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THE FEDERAL COCONSPIRATOR EXCEPTION: ACTION, ASSERTION, AND HEARSAY

*Christopher B. Mueller**

What if my words were meant for deeds . . . ?

George Elliott¹

Words are also actions, and actions are a kind of words.

Ralph Waldo Emerson²

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1. G. ELIOT, *THE SPANISH GYPSY* 277 (1868).
2. R. EMERSON, *The Poet*, in *ESSAYS* 14 (1st & 2nd series 1883).

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INTRODUCTION

Coconspirator statements have been admissible in federal criminal cases for more than a century and a half, and for all that time a hearsay exception (now “firmly established”³) has paved the way for their use as proof of what they assert. The exception seems timeless: Rule 801(d)(2)(E) sets out the modern version in terms which Thomas Starkie and Joseph Story would have found congenial. It seems important too: In conspiracy prosecutions it is a lethal weapon for the government, and in appellate opinions it commands constant attention.

Yet the exception is fraught with problems. In terms of theory, it is an embarrassment. Its requirements seem substantive rather than evidential; it seems to have been created by accident, and the one traditional explanation which survives does not convince. In terms of procedure, the exception is tangled in a thicket. Modern federal opinions have cut a path through, but the undergrowth threatens to encroach again, and cannot be cleared away entirely.

This article examines the coconspirator exception in the context in which it finds its greatest use—the conspiracy prosecution, where a statement by one alleged conspirator is offered in evidence against another. Part I considers the almost accidental English origin of the exception and its adoption by federal courts, and expounds the explanations first offered, including the substantive agency theory and its modern revision, and the evidential “*res gestae*” theory. This Part suggests that the agency theory may never have been intended to support a hearsay use of coconspirator statements, and that the “*res gestae*” theory actually contained useful insights, though they were not well developed and were obscured by indiscriminate use of the Latinism. This Part concludes with a survey of modern practice

3. *Krulewitch v. United States*, 336 U.S. 440, 443 (1949).

under rule 801(d)(2)(E).

Part II considers different varieties of coconspirator statements. They are relevant in different ways, and they implicate the hearsay doctrine differently. These differences bear importantly upon the sound application of the exception and upon the procedures followed in administering it.

Part III presents a critical examination of the modern exception. It argues that the agency theory, though often cited, has neither an appreciable impact upon application of the exception nor any real value in explaining the hearsay use of coconspirator statements. It argues further that there are two better explanations, one arising out of the verbal act doctrine and the other turning upon conduct by the declarant. Finally, Part III suggests that these explanations too are only partial, and that where they do not apply courts should (and often do) look for other factors bearing upon reliability.

Part IV takes up procedural issues, arguing that federal courts have arrived at the best solution to intractable problems, though failing adequately to articulate the reasons for doing so. This Part attempts to set out those supporting reasons and to explain the problems that remain.

Finally, Part V suggests by way of conclusion that the exception should be amended to require a finding of reliability before coconspirator statements are received for hearsay use, and suggests an approach designed to aid in the sensible application of the exception.

I. THE COCONSPIRATOR EXCEPTION IN EARLY FLOWER AND LATE BLOOM

A. *English Origins and American Adoption*

The coconspirator exception made its first appearance in English treason trials in the late eighteenth century, where defendants were charged with trying to import the French Revolution to English soil. While there are earlier cases in which coconspirator statements were received,⁴ the later trials of sympathizers with the French Revolution have special importance. The idea of conspiracy as a punishable offense, consisting (as it does in modern law) of an agreement to commit an unlawful act or a lawful act by unlawful means,

4. See, e.g., Trial of William Lord Russell 9, How. St. Tr. 577, 604 (1683) (In the trial of Lord Russell for alleged high treason in 1683, it was proved that one of defendant's henchmen said to another: "above ten thousand brisk boys are ready to follow me.").

had long since gained a secure foothold in English criminal law.⁵ And a general rule barring proof by hearsay, while later in coming and slower in developing, had become a central feature of English evidence law.⁶ It was in the late eighteenth century treason trials that judges first confronted the possibility that the law of criminal conspiracy and the evidential doctrine of hearsay might conflict: The law of conspiracy necessarily implies that sometimes statements by one alleged conspirator will be provable against another charged with conspiring, while the hearsay doctrine points in the opposite direction.

There are four striking features in the attempt at reconciliation made by the English judges:

The first is a clear recognition that coconspirator statements are sometimes hearsay, and sometimes not. In the trial of Thomas Hardy in 1794,⁷ Chief Justice Eyre offered the simplest possible illustration of this point: If three persons are prosecuted for conspiracy, the conversation in which they plan the venture and agree to participate is not hearsay, and the words spoken by each may be proved against all, but a later statement by one of them admitting his involvement would be hearsay if offered against the others to prove that point.⁸ Unfortunately this important observation apparently blinded the early judges and commentators to the possibility that coconspirator statements might have *both* hearsay *and* nonhearsay significance. In fact, many coconspirator statements do, and understanding this point is critical to the sensible application of the coconspirator exception.

The second feature is the insight that some coconspirator statements suggest the operation of a conspiracy, hence necessarily its existence, but not that defendant is involved, while other such statements expressly implicate him in the venture. It followed, of course, that some coconspirator statements had to be "brought home" to the defendant (or "connected" to him, as a modernist would say) by other proof.⁹ This discovery exposed an issue which has plagued the

5. D. HARRISON, CONSPIRACY AS A CRIME AND AS A TORT IN ENGLISH LAW 3-47 (1924); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 401-07 (3d ed. 1923); 8 *id.* at 378-84 (1926).

6. 9 W. HOLDSWORTH, *supra* note 5, at 214-19 (1926).

7. 24 How. St. Tr. 200 (1794).

8. *Id.* at 474.

9. *Id.* at 438 ("in a general charge of conspiracy," the action of one of its members "is evidence to prove a circumstance in that conspiracy," but whether it will ultimately be "brought home" to the accused is "another consideration") (remarks by Lord Chief Justice

coconspirator exception ever since: If a coconspirator statement must be "brought home" to the defendant, who is to decide whether the connection has been made, judge or jury, and how? And if a statement on its face implicates the defendant (and need not be "brought home" to him), who decides whether the statement may be used against him, and how?¹⁰ To put it another way, what are the appropriate roles of judge and jury when coconspirator statements are offered? The judges in the English treason trials heard arguments on the problem, but failed to resolve it.¹¹

The third remarkable feature in these trials is that the judges were quick to reconcile the apparent conflict between the law of conspiracy and the hearsay doctrine by suggesting that a coconspirator statement may be admitted when it is "in furtherance of" the conspiracy, and not otherwise.¹² Not, in other words, when the state-

Eyre); Trial of William Stone, 25 How. St. Tr. 1155, 1273 (1796) (drawing upon Lord Chief Justice Eyre's remarks in the Hardy trial, counsel Erskine suggests that in conspiracy trials the evidence has "two branches," one of which shows "that a specific conspiracy existed," and the other of which shows "that the prisoner was a member of it").

10. The question whether an act by one alleged conspirator has been "brought home" or "connected" to a defendant charged with conspiring is, in Rules terms, one of "conditional relevancy" which the judge should pass to the jury pursuant to FED. R. EVID. 104(b), if there is sufficient evidence to permit reasonable persons to find the necessary connection. The same is true of statements made by one alleged conspirator, insofar as they have no hearsay significance in the case and are offered only as verbal acts. See *infra* notes 149-50 and accompanying text.

A different question is presented when a statement by one alleged conspirator is offered against another under FED. R. EVID. 801(d)(2)(E) as proof of what it asserts. Here, the question is one of "admissibility," to be answered by the trial judge alone pursuant to FED. R. EVID. 104(a). See *infra* notes 145-49 and accompanying text.

11. See, e.g., Trial of William Stone, 25 How. St. Tr. 1155, 1272-75 (1796) (The defense conceded that a letter conveying intelligence to the enemy tended to prove a conspiracy, as well as the sender's involvement, but argued that it should not be admitted because it was not connected to the defendant; the prosecutor replied at length that the jury should resolve this issue, citing an example of a murder prosecution, "where a man holds horses at a gate, and the murder is committed in the field," and arguing that "the acts in the field are to be given in evidence against the man who stands at the gate," since "it is for the jury to consider, whether the standing at the gate, holding the horses, is an act done in execution of one common purpose with those who in his absence are murdering").

