzales' statements. This court has recognized that "[a]dmissibility under the co-conspirator exception to the hearsay rule does not . . . automatically demonstrate compliance with the confrontation clause." (Citations omitted).

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may be substantial. Moreover, when the hearsay rule is coupled with evidentiary problems such as the so-called "slight evidence" rule,<sup>120</sup> further connected to complicity liability for conspirators<sup>121</sup> and the lax standard for admissibility of conspiracy declarations,<sup>122</sup> it is difficult indeed to justify the automatic compliance rule.

While specific rules or principles are difficult to set forth in this area, the more difficult, yet satisfying, case-by-case analysis to determine if "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement"<sup>123</sup> seems preferable. Perhaps the best analysis of the factors to be utilized here was set out by the Tenth Circuit in the *United States v. Roberts*.<sup>124</sup> The court indicated eight factors which are relevant in determining whether the confrontation clause has been violated. While these factors are hardly exhaustive of those which can be considered, they are most useful in analyzing the problem.

[The Court should consider:] (1) what opportunity the jury had to evaluate the credibility of the declarant, (2) whether the statements were crucial to the government's case or devastating to the defense, (3) the declarant's knowledge of the identities and roles of the other co-conspirators, (4) whether the extrajudicial statements might be founded on faulty recollection, (5) whether the circumstances under which the statements were made provide reason to believe the declarant misrepresented defendant's involvement in the crime, (6) whether the statements were

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120. "It is well settled that 'where the existence of a conspiracy is shown . . . only slight additional evidence is required to connect a particular defendant with it.'" *United States v. Lawson*, 523 F.2d 804, 807 (5th Cir. 1975). Citing *United States v. McGann*, 431 F.2d 1104, 1107 (5th Cir. 1970), cert. denied, 401 U.S. 919 (1971) (emphasis in original). Unique among the circuits, the Fifth Circuit, formerly one of the most enthusiastic supporters of the slight evidence rule, has finally eliminated the use of the rule entirely. *United States v. Malatesta*, 590 F.2d 1379 (5th Cir. 1979). The slight evidence rule normally is used to prove the connection of the defendant as a general matter. It can, however, also be used to establish his connection for purposes of showing the admissibility of a co-conspirator's declaration. For a good discussion of this point, see, Note, *Connecting Defendants to Conspiracies: The Slight Evidence Rule and the Federal Courts*, 64 VA. L. REV. 881, 889-892 (1978); *United States v. Dixon*, 562 F.2d 1138, 1141 (9th Cir. 1977).

121. Under *Pinkerton v. United States*, 328 U.S. 640 (1946) the co-conspirator is liable for all substantive offenses committed pursuant to the conspiracy, even if these offenses were not discussed, so long as they were foreseeable.

122. The standard for admissibility is, obviously, considerably less than the usual reasonable doubt standard. The normal such standard, as discussed *supra*, is a preponderance of the evidence or proof of a prima facie case.

123. *California v. Green*, *supra*, 399 U.S. at 161.

124. 583 F.2d 1173 (10th Cir. 1978). As the court in *Roberts* noted, "simply pigeonholing evidence into a recognized exception is insufficient to show compliance with the confrontation clause." *Id.* at 1176.

ambiguous (7) what limiting jury instructions, if any, were given, (8) whether prosecutorial misconduct was present, etc.<sup>125</sup>

THE SCOPE OF THE CONSPIRACY, "RICO TO THE RESCUE: THE ENTERPRISE CONSPIRACY"<sup>126</sup>

One of the most difficult tasks the prosecution faces in a complex conspiracy trial is proving the breadth of a single conspiracy or the number of agreements involved in the criminal activities. In recent years many important issues have been raised surrounding this problem of defining the scope of the agreement. For instance, there is the question of whether a defendant can be charged with two separate conspiracy counts for becoming a member of a single conspiracy which violated two specific drug conspiracy statutes.<sup>127</sup> Also, there was some question as to the ability of Congress to define a single group endeavor as both a conspiracy offense and a substantive offense.<sup>128</sup> Because these problems bear on the hearsay exception problem in only a collateral manner,<sup>129</sup> the discussion here will

125. *Id.* at 1176. Interestingly enough, the Tenth Circuit was also the court to decide the *Montgomery* "automatic compliance" case discussed, *supra*.

126. *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978).