Compare 2 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 402 (3d Am. ed. 1830) (speaking of "a declaration made by one conspirator at the time of doing an act in furtherance of the general design . . .," and concluding that it "is for the Court to judge whether a sufficient connection has been established to affect one person with the acts of others") with 1 S. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 199 n.5 (3d ed. 1849) (suggesting that acts by one coconspirator may be proved against another charged with conspiring, hence that statements by the latter may also be proved, and concluding that in "such cases it is necessary, that there should be given, at some period of the trial, sufficient evidence to go to the jury, of concert and connection on the part of the prisoner").

12. E.g., Trial of Thomas Hardy, 24 How. St. Tr. 199, 454 (1794).

ment is a “mere recital.”¹³ The judges were quick to explain that such “furthering” statements were admissible because the “transactions” of a conspiracy, which meant the acts and words of the schemers carrying out the plot, were to be “imputed” to all conspirators, hence provable against them.¹⁴ Thus, the early judges arrived at a definition and an explanation that are very close to those which prevail today, and it is little exaggeration to say that the coconspirator exception was born full grown at that time, at least insofar as definitions and reasons count for anything.

The fourth remarkable point is that most of the statements offered in the treason trials had no hearsay significance at all,¹⁵ and those that did were excluded, or only admitted under instructions forbidding hearsay use.¹⁶ Therefore, while the English judges arrived at a close approximation of what was to become the modern coconspirator exception, they did not apply it as an exception. Yet their definition was to become a true hearsay exception in modern law—a rule that permits the use of coconspirator statements as proof of what they assert.

Drawing upon these treason trials, the nineteenth century English scholars March Phillipps and Thomas Starkie announced the “established rule” that “a declaration made by one conspirator at the time of doing an act in furtherance of the general design, is evidence against the other conspirators.”¹⁷ Given their source material, it comes as no surprise that Starkie and Phillipps did not seem to

13. *Id.* at 451.

14. *E.g., id.* at 451-54, 474-78.

15. *E.g.,* Trial of William Stone, 25 How. St. Tr. 1155, 1311-19 (1796) (letters from defendant’s alleged coconspirator Jackson “pointing out the places in which an invasion may be made in this country,” hence conveying “intelligence to the enemy”); Trial of Thomas Hardy, 24 How. St. Tr. 199, 436-51, 453-79 (1794) (defendant’s alleged coconspirator directs printer to prepare copies of political tract; unsent letter prepared by one of the defendant’s coconspirators and addressed to another, containing terms “calculated to excite,” admitted to show the fact and general nature of the alleged conspiracy); Trial of Lord George Gordon, 21 How. St. Tr. 485, 542-45 (1781) (cries of rioters); Trial of Daniel Dammaree, 15 How. St. Tr. 522, 552-78 (1710) (cries of rioters).

16. *E.g.,* Trial of Thomas Hardy, 24 How. St. Tr. 199, 447-53 (1794) (letter from defendant’s alleged coconspirator to an outsider, naming defendant as a conspirator, excluded as “mere recital”); Trial of John Horne Tooke, 25 How. St. Tr. 1, 73-101, 123-27, 160-61 (1794) (books of the Constitutional Society prepared by its secretary may not be read to prove defendant’s presence at meetings until the secretary testifies; he thereafter did testify, and in substance verified that defendant was at the meetings); *see* Trial of William Lord Russell, 9 How. St. Tr. 577, 608, 635 (1683) (judge instructed jury that the remark about the “brisk boys,” *see supra* note 4, was only evidence of “some consults,” and “nothing against” the defendants).

17. 1 S. PHILLIPPS, *supra* note 11, at 199; 2 T. STARKIE, *supra* note 10, at 402.

believe that they were expounding a hearsay exception: Starkie spoke of certain kinds of statements that have "intrinsic credit" and which could therefore be received as proof of what they assert, but did not include coconspirator statements among these,¹⁸ and Phillipps placed his discussion of "certain exceptions" to the bar against hearsay proof *after* his treatment of coconspirator statements, and apart from it.¹⁹

Whatever it may have been, the rule endorsed in the treason cases and annointed by the English scholars found its way almost immediately into American law. In 1827, the United States Supreme Court adopted it in full in an opinion by Justice Story in *United States v. Gooding*,²⁰ quoting Starkie on that point.²¹ The Court found that a coconspirator statement could be received so long as it was "connected with acts in furtherance of the objects" of the venture, and the Court was careful to intimate that the result might be different for "naked declarations" which were "unaccompanied with" furthering acts by the declarant.²² A number of state courts had discovered and embraced the English rule at about the time *Gooding* was decided.²³ The American scholar Greenleaf, whose treatise Wigmore later took over and made his own, announced tersely that statements made by a coconspirator "while the conspiracy was pending, and in furtherance of the design," are admissible against others charged with conspiring.²⁴ Wigmore never doubted it,²⁵ and the Supreme Court has repeatedly considered and approved

18. 1 T. STARKIE, *supra* note 11, at 46.

19. 1 S. PHILLIPPS, *supra* note 11, at 210.

20. 25 U.S. (12 Wheat.) 460, 461 (1827).

21. *Id.* at 470.

22. *Id.*

23. See, e.g., *Reitenbach v. Reitenbach*, 1 Rawle (Pa.) 362, 365 (1829); *Claytor v. Anthony*, 27 Va. (6 Rand.) 285, 300-01 (1828); *Broughton v. Ward*, 1 Tyler (Vt.) 137, 139 (1801); *Patton v. Freeman*, 1 N.J.L. 134, 136 (1791).

24. 3 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 89 (1853).

25. See 2 J. WIGMORE, A TREATISE ON THE LAW OF EVIDENCE §§ 1077, 1079 (1904); 4 J. WIGMORE, *id.* (3d ed. 1940) (in the same language, both editions invoke the general principle that when one person is affected, by virtue of substantive principles, by the act of another, "there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally" inasmuch as "the greater may here be said to include the less[er]," and this result is also supportable "as a matter of fairness," since a person chargeable with the acts of another "can hardly object to the use of such evidence as the other may furnish"; hence, "the admissions of a coconspirator may be used to affect the proof against the others, on the same conditions as his acts when used to create their legal liability"; the question here is "purely one of criminal law, or of conspiracy as affecting joint civil liability, and its solution is not to be sought in any principle of evidence").

the doctrine in this form.²⁶

What is perhaps most striking about the American adoption of this rule is that the *Gooding* case involved a coconspirator statement that had obvious hearsay significance. In *Gooding*, the defendant was a shipowner prosecuted for alleged illegal trading in slaves. The opinion by Justice Story upheld receipt against the defendant of a statement by the ship's captain, uttered in the course of attempting to hire a first mate, in which he described the purposes of the voyage and explained that defendant stood behind the venture and had the wherewithal to pay the expenses.²⁷ Although the Court in *Gooding* never expressly mentioned the hearsay doctrine, it apparently meant to endorse unrestricted use of the statement. In fact, any doubt that coconspirator statements within the rule adopted in *Gooding* may be used as proof of what they assert has long since disappeared.²⁸

Gooding presents a good example of a coconspirator statement

26. See *United States v. Nixon*, 418 U.S. 683, 701 (1974); *Anderson v. United States*, 417 U.S. 211, 218 (1974); *Dutton v. Evans*, 400 U.S. 74, 81 (1970); *Wong Sun v. United States*, 371 U.S. 471, 490 (1963); *Lutwak v. United States*, 344 U.S. 604, 617-18 (1953); *Krulewitch v. United States*, 336 U.S. 440, 442-43 (1949); *Glasser v. United States*, 315 U.S. 60, 74-75 (1942); *Wiborg v. United States*, 163 U.S. 632, 657-58 (1896); *Clune v. United States*, 159 U.S. 590, 593 (1895); *St. Clair v. United States*, 154 U.S. 134, 149-50 (1894); *Brown v. United States*, 150 U.S. 93, 97-98 (1893); *Logan v. United States*, 144 U.S. 263, 308-09 (1892); *Nudd v. Burrows*, 91 U.S. 426, 438 (1875); *Lincoln v. Claflin*, 74 U.S. (7 Wall.) 132, 138-39 (1868); *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 364 (1829); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 470 (1827).