127. The early cases on this point prohibited double prosecutions finding that such a result was compelled by *Braverman v. United States*, 317 U.S. 49 (1942). See *United States v. Adcock*, 487 F.2d 637 (6th Cir. 1973); *United States v. Honneus*, 508 F.2d 566 (1st Cir. 1974), *cert. denied*, 421 U.S. 948. The more recent cases allow this double prosecution, focusing on the intent of Congress to deal harshly with the drug traffic. See *United States v. Houltin*, 525 F.2d 943 (5th Cir. 1976); *United States v. Marotta*, 518 F.2d 681 (9th Cir. 1975); *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978). This rationale was sharply criticized by Judge Rubin in *United States v. Rodriguez*, 585 F.2d 1234, 1251 (5th Cir. 1978). The rule in the Fifth Circuit may be subject to change in light of the order by the court to have *Rodriguez* reheard en banc.

128. The problem arose because of § 1955 of the Organized Crime Control Act of 1970 which was the basis for the Supreme Court's decision in *Iannelli v. United States*, 420 U.S. 770 (1975). The question in *Iannelli* was not so much the scope or application of § 1955, as is common in the RICO situation, but whether the defendant could be charged with violating both § 1955 (dealing with illegal gambling business) and the general conspiracy section, § 371. In essence, the defendant argued that by definition § 1955 required a conspiracy; hence he could not be charged twice for the same offense. The Court rejected this argument and found that convictions for both a conspiracy to violate § 1955 and a § 1955 violation were proper.

129. They do bear on the question, however, and often in a most important way. For instance, in the situation involving dual drug conspiracies, if the prosecutor charges the defendant with violating a specific conspiracy statute, such as conspiracy to import, certain individuals who were in *that* conspiracy (e.g., a middle-man on the importation side) may be co-conspirators for purposes of the exception. If, on the other hand, the defendant is only charged with conspiracy to distribute, the statement of the importer co-conspirator may not be admissible against the defendant in that distribution conspiracy. The statement would not be admissible because it was not in furtherance of the *defendant's* group. If, instead, the defendant is charged with two conspiracy violations—importation and distribution—the statement would be admissible for it would have been made in furtherance of one of the conspiracies, the con-

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center on a scope problem which is the other side of the coin from these questions. The question here is not whether a single agreement can be divided up for prosecution or punishment purposes. Rather, the issue is whether several seemingly separate agreements can be charged together as one conspiracy. As a practical matter, this scope question can be of great significance to the application of the co-conspirator declaration role. If numerous conspiracies can be charged together as a single all-encompassing agreement, the words of one conspirator as to a portion of that activity are admissible against all members of all portions of the conspiracy.<sup>130</sup>

Traditionally the issues surrounding the joinder of seemingly separate conspiracies as a single one have confounded courts in general and the Supreme Court in particular. The courts have spent a good deal of time trying to analyze the single conspiracy argument in terms of whether the criminal activity fell within the so-called wheel<sup>131</sup> or chain conspiracies.<sup>132</sup> While the problems surrounding the spokes and chains have hardly disappeared and indeed may well be plaguing the lower courts more than ever,<sup>133</sup> few new legal developments in recent years have shed light on an appropriate judicial response. Rather, the problem continues as one of definition and proof at trial.

This relatively static nature of things is to be contrasted with a very major, and very recent, development found under the guise of the Racketeer Influenced and Corrupt Organizations Act, commonly

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spiracy to import. This is true, even though the declarant's activities are exactly the same in both cases: he is simply the middle-man.

130. And, of course, the more wide reaching the conspiracy and the more distant the co-defendants, the less able the defendant is to rebut effectively the co-conspirators' declarations.

131. A wheel conspiracy is present when a single individual (or individuals), the hub, deals with various other parties engaging in criminal transactions. The wheel is complete, and thus a single large conspiracy can be proved when the groups, the spokes, who deal with the one moving force, know that other participants exist and know that their involvement is criminal. The major Supreme Court decision in this area is *Kotteakos v. United States*, 328 U.S. 750 (1946).

132. A chain conspiracy is present when there is a criminal operation involving a distribution system in which parties at one end of the system pass materials to parties at the other end. The various parties to the transaction are "links" in the conspiracy, and thus can be joined in a single large conspiracy, if they are aware of the general enterprise and their involvement in it. The most famous chain conspiracy case is not a Supreme Court decision at all. It is the Second Circuit's decision in *United States v. Bruno*, 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939).