27. 25 U.S. (12 Wheat.) 460, 470 (1827).

As reported in the court's opinion, the mate testified that while the vessel was docked at St. Thomas in the West Indies,

Captain Hill, the master of the vessel, then and there proposed to the witness to engage on board the General Winder as mate, for the voyage then in progress, and described the same to be a voyage to the coast of Africa, for slaves, and thence back to Trinidad de Cuba; that he offered to the witness \$70 per month, and five dollars per head for every prime slave which should be brought to Cuba; that on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning, (as the witness understood) John Gooding, the defendant.

25 U.S. (12 Wheat.) at 467.

28. It appears in *Gooding* that the relationship of principal and agent, as between defendant and declarant, was actual rather than fictional. In most conspiracy cases any such relationship can be inferred and defined with far less precision, if at all. 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, 14-15 (1975) (suggesting that "*Gooding* involved a business venture which was every bit as commercial as it was illicit, and which was accordingly organized and operated along conventional business lines"; therefore "the coconspirators shared a classic civil agency relationship"; author notes that while the exception "is generally traced to" *Gooding*, "the elastic concepts of 'agency' embodied in current conspiracy law have eroded the original agency rationale").

admissible under the American exception. The Court's later decision in *Logan v. United States*²⁹ presents an example of an inadmissible coconspirator statement which did not satisfy the furtherance requirement. In *Logan*, statements made by one alleged conspirator to another, identifying a third as "one of the mob"³⁰ that had ambushed a group of prisoners, were at cross-purposes with an attempt to cover up the latter's involvement in the ambush, and so were "not in execution or furtherance of the conspiracy, but were mere narratives of a past fact."³¹

The American coconspirator exception came to consist of three elements.³² Coconspirator statements were to be admissible over a hearsay objection if it could be shown (1) that declarant and defendant were coconspirators (the "coventurer" requirement), and that the statement had been made (2) during the course of the venture (the "pendency" requirement), and (3) in furtherance thereof (the "furtherance" requirement). The framers of rule 801(d)(2)(E) elected not to alter the received American tradition, and instead carried it forward intact.³³

B. *The Exception in Theory*

The English commentators offered two explanations for admitting coconspirator statements. One was substantive, and rested upon an agency principle holding each conspirator responsible for the acts of his coventurers. The other was evidential, and rested upon the idea that furthering statements and acts are inseparably fused. Modern American authorities accept the substantive agency theory,

29. 144 U.S. 263 (1892).

30. *Id.* at 274.

31. *Id.* at 309.

32. *See, e.g.,* *United States v. Nixon*, 418 U.S. 683, 701 (1974); *Anderson v. United States*, 417 U.S. 211, 218 (1974). Post-Rules authority commonly paraphrases the requirements of FED. R. EVID. 801(d)(2)(E) in this way. *See, e.g.,* *United States v. Katsougrakis*, 715 F.2d 769, 778 (2d Cir. 1983); *United States v. Lieberman*, 637 F.2d 95, 102 (2d Cir. 1980); *United States v. Lyles*, 593 F.2d 182, 194 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979); *see generally* the discussion of the coconspirator exception in 4 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 427 (1980); P. MARCUS, *PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES* §§ 5.01-.06 (1983).

33. The coconspirator exception did not undergo any change, either during the rulemaking process or at the hands of Congress, and was ultimately enacted in the form originally proposed. *See* 4 D. LOUISELL & C. MUELLER, *supra* note 32, § 410. The Advisory Committee Note accompanying the provision observes simply that the provision is written "in the accepted pattern," and it defends the pendency and furtherance requirements by a laconic observation that the underlying agency theory is "a fiction" which should not be expanded. FED. R. EVID. 801(d)(2)(E) advisory committee note (1975).

though sometimes recasting it in adversary terms, reject or ignore the evidential theory, and add an appeal to necessity. Both the English and American explanations emphasize the "furtherance" idea and condemn the receipt of "mere narrative" statements.

The substantive agency theory employed a syllogism which linked and likened statements to acts of the venture. The major premise was as follows: The act of one conspirator in furtherance of the venture is legally considered the act of all conspirators. The minor premise was as follows: "[A] declaration accompanying an act strongly indicates the nature and intention of the act," and may even be considered "part of the act" itself.³⁴ Hence the following conclusion: "[A] declaration made by one conspirator at the time of doing an act in furtherance of the general design, is evidence against the other conspirators."³⁵

It was this theory that the Supreme Court adopted in the *Gooding* case, which upheld receipt of the captain's statement against the shipowner.³⁶ The shipowner had appointed declarant as his agent and master of the vessel, and "[w]hatever the agent does, within the scope of his authority, binds his principal, and is deemed his act."³⁷ This rule, said the Court, is not "confined" to civil cases, but applies with equal force in criminal prosecutions.³⁸ Here, the captain had "implied authority to hire a crew," which justified such "declarations and explanations as are proper to attain the object," and these were admissible because "connected with acts in furtherance of the objects of the voyage."³⁹ Greenleaf echoed the theme,⁴⁰ as did Wigmore after him:

So far as one person . . . is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. . . . [T]he greater may here be said to include the less[er]. . . .⁴¹

Much the same thought finds expression in twentieth century federal

34. 2 T. STARKIE, *supra* note 11, at 403; see 1 S. PHILLIPPS, *supra* note 11, at 199-200.

35. 2 T. STARKIE, *supra* note 11, at 403.

36. 25 U.S. (12 Wheat.) 460 (1827).

37. *Id.* at 469.

38. *Id.*

39. *Id.* at 470.

40. 3 S. GREENLEAF, *supra* note 24, at 88-89.

41. 2 J. WIGMORE, *supra* note 25, §§ 1077, 1079.

opinions.⁴²

In modern discussions, the agency theory sometimes wears a slightly different look. It is *fair* to receive in evidence against each alleged conspirator the furthering statements of others because in joining the venture each impliedly authorizes the others to speak, and so assumes the risk of the consequences.⁴³ Here, the agency theory becomes a general tenet of adversary philosophy, and the thought finds expression in two more particular forms: (1) a party is responsible to make his own case, both in and out of court, so his own statements and those of persons for whom he is responsible should be provable against him whenever relevant; and (2) as to his own statements and those by persons for whom he is responsible, a party should not be heard to complain of a lack of opportunity to cross-examine.

The other theory, which attempted an evidential explanation, suggested that "the [hearsay] objection ceases" when a statement is "in itself a fact, and a part of the *res gestae*."⁴⁴ As to any such statement, Starkie wrote, "importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances"⁴⁵ There seem to be two points here: One is that the statement is inseparable from the act, and so must be provable if the act is to be properly understood. The other is that circumstances corroborate the statement, and thus lessen the importance of the credibility of the declarant. Phillipps added that what is said at the time of the act is likely to be "the best" proof of the nature of equivocal acts, for it is "more likely to be a true disclosure" of declarant's thoughts than any "subsequent statements."⁴⁶ In other words, immediacy makes

42. See, e.g., *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974); *United States v. Tombrello*, 666 F.2d 485, 490 (11th Cir.), cert. denied, 456 U.S. 994 (1982); *United States v. Robinson*, 651 F.2d 1188, 1196 (6th Cir.), cert. denied, 454 U.S. 875 (1981); *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979).

43. See 2 J. WIGMORE, *supra* note 25, §§ 1077, 1079; *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir. 1983) (Unlike statements within hearsay exceptions, which are admitted because of their "special trustworthiness," coconspirator statements are within the admissions category, which has a "different" rationale; admissions do not come in "because of confidence in their inherent reliability," but rather "because a party will not be heard to object that s/he is unworthy of credence." FED. R. EVID. 801(d)(2)(E) treats coconspirator statements as admissions "because of the legal fiction that each conspirator is an agent of the other and that the statements of one can therefore be attributable to all."), cert. denied, 104 S. Ct. 344 (1983).

44. 1 T. STARKIE, *supra* note 11, at 46-47.

45. *Id.* at 47.

46. 1 S. PHILLIPPS, *supra* note 11, at 195.

the statement trustworthy. Starkie and Phillipps agreed that coconspirator statements are part of the *res gestae*.