133. For excellent judicial discussion of wheels and chains, see the Fifth Circuit's decisions in *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977) and *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974). See also Note, *Federal Treatment of Multiple Conspiracies*, 57 COLUM. L. REV. 387 (1957).

known as RICO.<sup>134</sup> In the decade in which RICO has been alive,<sup>135</sup> and particularly in the past several years, the courts have had to come to grips with a marked change in the analysis of the single conspiracy theory.

The substantive portion of the RICO statute is straightforward. Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The key words in the provision are defined with clarity in other portions of the statute. An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."<sup>136</sup> Racketeering activity consists of any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, narcotics violations, and most interstate commerce violations.<sup>137</sup> A pattern of racketeering activity merely means "two acts of racketeering activity."<sup>138</sup> Given the broad definitions, it truly appears that, in passing RICO, Congress attempted to deal a telling and unobstructed blow to organized crime. Still, the difficulties in the RICO prosecutions have not generally involved violations of the substantive RICO provision but rather of the section that allows for conviction for having conspired to violate the substantive section.<sup>139</sup> This point is made especially clear in what is probably the most far reaching interpretation of RICO, *United States v. Elliott*.<sup>140</sup>

In *Elliott*, two brothers, J.C. and Recea Hawkins, were convicted of a substantive violation of RICO, § 1962(c). The substantive violation was easily affirmed because, as the court properly found, under the defendant's "loose organization" J.C. was the "chairman of the board" and Recea was, at minimum, part of an "executive committee" which arranged for the theft and distribution of numerous stolen commodities. Even though the criminal en-

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134. 18 U.S.C. 1961 *et seq.*

135. Congress enacted the statute in 1970.

136. § 1961(4).

137. § 1961(1).

138. § 1961(5).

139. § 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."

140. 571 F.2d 880 (5th Cir. 1978).

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deavor here was a “myriad criminal network”<sup>141</sup> it was a connected network dealing in everything from arson to car theft to murder to narcotics transactions to theft of interstate commercial goods. No, the problem with the *Elliott* case was not that two of the major principals were charged on an enterprise theory. Instead, the problem was that the government also used a conspiracy charge for other participants.

With regard to the conspiracy argument, the defendant’s contention was the usual one made in this area: “[W]hile the indictment alleged but one conspiracy, the government’s evidence at trial proved the existence of several conspiracies.”<sup>142</sup> In this particular case, the impact of this contention, if proved, was that there was a variance between the indictment and the proof which prejudiced their trial rights.<sup>143</sup> The argument obviously would have considerable impact in the hearsay area as well. That is, if the declarant could not be properly held as part of a large conspiracy with another member, the declarations of the first conspirator could hardly be used against the second.

The defendants named in the conspiracy court were engaged in a wide range of activities. Moreover, other than their rather remote dealings with a few of the principals in the case, these activities were not related. For instance, several of the defendants had no contacts whatsoever with Recea Hawkins and were engaged in a particular type of criminal activity. In addition, although one of the defendants helped to conceal stolen meat, there was no evidence to indicate that he knew that J.C. Hawkins was selling drugs to other persons. Similarly, there was no showing that defendants who were furnishing counterfeit titles to a car theft ring knew that a man supplying the titles was also stealing goods in interstate commerce. Without such knowledge on the part of the defendants a successful single conspiracy prosecution for all these defendants was not likely without RICO. This much the court conceded.

Applying pre-RICO conspiracy concepts to the facts of this case, we doubt that a single conspiracy could be demonstrated . . . The enterprise involved in this case probably could not have been successfully prosecuted as a single conspiracy under the general federal conspiracy statute, 18 U.S.C. § 371.<sup>144</sup>

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141. *Id.* at 899.

142. *Id.* at 900.

143. Under *Kotteakos v. United States*, *supra*. See discussion in PROSECUTION AND DEFENSE, *supra*, at § 4.03.

144. 571 F.2d at 902.

No doubt the court's concession was quite correct. Indeed, there have been numerous cases in which suppliers of a small portion of a drug deal were found not to be members of the larger drug operation precisely because they were not aware of the larger operation.<sup>145</sup> To be sure, the *Elliott* court itself cited the Second Circuit's holding in *United States v. Bertolotti*,<sup>146</sup> in which the court

focused on an alleged narcotics conspiracy that bore little resemblance to "the orthodox business operation" found to exist in other drug cases; many of the "narcotics transactions" involved amounted to "little more than simple cash thefts" in which no drugs changed hands. The only factor that tied several isolated transactions together, the Court noted, was the presence of two of the defendants . . . in each. In effect, "[t]he scope of the operation was defined only by [one defendant's] resourcefulness in devising new methods to make money". Under these circumstances, the Court held that the government had failed to prove the existence of a single conspiracy.<sup>147</sup>

Thus, without RICO, and without proof of knowledge of one conspirator as to the existence of other conspirators in wholly unrelated activities (the drug transactions and the stolen meat transactions were hardly bases for knowledge, whether implied or proven in fact), the prosecutions would not and should not have been successful under the general conspiracy statute. Nevertheless, the court affirmed the RICO conspiracy violations.

The government agreed with the defense that in its prosecution it "attempted to achieve a broader application of RICO than has heretofore been sanctioned."<sup>148</sup> All too clearly the government was right. It is not only a broader application of RICO than in prior cases, it is broader than the Constitution and good public policy allow. The Fifth Circuit, however, focusing on the Congressional purpose in enacting the Act, did not agree. The chief purpose was "to seek the eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."<sup>149</sup>

Because the general conspiracy statute, and existing conspiracy law,

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145. *United States v. Miley*, 513 F.2d 1191 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1975).

146. 529 F.2d 149 (2d Cir. 1975).

147. 571 F.2d at 901-902.

148. 571 F.2d at 884. The court remarked: "RICO has displaced many of the legal precepts traditionally applied to concerted criminal activity. Its effect in this case is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes." *Id.* at 900.

149. *Id.* at 902, *quoting* Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970).

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would not allow for the single conspiracy theory of the government, the court concluded that RICO intended to authorize exactly that: “the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate ‘wheel’ and ‘chain’ rationales with a new statutory concept: the enterprise.”<sup>150</sup>

The magic of the RICO statute, of course, lies in the fact that in charging a conspiracy to violate it, the government does not charge a conspiracy to violate a particular law or statute but rather a conspiracy to “conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.”<sup>151</sup> According to the court, this means that no defendant need agree to commit any particular criminal activities or even have knowledge of the nature of the other criminal activities. The defendants need only “agree to participate, directly and indirectly in the affairs of the enterprise by committing two or more predicate crimes.”<sup>152</sup> The only real issue is whether the court could “reasonably infer that each crime was intended to further the enterprise’s affairs.”<sup>153</sup> Once this overall objective of agreement to further the enterprise was found to exist, the many defendants could be joined together, their statements used against each of them, and, presumably, substantive offenses committed by any one of them charged to the rest.<sup>154</sup>

While the court found that under RICO “remote associates of an enterprise may be convicted as conspirators on the basis of purely circumstantial evidence,”<sup>155</sup> it found no constitutional infirmity with that conclusion. The statute only allowed conviction, in the court’s reasoning, if the defendant engaged in the commission of two or more predicate crimes. Hence, the defendant was being convicted because of his crimes, not because of the crimes of others.

The problem with the court’s analysis is that in a case like *Elliot* it is not a fact that the defendant is being convicted of his crimes; he is being convicted of the crimes of others. The court itself stated that one of the defendants, who was engaged in an arson activity and the theft of stolen meats and shirts, “may have been unaware that others who agreed to participate in the enterprise’s affairs did so by selling drugs and murdering a key witness.”<sup>156</sup> This is said to be

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150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 902-903.

154. *Under Pinkerton v. United States*, 328 U.S. 640 (1946).

155. 571 F.2d at 903.

156. *Id.* at 904.

irrelevant to the question of whether he participated in the enterprise; he did *that*, according to the court, even though he did not agree to commit each of the crimes and was unaware of them. True, perhaps, except that the court itself defined the enterprise as a criminal activity involving, among other things, selling drugs and murdering witnesses. If the defendant had no knowledge of those activities, and if the defendant could not reasonably have foreseen them, it is difficult to justify linking that person with the defendants who committed murder and who sold drugs, or binding him by their statements.