The Supreme Court's opinion in *Gooding* invoked the *res gestae* shibboleth, but apparently drew from it only the idea that act and statement are sometimes "so combined . . . as to be inseparable without injustice."⁴⁷ The Court did not suggest that the statement in question was reliable or corroborated, or that circumstances diminished the importance of declarant's credibility.

The Latinism became a staple in American opinions on coconspirator statements,⁴⁸ but it never attained the precision of a term of art. Instead it found a multitude of uses⁴⁹ and became, as it may have been in the beginning, a substitute for analysis.⁵⁰ Scholars rightly crusaded against it,⁵¹ and it does not serve as an explanation of the coconspirator exception. The underlying ideas in the evidential

47. 25 U.S. (12 Wheat.) at 470.

48. See, e.g., *Wiborg v. United States*, 163 U.S. 632, 657-58 (1896) (in order to be admissible, coconspirator statements "must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance"); *St. Clair v. United States*, 154 U.S. 134, 149 (1894) ("if part of the *res gestae*," coconspirator statements are "admissible for the purpose of presenting to the jury an accurate view of the situation" because "[c]ircumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence"); *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 365 (1829) ("any act or declaration of one of the parties [to a conspiracy], in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others").

49. See, e.g., *Wabisky v. D.C. Transit Sys., Inc.*, 309 F.2d 317, 318 (D.C. Cir. 1962) (the term "*res gestae*" embraces "at least four distinct exceptions to the hearsay rule," including: "(1) declarations of present bodily condition; (2) declarations of present mental state and emotion; (3) excited utterances; (4) declarations of the present sense impression") (opinion by then Circuit Judge Burger).

50. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae*, 15 AM. L. REV. 1, 10 (1881), reprinted in J. THAYER, *LEGAL ESSAYS* 207, 244 (1908).

The law of hearsay was quite unsettled [at the end of the eighteenth century]; lawyers and judges seem to have caught at the term *res gesta* . . . as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the 'limbo' of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one,—some things belonged there, other things might, for purposes of present convenience, be put there. We have seen that the singular form of the phrase [*res gesta*] soon began to give place to the plural [*res gestae*]; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.'

Id.

51. See, e.g., J. THAYER, *supra* note 50; C. MCCORMICK, *MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 288 (2d ed. 1972); 6 J. WIGMORE, *supra* note 25, §§ 1745-57; Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 *Yale L.J.* 229 (1922).

theory never found their way into the American law of coconspirator statements, and are all but forgotten.

As if to make up the deficit, modern commentators have suggested that the exception exists largely because it is necessary as a means of convicting conspirators. Since conspiracies are dangerous to society and hard to prove at trial, a relaxation of the hearsay doctrine is required.⁵² Courts occasionally find something in this view.⁵³

C. *The Exception Applied*

The coventurer requirement is in one sense straightforward. In conspiracy prosecutions, this element in the exception coincides with the elements that comprise the crime of conspiracy,⁵⁴ with the result that evidence of guilt tends also to satisfy the coventurer requirement of the exception. Sometimes the proof is direct, in the form of statements by the defendant himself (which are of course admissible against him under the admissions doctrine),⁵⁵ but it is settled that circumstantial evidence may suffice, and in fact such proof is far more common. Usually it takes the form of evidence that defendant and declarant were seen together over time, coupled with evidence of conduct by the two, where the entire picture suggests a common understanding and coordinated action toward a mutual goal.⁵⁶

52. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1166 (1954) (the "true reason" for the exception is that "there is a great probative need for such testimony," since "conspiracy is a hard thing to prove," and the expansion of the substantive doctrine "created a tension solved by relaxation in the law of evidence," so coconspirator statements "are admitted out of necessity"); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 989 (1959) ("necessity theory" may explain "the substitution of pendency or relation for the requirement of furtherance," since the former are more easily satisfied than the latter, hence explaining "the extensions" of the coconspirator exception, but this theory "fails to explain the limitations on the coconspirator rule itself, such as the furtherance requirement").

53. *E.g.*, *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979) (coconspirator exception "is largely a result of necessity, since it is most often invoked in conspiracy cases in which the proof would otherwise be very difficult and the evidence largely circumstantial").

54. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969) ("in a conspiracy trial the preliminary issue on the admissibility of evidence [of a coconspirator statement] coincides with the ultimate one of the defendant's guilt"), *cert. denied*, 397 U.S. 1028 (1970).

55. *United States v. Riccobene*, 709 F.2d 214, 226 (3rd Cir. 1983), *cert. denied*, 104 S. Ct. 157 (1983); *United States v. Simpson*, 709 F.2d 903, 909 (5th Cir.), *cert. denied*, 104 S. Ct. 360 (1983); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 320 (4th Cir. 1982); *United States v. Heffington*, 682 F.2d 1075, 1084-85 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 734 (1983); *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 815 (1983); *United States v. Roe*, 670 F.2d 956, 963 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 126 (1983); *United States v. Friedman*, 593 F.2d 109, 116 (9th Cir. 1979).

56. *United States v. Kelly*, 718 F.2d 661, 663-64 (4th Cir. 1983) (defendant and declarant seen conferring together by undercover agent; sometime later during drug sale to under-

In another sense, however, the coventurer requirement is anything but straightforward: For one thing, it leads (at least as framed in the rule) to the conclusion that under the exception a defendant charged with conspiring cannot offer his own statement against the government,⁵⁷ although it is somewhat unclear whether he might offer his own or another's statement against still others charged with conspiring. For another, it became entangled in a procedural quagmire, which is treated separately hereafter.⁵⁸

The pendency requirement seems and often is mechanical. Pre-conspiracy statements are not within the exception,⁵⁹ nor are post-conspiracy statements.⁶⁰ Statements by a conspirator after his arrest likewise do not qualify,⁶¹ upon the ground that as to the declarant

cover agent, declarant leaves and consults with defendant); *United States v. Ammar*, 714 F.2d 238, 249-51 (3d Cir.) (defendant directed declarant to deliver package shown to contain heroin; defendant shown to have met other members of the conspiracy "repeatedly" on occasions "coinciding with the heroin importations"), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Robinson*, 707 F.2d 811, 813-14 (4th Cir. 1983) ("direct evidence" established participation of declarants in the venture; the proof showed shipment of narcotics from one to the other, and that one kept receipts for shipments in the other's name; evidence also indicated that defendant participated in telephone calls from the home of one declarant to the home of another; statements by the declarants were properly received under the coconspirator exception); *United States v. Fernandez-Roque*, 703 F.2d 808, 811 (5th Cir. 1983) (alleged co-offender who had pleaded guilty described background of the venture, his travel at the request of one conspirator to meet with other conspirators, defendant's request to be picked up and brought to meet with other conspirators, and defendant's statement of intent at the meeting; following the meeting a murder was committed consistent with defendant's stated intent, satisfying the coventurer requirement); *United States v. Guerro*, 693 F.2d 10, 12 (1st Cir. 1982) (coventurer requirement satisfied by evidence of defendant's "many suspicious movements," including "his interaction" with an alleged coconspirator and his actions in "procuring supplies" used in the alleged conspiracy).

57. *United States v. Anderton*, 679 F.2d 1199, 1202-03 (5th Cir. 1982) (coconspirator exception "does not avail one in this rather unusual position who seeks to introduce the evidence in his own behalf").

58. See *infra* text accompanying notes 139-54.

59. *United States v. Astorga-Torres*, 682 F.2d 1331, 1336 (9th Cir. 1982) (harmless error to admit for all purposes a statement made before the conspiracy was shown to have commenced, where impact of erroneous jury instruction was limited and evidence of defendant's involvement was abundant), *cert. denied*, 103 S. Ct. 455 (1983).

60. *United States v. Gullett*, 713 F.2d 1203, 1213 (6th Cir. 1983) (harmless error to receive coconspirator statements after two members of the venture had been arrested, and two more were under investigation, since "the conspiracy had in fact terminated").

However, the mere arrest of some members of the venture does not terminate the conspiracy for purposes of applying the exception. *United States v. Ammar*, 714 F.2d 238, 253-54 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983).

61. *United States v. Poitier*, 623 F.2d 1017, 1020 (5th Cir. 1980). *Contra United States v. Ammar*, 714 F.2d 238, 252-53 (3d Cir.) (arrest "does not necessarily terminate" declarant's involvement; here the post-arrest statement was apparently made in an effort to assist in the collection of money owed from heroin transactions, and was within the exception), *cert. denied*,

the conspiracy terminated when he was apprehended. While similar logic might suggest that statements by at-large members of the venture after defendant's arrest are not within the exception, the authorities conflict in this instance,⁶² although it seems that if defendant withdraws from the venture the statements by his former colleagues made thereafter are not within the exception.⁶³ Statements made by members of the venture before defendant joined have generally been held admissible under the exception, apparently on the theory that, in joining, defendant ratified or assumed responsibility for what had already transpired.⁶⁴

In a series of opinions, the Supreme Court has steadfastly insisted that a conspiracy ends, for purposes of the exception, when its principal objects have been accomplished or thwarted.⁶⁵ While this

104 S. Ct. 344 (1983).

62. Upholding receipt are the following: *United States v. Saavedra*, 684 F.2d 1293, 1298-99 (9th Cir. 1982); *United States v. Mason*, 658 F.2d 1263, 1269-70 (9th Cir. 1981); *United States v. Kahan*, 572 F.2d 923, 933-36 (2d Cir.), *cert. denied*, 439 U.S. 833 (1978). Requiring exclusion are the following: *United States v. Barnes*, 586 F.2d 1052, 1059 (5th Cir. 1978); *United States v. Sisto*, 534 F.2d 616, 622 n.7 (5th Cir. 1976); *United States v. Killian*, 524 F.2d 1268, 1272 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

63. *United States v. Mardian*, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976).

64. *United States v. Cochran*, 697 F.2d 600, 604 (5th Cir. 1983) (coconspirator statements admissible against defendant "who later joined the conspiracy"); *United States v. Piccolo*, 696 F.2d 1162, 1168 (6th Cir. 1983) (statements "made prior to the defendant's joining may be admissible"); *United States v. Holder*, 652 F.2d 449, 450-51 (5th Cir. 1981) ("otherwise admissible declaration . . . is admissible against members of the conspiracy who joined after the statement was made"). *Contra United States v. Gee*, 695 F.2d 1165, 1169 (9th Cir. 1983) (statements made before defendant "joined the conspiracy are not admissible to show his participation").

65. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (post-arrest confession not within coconspirator exception; "confession was not the fruit of [the] arrest and was therefore properly admitted at trial"); *Krulewitch v. United States*, 336 U.S. 440, 442-43 (1949) (alleged interstate transportation of women for purposes of prostitution; post-conspiracy comment by one woman implying defendant's guilt was improperly admitted; this statement "was not made pursuant to and in furtherance of objectives of the conspiracy" because the statement, if made, came "after those objectives either had failed or had been achieved"; hence, it could not be received "on the theory that it was made in furtherance of the alleged criminal transportation undertaking"); *Fiswick v. United States*, 329 U.S. 211, 217 (1946) ("confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise," but "rather a frustration of it"); *Logan v. United States*, 144 U.S. 263, 274, 309 (1892) (since conspiracy ended at the time of the attack upon the prisoners and dispersion of the mob, subsequent statements were inadmissible: "After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others."); *see Anderson v. United States*, 417 U.S. 211, 218-19 (1974) (dictum) (limit not applicable to post-conspiracy acts); *Lutwak v. United States*, 344 U.S. 604, 617-18 (1953) (same); *see also Grunewald v. United States*, 353 U.S. 391, 399-406 (1957) (reaffirming doctrines of *Lutwak*, 344 U.S. 604, and *Krulewitch*, 336 U.S. 440, in context of discussing duration of conspiracy for purposes of

limit is sometimes expressed as a temporal aspect of the furtherance requirement (only an ongoing venture may be "furthered"), it has also taken on a life of its own. In its major opinion in *Lutwak v. United States*,⁶⁶ the Supreme Court refused to extend the time limit beyond this point to the concealment phase, though it was to acknowledge later that if it is in the very nature of the venture to cover up the events or if the conspirators plan a coverup from the beginning, then statements made during that phase may be admitted.⁶⁷ Moreover, the Court took the view that *acts* by coconspirators are not subject to this restriction (including verbal acts, meaning words whose assertive aspect is not important),⁶⁸ and it declined "to constitutionalize" the pendency requirement, leaving states apparently free to receive post-conspiracy statements under their versions of the exception.⁶⁹

The furtherance requirement has been considered satisfied where the statement amounts to an attempt to persuade an outsider to do business with the venture,⁷⁰ to recruit new members,⁷¹ to ob-

statute of limitations).

66. 344 U.S. 604 (1953).

67. *Grunewald v. United States*, 353 U.S. 391, 399-405 (1957) (accepting government theory that aim of alleged conspiracy to defraud government included obtaining a "no prosecution" ruling and "absolute immunity from tax prosecution," hence approving receipt of proof of acts of concealment). The Court in *Grunewald* stated: "[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". See *United States v. Fortes*, 619 F.2d 108, 117 (1st Cir. 1980); *United States v. Gleason*, 616 F.2d 2, 23 (2d Cir. 1979), *cert. denied*, 445 U.S. 931 (1980); *United States v. Del Valle*, 587 F.2d 699, 704 (5th Cir. 1979), *cert. denied*, 442 U.S. 909 (1979); *United States v. Hickey*, 596 F.2d 1082, 1089-90 (1st Cir.), *cert. denied*, 444 U.S. 853 (1979); *United States v. Mackey*, 571 F.2d 376, 382-84 (7th Cir. 1978); *United States v. Diez*, 515 F.2d 892, 897-98 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); see also *United States v. Xheka*, 704 F.2d 974, 985-86 (7th Cir. 1983) (relying upon *Grunewald*, court suggests that since arson conspiracy continued until insurance was collected, statements made after the fire were within the coconspirator exception).

68. *Anderson v. United States*, 417 U.S. 211, 218 (1974) ("ongoing conspiracy requirement is . . . inapplicable to . . . acts of alleged conspirators, which would not otherwise be hearsay"; here post-conspiracy perjured testimony by alleged conspirator was properly received as proof of purpose and motive); *Lutwak v. United States*, 344 U.S. 604, 617 (1953) (post-conspiracy acts may be proved; here the behavior of ostensibly married couples in living separately and obtaining divorces was properly proved "to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies. . .").

69. *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (Court rejects constitutional attack upon post-conspiracy statement received under Georgia version of coconspirator exception, reasoning that "it does not follow that because the federal courts have declined to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy, [that] such an extension automatically violates the Confrontation Clause").

70. *United States v. Peacock*, 654 F.2d 339, 350-51 (5th Cir. 1981), *vacated in part on*

tain (that is, encourage or coerce) performance by a conspirator,⁷² or to prepare future strategy.⁷³ Regularly, statements such as these have been thought to satisfy the requirement when they identify members of the venture or explain their roles in it.⁷⁴ And the cases make it at least implicitly clear that the intent of the declarant is what counts, and not the actual effect of the statement.⁷⁵ Hence,

other grounds, 686 F.2d 356 (5th Cir. 1982); *United States v. Knippenberg*, 502 F.2d 1056, 1061 (7th Cir. 1974).

71. *United States v. Goodman*, 605 F.2d 870, 878 (5th Cir. 1979) (statements seeking to persuade a person to join conspiracy, and later to keep him abreast of its current status); *United States v. Mangan*, 575 F.2d 32, 43-44 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978); *United States v. Dorn*, 561 F.2d 1252, 1256-57 (7th Cir. 1977) (statements with which declarant sought to recruit his wife as a member were properly received; statements "made by conspirators to prospective co-conspirators for membership purposes" amount to "acts in furtherance of the conspiracy").

72. *United States v. Ammar*, 714 F.2d 238, 252 (3d Cir.) (statements among coconspirators further the venture where they "provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy . . ."); *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Whitten*, 706 F.2d 1000, 1018 (9th Cir. 1983) (coconspirator statements furthered venture where they were intended "to assure . . . continued participation in [declarant's] drug activities"); *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. 1981) ("[p]uffing, boasts, and other conversation" are within the exception when used "to obtain the confidence of one involved in the conspiracy," as are statements by a conspirator "to allay suspicions"), *cert. denied*, 103 S. Ct. 121 (1982); *United States v. Anderson*, 642 F.2d 281, 285 (9th Cir. 1981) (statement identifying fellow conspirator as source of heroin furthered conspiracy, since it was "made for the purpose of inducing continued participation").