While the court perceived in this "no significant extension of a co-conspirator's liability,"<sup>157</sup> it is hard to see it as anything but a tremendous extension, indeed, distortion of the concept of a co-conspirator's liability. In the *Elliott* case itself, four defendants who did not commit murder were forced to stand trial with two others who did. If they were all properly joined for trial, their statements could have been used against each other. This does not go beyond the scope of the co-conspirator's liability? No, says the court, even though it "ups the ante for RICO violators who personally would not contemplate taking a human life."<sup>158</sup> As has been pointed out innumerable times, while the co-conspirator need not be aware of all facets of the conspiracy, or of all members of it, he must have some basic ideas as to what the agreement means. If he does not know the nature of the enterprise in the broadest sense, it is difficult to see how he could agree criminally to commit the act.<sup>159</sup> The Fifth Circuit itself recognized this in a case decided after *Elliott*. "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it."<sup>160</sup>

The court's RICO analysis goes well beyond even the *Pinkerton* complicity formulation which itself has been subject to substantial criticism.<sup>161</sup> In *Pinkerton v. United States*,<sup>162</sup> the Supreme Court

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157. *Id.*

158. *Id.*

159. See generally Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, 1976 UNIV. OF ILL. LAW FORUM 627.

160. *United States v. Conroy*, 589 F.2d 1258, 1269 (5th Cir. 1979) quoting Learned Hand's famous opinion in *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938). The court went on to say, "It is not necessary that the members of the conspiracy know all the details of the plan, but they must be aware of the essential nature and scope of the enterprise and intend to participate."

161. See Marcus, *The Proposed Federal Criminal Code: Conspiracy Provisions*, 1978 UNIV. OF ILL. LAW FORUM 379, 381-82.

162. 328 U.S. 640 (1946).

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held that a conspirator would be liable for all criminal acts of his co-conspirators in furtherance of the conspiracy even if there were no knowledge or discussion of those criminal acts, so long as those acts were reasonably foreseeable. As noted by a Section of the American Bar Association,<sup>163</sup> this is broad liability, but at least it requires negligence, lack of due care. As the court in *Elliott* interprets RICO, however, it appears that the liability of the defendant, going well beyond the particular act to which he agreed or that is foreseen, amounts to strict liability. That is, the defendant may have no knowledge of activities such as murder or drug sales, such activities may not be reasonably foreseeable, and yet the defendant can be joined with the persons who commit those crimes in a single conspiracy. Moreover, there is no reason to believe that statements made by one conspirator could not be used against all of the conspirators under the hearsay exception if this is a proper conspiracy. If this does not come very close to being strict liability in the criminal context, it is difficult to see what would. The *Elliott* court wrote that the RICO statute already had a "pervasive scope." Unfortunately, under the facts in *Elliott*, and with the potential for further prosecutions, the court's construction of RICO allows for a far too pervasive scope. To echo the words of Judge Ely in stressing concern over large, joint conspiracy trials:

The prejudice to the individual defendant forced to defend himself at a joint trial with numerous other alleged co-conspirators is compounded in instances where, as here, the proof as readily indicates the existence of a number of isolated transactions or several small conspiracies as it does the single conspiracy charged by the prosecution. Just as the danger of inferring guilt from one codefendant to another increases in proportion to the number of persons compelled to stand trial together, the danger of guilt by association at a multiple defendant trial intensifies as the number of possible conspiracies grows. Undoubtedly there is a tendency for the jury to believe that a defendant must have been involved in the alleged all-encompassing conspiracy, once it finds that individual to have committed one of the minor acts which the prosecution contends is but an extension of the greater conspiracy.<sup>164</sup>

## CONCLUSIONS

Opinions which struggle to define and apply the co-conspira-

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163. Criminal Justice Section, American Bar Association Policy Regarding S-1, *The Proposed Federal Criminal Code* (94th Congress) at 5 (adopted August 1975).

164. *United States v. Eubanks*, 591 F.2d 513, 523 (9th Cir. 1979) [concurring opinion].

tor's declaration rule continue to abound; although there is substantial basis for the use of the rule, the courts are constantly plagued by difficult cases exploring the outer reaches of the principle and purpose behind the rule. With the advent of the Federal Rules of Evidence, many courts became concerned over legislative involvement in this area. Today, however, the Rules stand as a unifying and legitimatizing force in this area.

While the courts must remain forever vigilant in avoiding excesses here, most federal judges in recent years have recognized the problem and expressed their concern about it through careful scrutiny of the rule. The one very troubling judicial action in this area is the sweeping interpretation given to the RICO statute. Such a reading can have only the most serious and negative effects in an already complex and questionable area of prosecutorial activity.