73. *United States v. Hamilton*, 689 F.2d 1262, 1269-71 (6th Cir. 1982) (conversations among coconspirators about previous transactions furthered the venture by "making plans to collect [the] money due"), *cert. denied*, 103 S. Ct. 753 (1983); *United States v. Peacock*, 654 F.2d 339, 350 (5th Cir. 1981) (conversation in which coconspirator "was clearly attempting to make preparations for" a future arson); *United States v. Eubanks*, 591 F.2d 513, 520 (9th Cir. 1979) (statements describing meetings, asserting the interest of a named buyer, and suggesting that the sellers should see the money first, furthered the conspiracy "because they set in motion transactions that were an integral part of the heroin distribution scheme").

74. *United States v. Handy*, 668 F.2d 407, 408 (8th Cir. 1982) (statements by one conspirator to another "identifying a fellow coconspirator" or his "role"); *United States v. Peacock*, 654 F.2d 339, 350 (5th Cir. 1981) (conversation in which one alleged conspirator informed another that a third "was a dangerous ringleader who had to be watched in order to insure one's own safety"), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982); *United States v. Anderson*, 642 F.2d 281, 285 (9th Cir. 1981) (statement by one conspirator to another, identifying a third as a source of heroin); *United States v. Patton*, 594 F.2d 444, 447 (5th Cir. 1979) (statements "by one conspirator to a fellow conspirator identifying yet another conspirator as the ultimate purchaser of the marijuana" satisfied furtherance requirement; reviewing court notes that "a statement by a person acting as a connection informing the ultimate purchaser of the identity of the source" furthers the venture and suggests that there is "no basis for a legal distinction" between the two situations).

75. *E.g.*, *United States v. Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982) (rejecting defense argument that coconspirator statements "must *actually* further the conspiracy to be admissible," court concludes that "[i]t is enough that they be intended to promote the conspir-

statements to undercover agents regularly get in, despite the fact that in the end these declarations frustrate the venture.⁷⁶ It is the furtherance requirement which leads to exclusion of "mere narrative" statements.⁷⁷

II. THE VARIETIES OF COCONSPIRATOR STATEMENTS

Assuming relevancy, the use of coconspirator statements in conspiracy cases may implicate the hearsay doctrine in any one of four different ways. Some such statements are simply verbal acts. Some are hearsay. Some are both verbal acts and hearsay, and may usefully be termed "dual aspect" statements. And some are intertwined with conduct which is not excludable under a hearsay objection, and may be provable to lend meaning to that conduct, either because they are verbal acts or because they are within the state-of-mind exception. These may usefully be termed "action statements." The "furtherance" requirement of the coconspirator exception suggests that it applies only to statements in the latter two categories.

These categories are for the most part familiar to students of evidence law. But in the discussion that follows the verbal act category is expanded somewhat beyond its usual meaning, and the cate-

torial objectives"; hence statements to already-arrested coconspirator cooperating with the government could be received), *cert. denied*, 103 S. Ct. 153-54 (1983).

76. *United States v. Ammar*, 714 F.2d 238, 251-52 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Hamilton*, 689 F.2d 1262, 1269-70 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 753-54 (1983).

77. *United States v. Snider*, 720 F.2d 985, 992 (8th Cir. 1983) (statements do not satisfy furtherance requirement where they "merely inform the listener of the declarant's activities"; it is harmless error to admit statements by coconspirator to visiting girlfriend); *United States v. Foster*, 711 F.2d 871, 880-81 (9th Cir. 1983) (it is harmless error to admit "mere narrative declarations" where they did not amount to attempts to persuade an outsider to enter into a deal or to obtain cooperation or assistance from fellow conspirators); *United States v. Means*, 695 F.2d 811, 818 (5th Cir. 1983) (it is harmless error to admit coconspirator statements which amounted to "mere idle conversation"); *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) ("idle chatter" not within coconspirator exception, though it was properly received in this case as declaration against interest); *United States v. Castillo*, 615 F.2d 878, 883 (9th Cir. 1980) ("casual admission" not within coconspirator exception); *United States v. Eubanks*, 591 F.2d 513, 520-21 (9th Cir. 1979) (statements to declarant's common-law wife, who did not join conspiracy until much later, did not further this venture; they amounted to casual admissions to a person who declarant trusted and were not designed to recruit the wife; as to some statements declarant "was merely informing [her] about his activities"; as to others, there was no indication that they "were any more than conversations between conspirators that did nothing to advance the aims of the alleged conspiracy," as they were not designed to induce "continued participation" of the wife "or to allay her fears"); *United States v. Moore*, 522 F.2d 1068, 1077 (9th Cir. 1975) ("casual admission of culpability to someone [declarant] had individually decided to trust" did not satisfy furtherance requirement), *cert. denied*, 423 U.S. 1049 (1976).

gory of action statements is the invention of the author, or at least his attempt to give modern meaning to an old idea.

Verbal Acts. The term "verbal act" is somewhat protean and overworked, but it serves in this context to describe the coconspirator statement which has probative worth independent of its assertive force. Such independent probative worth may be a function of substantive legal principles which apply in the case, or it may simply be a function of logic. In either case, the statement is viewed as behavior, the declarant as actor, and his verbal act is not hearsay.⁷⁸

One of the substantive legal principles is found in statutes defining conspiracy that include a requirement of an "overt act" to complete the crime.⁷⁹ In an early English case which is often cited as one of the origins of the modern coconspirator exception, for example, the prosecutor was permitted to offer, against a defendant charged with sedition, evidence that another alleged conspirator had taken a political tract to a printer and asked that it be printed. In the court's view, the evidence showed a "transaction" of the venture and "an act which shall bind" the defendant.⁸⁰ If the federal sedition statute required an overt act, there is little doubt that proof of such behavior would suffice, and modern federal decisions make it clear that verbal behavior may satisfy such requirements in whole or in part.⁸¹

78. Where a coconspirator statement has only non-hearsay significance in a case, resort to the coconspirator exception of FED. R. EVID. 801(d)(2)(E) is unnecessary. Courts frequently resort to it anyway. *E.g.*, *United States v. Layton*, 720 F.2d 548, 555-58 (9th Cir. 1983); for a discussion of *Layton*, see *infra* note 83.

This habit simply confuses matters. See generally the discussion of nonhearsay uses of out-of-court statements in 4 D. LOUISELL & C. MUELLER, *supra* note 32, § 417.

Some courts rightly recognize that coconspirator statements having only non-hearsay significance need not be fit within any exception. See, *e.g.*, *United States v. Gibson*, 690 F.2d 697, 700-01 & n.1 (9th Cir. 1982) (alleged wire fraud and related crimes, arising out of alleged scheme to sell fast food franchises; representations by salespeople were properly admitted against defendant; they tended to prove "the existence of a scheme" and were "not hearsay"; what was important was "to establish the fact that the salesmen and employees had made the statements," although ultimately "the truth or falsity of the statements was important to the outcome of the [fraud] case"), *cert. denied*, 103 S. Ct. 1446 (1983).

79. Some federal statutes defining criminal conspiracy require overt acts and some do not. See *infra* note 98.

80. *Trial of Thomas Hardy*, 24 How. St. Tr. 200, 436-51, 542-45 (1794).

81. *United States v. Civella*, 648 F.2d 1167, 1174 (8th Cir.) (upholding convictions for bribing public officials: "Telephone conversations and meetings in which plans and arrangements are made in furtherance of the conspiracy are overt acts."), *cert. denied*, 454 U.S. 867 (1981); *United States v. Marable*, 574 F.2d 224, 230 (5th Cir. 1978) (alleged drug conspiracy; defendant's "telephone conversations" and his attendance at meetings "discussing and arranging the sale of heroin" amounted to "overt acts in furtherance of the conspiracy to distribute heroin"; court appears to overlook fact that underlying statute requires no overt act; court's position replies to defense contention "that he took no act in furtherance of the conspiracy");

Another of these legal principles is the one which holds that conspiracy carries with it a kind of accomplice liability for other "substantive" crimes committed by members of the venture in furtherance of its purposes.⁸² It is commonplace for indictments charging conspiracy to include charges that the defendants also committed crimes such as drug dealing or bank robbery, and these may well involve verbal behavior. Suppose, for example, that two defendants are prosecuted for conspiracy to rob a bank and for bank robbery. Suppose further that it can be shown that one entered the bank, brandished a weapon, and demanded cash from the teller while the other waited in a car outside, and that the two then sped off together. Assuming that the court applies the principle of accomplice liability, the words of the perpetrator are verbal acts which may be offered in evidence against his codefendant, as proof of his guilt (by

United States v. Eucker, 532 F.2d 249, 254 (2d Cir. 1976) (alleged securities fraud; reviewing court rejects contention that defendant was "at most a silent onlooker," approving jury instruction that planned silence may be "an act in furtherance of a conspiracy" which amounts to "an overt act"), *cert. denied*, 429 U.S. 1044 (1977); Bartoli v. United States, 192 F.2d 130, 132 (4th Cir. 1951) (telephone conversations among alleged conspirators, between Chicago and West Virginia, "were all overt acts" in West Virginia).

Cf. United States v. Helmich, 704 F.2d 547, 549 (11th Cir.) (alleged conspiracy to commit espionage; taking steps to collect money after transmitting secrets amounts to overt act for purposes of statute of limitations; "action lawful by itself" may "establish a requisite overt act in furtherance of a conspiracy"), *cert. denied*, 104 S. Ct. 353 (1983); United States v. Slocum, 695 F.2d 650, 654 (2d Cir. 1982) (alleged securities and wire fraud; acts of check-kiting amounted to overt acts despite fact that they did not themselves amount to the charged substantive crimes; overt acts need not even be criminal in nature), *cert. denied*, 103 S. Ct. 1260 (1983).

82. In the federal system, the crime of conspiracy carries accomplice liability for substantive offenses committed during and in furtherance of the venture under the doctrine of Pinkerton v. United States, 328 U.S. 640 (1946). *See infra*, notes 99-100 and accompanying text. *See also, e.g.*, United States v. Hamilton, 689 F.2d 1262, 1270 n.4 (6th Cir. 1982) (in prosecution for alleged illegal dealing in explosives and related conspiracy, the orders for such explosives were "verbal acts" and therefore not "hearsay at all," hence "unaffected by the coconspirator rule"), *cert. denied*, 103 S. Ct. 753-54 (1983); United States v. Saavedra, 684 F.2d 1293, 1297-98 (9th Cir. 1982) (alleged wire fraud and related conspiracy; statements accomplishing the fraud were properly received, and "were not, in any event, hearsay," so reviewing court did not have to reach defense contention that predicate of FED. R. EVID. 801(d)(2)(E) was not established); United States v. Bruner, 657 F.2d 1278, 1284-85 (D.C. Cir. 1981) (alleged conspiracy to distribute Preludin and Dilaudid illegally, by sending overweight women to physicians to obtain prescriptions that were later used to obtain and resell the drugs; evidence of prescriptions taken from office of physician who had pleaded guilty of conspiring was properly received; in fact, the prescriptions were "not hearsay," since they were not offered to prove the addresses of the doctor or any of his patients, or even to prove that the doctor believed that the patients needed the drug; rather, they were offered "to show [that] they were used to obtain drugs" [alternate ground; they would also satisfy the coconspirator exception]).

complicity) of the robbery.

Finally, a coconspirator statement may amount to a verbal act because it has logical relevance in the case independent of its assertive force, amounting to a kind of circumstantial evidence.⁸³ Here the statement is inevitably more than an assertion: Sometimes the act of uttering the statement changes the position of the declarant, tending in some way to obligate him or to expose him to liability of some sort; sometimes the act of uttering, taken in light of other circumstances, suggests a coordinated effort among declarant and others, hence the existence of a conspiracy.

As an example of the change-of-position statement, consider the case in which two members out of a larger group charged with conspiring to cast fraudulent votes in a federal election are shown to have perjured themselves in an investigation of irregularities in state returns by claiming that certain voters came to the polls who did not in fact do so.⁸⁴ The acts of perjury exposed declarants to possible criminal sanctions, and in this sense their perjured testimony amounted to verbal acts. Since the falsehoods covered up the ballot-stuffing in the local returns, the evidence was relevant against all defendants in suggesting an “underlying purpose and motive” for falsifying the federal returns at the same time (since a disparity in which local exceeded federal totals “would likely have aroused suspicion”), and it had no hearsay use because its probative worth did not turn upon taking the statements as proof of what they asserted.⁸⁵

83. In addition to fitting within the conventional “verbal act” category, coconspirator statements may have other nonassertive uses in conspiracy cases. *See, e.g.*, *United States v. Layton*, 720 F.2d 548, 555-58 (9th Cir. 1983) (in a conspiracy prosecution arising out of the Jonestown massacre, in which a visiting Congressman was killed and a government official was wounded, statements by Jim Jones apparently exhorting his followers to act against the Congressman were admissible as coconspirator statements; reviewing court characterizes the statements as “the rallying cries of a charismatic leader to his devoted followers,” which “both had the effect of and were intended to enlist the crowd into compliance with the imminent murder of [Congressman] Ryan and to bolster the resolve of any in the audience who might already have agreed to help”; court invokes FED. R. EVID. 801(d)(2)(E), but might easily have held the statements admissible as nonhearsay in the sense of being beyond reach of the hearsay doctrine, since they seemed to bear on the case simply as suggesting effect upon the listener). *See also* *Curreri v. International Brotherhood of Teamsters*, 722 F.2d 6, 11 (1st Cir. 1983) (in another context, reviewing court correctly draws distinction between “statements *qua* assertions and statements *qua* conduct,” concluding that statement by official that “the union does not condone violence” could properly be received “as evidence of conduct inconsistent with actual participation, knowledge, or ratification” of violence on the picket line, regardless of whether it fit within hearsay exception).

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

85. *Id.* at 221-22.

Further, consider the case in which one member of a group charged with violating the immigration laws by entering into sham marriages with immigrants is shown to have divorced his newly-arrived spouse.⁸⁶ Bringing about the divorce involved behavior which was largely a matter of utterances, and these amounted to verbal acts which were relevant in the immigration case in suggesting that the marriage was indeed a sham.⁸⁷ Once again, probative worth did not turn upon taking the statements of the declarant as proof of what they asserted.

As examples of the coordinated effort statement, consider the first two instances cited above—the declarant who tells another to print a political tract and the one who demands cash from the teller. In both, the statements would likely be viewed as verbal acts even if the charges of conspiracy do not require proving an overt act and even if no substantive charges are brought. In each, the fact that declarant made the particular statement may be critical in an array of facts suggesting a scheme involving him: For reasons of his own, a person acting alone may ask another to print a political tract, but he is more likely to be part of a group on whose behalf he acts and speaks. A lone gunman may hold up a bank, but the greater number of perpetrators probably enlist the aid of one or more others in advance. In both cases, the behavior of the perpetrator after the fact (for example, in meeting with another) may tend strongly to confirm such inferences, and may of course point to the involvement of a particular other. The importance of the additional facts and the strength of any inference of conspiracy vary widely, but the point is that the behavior of one person (his conduct and his statement) bears logically upon the question whether others engaged with him in a scheme, and the inference need not rest upon his statement in its assertive aspect.

The examples cited in the preceding paragraph depend upon the proposition that the hearsay doctrine does not reach evidence of nonassertive conduct offered to prove the actor's belief in a fact, hence the fact itself. The Federal Rules of Evidence endorse this result,⁸⁸ and when the behavior of the declarant involves words that are not used in their assertive aspect as proof of facts asserted, their presence does not affect the outcome.

Hearsay. When a coconspirator statement has significance only

86. *Lutwak v. United States*, 344 U.S. 604 (1953).

87. *Id.* at 617-18.

88. See *infra* notes 102-04 and accompanying text.

as proof of what it asserts, it is only hearsay. When, for example, a member of the venture describes the scheme to a friend in a casual conversation, the statement, if believed, tends to prove the existence of the scheme, but has no other significance. It is not an overt act, nor a substantive crime (or part of one), nor does the fact of the utterance have any other logical significance in the case as behavior on the part of the declarant. Obviously the words suggest declarant's belief or memory that he and others hatched a scheme, but this inference depends upon the assertive force in the words spoken, and thus involves a hearsay use. (There is, of course, the state-of-mind exception which makes such words admissible as proof of declarant's belief, but this exception does not permit use of the words as proof of the prior facts which produced the memory or belief⁸⁹ and is therefore unavailable if the purpose is to prove the involvement of another in a conspiracy.)

Dual Aspect. The dual aspect coconspirator statement is one which has probative worth both independent of what it asserts and also because of what it asserts. That is to say, it is an overt act or substantive crime (or part of one), or is in some sense more than an assertion, but it also has significance because of its assertive force.

Often the dual aspect statement is one in which the declarant seeks to enter into a transaction with a third party, and in the process he identifies defendant as a member of the venture. In the *Gooding* case, for example, the captain's statement was part and parcel of an attempt to hire the mate, and it implicated defendant as owner of the vessel and backer of the venture.⁹⁰ And in what is perhaps the most common modern scenario, statements by one alleged member of a drug ring seeking to buy or sell and naming another as a member of the venture are routinely received against the party named as proof of his involvement.⁹¹

89. FED. R. EVID. 803(3) (authorizing receipt of a statement describing "declarant's then existing state of mind," but expressly excluding "a statement of memory or belief to prove the fact remembered or believed"). This exception, however, does allow the latter use of such statements in wills cases. For a further discussion of this exception, see 4 D. LOUISELL & C. MUELLER, *supra* note 32, § 442 (1980).

90. 25 U.S. (12 Wheat.) at 470.

91. See *United States v. Fleishman*, 684 F.2d 1329, 1337 n.7 (9th Cir.) (statements concerning whereabouts of coconspirators are declarations in furtherance of conspiracy and admissible), *cert. denied*, 103 S. Ct. 464 (1982); *United States v. Regilio*, 669 F.2d 1169, 1174-76 (7th Cir. 1981) (out of court identification of drug source admissible), *cert. denied*, 102 S. Ct. 2959 (1982); *United States v. Macklin*, 573 F.2d 1046, 1050 (8th Cir.) (once conspiracy has been established, statement identifying a coconspirator is in furtherance of conspiracy and admissible), *cert. denied*, 439 U.S. 852 (1978); *United States v. Carlson*, 547 F.2d

In both of these examples the statements are verbal acts. Both would likely qualify as overt acts. The attempt to buy or sell drugs would likely be a crime in itself, and coconspirators might be made liable as accomplices. In both cases the statements are more than assertions. In each, the act of uttering suggests declarant's belief in a venture, hence its existence, and the utterance may reasonably be viewed as action carrying out the scheme. And in both examples the statements have hearsay significance, for they assert (and if believed tend to prove) the fact of another's involvement.

In both examples described above, the act of uttering supports the backward-looking inference that declarant and others had entered into a venture, and little or no additional proof is needed. But sometimes the act of uttering supports such an inference only in conjunction with other proof, and it depends upon the apparent coordination of activities by declarant and defendant. Consider, for example, the prosecution of T and N for the alleged theft of cases of Excedrin from interstate commerce, where T is shown to have told the owner of a shop where the cases were stored that the Excedrin "belonged to" N and that T was "thinking of buying it" from him.⁹² While this statement might amount to an act carrying out a venture involving N, it is not *as an act* (that is, ignoring its assertive force) a very strong indication of such a scheme, and an inference of conspiracy would be especially dependent upon the assertive force of the statement or upon other proof connecting declarant with N. Consider another example: In a prosecution of H for alleged mail fraud and conspiracy, accomplished by insuring and then killing a person and collecting insurance proceeds, alleged conspirator E is shown to have told the victim's widow C (herself allegedly a member of the venture) before the fact that H would assist in the murder and would help collect the insurance. E is also shown to have indicated anger after the fact, over mistakes by H, telling the widow that H had driven the car at the time and that she should let E know when she heard from the insurance companies so that E could make sure that H got paid.⁹³ Again the statements might amount to acts carry-

1346, 1362 (8th Cir. 1976) (same), *cert. denied*, 431 U.S. 914 (1977).

92. The facts of this hypothetical example are drawn from *United States v. Trotter*, 529 F.2d 806, 811-13 (3d Cir. 1976), where the reviewing court concluded that the statement was properly admitted under the coconspirator exception.

93. The facts of this hypothetical example are drawn from *United States v. Handy*, 668 F.2d 407, 408 (8th Cir. 1982), where the reviewing courts upheld receipt of the statements under the coconspirator exception).

ing out a venture with H, but E's act of uttering is not itself a very strong indication of conspiracy. Of course, the statements assert the involvement of H, and in this hearsay sense they are evidence of the conspiracy. The question whether this hearsay use should be permitted, however, cannot be readily resolved by viewing the statements as nonhearsay acts confirming the assertions by suggesting declarant's belief in the venture, hence its existence. Any such nonhearsay inference would depend very much upon additional evidence connecting declarant and defendant.

Action Statements. Sometimes statements made by a coconspirator are intertwined with his nonassertive conduct. Taken together, his statement and conduct may indicate his belief in a fact, hence tending to prove the fact itself. As explained below,⁹⁴ the Federal Rules of Evidence place nonassertive conduct beyond the reach of the hearsay doctrine, and in the present situation the words may be viewed as verbal acts or as hearsay within the state-of-mind exception.

If the proof shows, for example, that in the course of a sales pitch to a would-be customer declarant named defendant as his source of drugs, and then went to see defendant or took the prospect to meet him, there exists nonhearsay evidence implicating defendant and declarant as schemers and suggesting that defendant acted as a drug source.⁹⁵ Declarant's conduct, taken in light of his verbal effort to line up a sale, indicates his belief in those facts, hence the facts

94. See *infra* notes 102-04 and accompanying text.

95. *United States v. Lisotto*, 722 F.2d 85, 86-88 (4th Cir. 1983). See *United States v. Kelly*, 718 F.2d 661, 663-64 (4th Cir. 1983); *United States v. Piccolo*, 696 F.2d 1162, 1167-69 (6th Cir. 1983); *United States v. Fischel*, 693 F.2d 800, 802 (8th Cir. 1982) (coconspirator statement by seller naming defendant as his source was properly received; "a reference by a declarant about 'his people' and going to 'his people' plus an actual purchase was enough evidence to find a conspiracy to sell drugs"); *United States v. Dockins*, 659 F.2d 15, 16-17 (4th Cir. 1981); *United States v. Perez*, 658 F.2d 654, 659-60 (9th Cir. 1981) (seller's statements identifying defendant as drug source were properly received; "substantial independent evidence" suggested defendant's involvement in conspiracy with declarant, including "[t]he fact that a phone call was placed by [declarant] to the defendant," which amounted to "proper evidence of nonassertive conduct" which was "nonhearsay"); *United States v. Fitts*, 635 F.2d 664, 666-67 (8th Cir. 1980) (declarant identified defendant as a drug source to a potential purchaser, then drove with the purchaser to defendant's residence; the statement identifying defendant was within the coconspirator exception).

Contra, *United States v. Gandara*, 586 F.2d 1156, 1158-59 (7th Cir. 1978) (after all parties agreed to heroin transaction, declarant indicated that he has a "source," and then contacted defendant; receipt of the statement under the coconspirator exception was error, but harmless; since an agreement had been reached, the statement did not further the venture and was "surplusage").

themselves. Proof of his conduct would mean little or nothing without proof of his words, and indeed his conduct could not be properly understood without the words. Still the conduct is apparently non-assertive in that its purpose was apparently not to assert a fact, but rather to achieve an end. The declarant's words are competent to prove the thought in his head: When offered for this purpose, they are either verbal acts amounting to nonhearsay circumstantial evidence, or they are hearsay but admissible under the state-of-mind exception.⁹⁶ His conduct is competent, and not hearsay, to prove that what he thinks is so. Of course, he could be mistaken because of faulty memory or misperception; of course, his conduct may not mean what it seems to mean, which is only to say that it is circumstantial evidence and that some ambiguity is inescapable. But declarant's behavior is relevant (both the words and the acts) as tending to show a scheme and defendant's role, and is not hearsay.

III. MODERN PRACTICE: A GARDEN OF ORDER AND CHAOS

A. *Theory and Practice Revisited*

The coconspirator exception purports to rest upon a substantive agency theory. This theory, however, does not account for the hearsay use of coconspirator statements, except by a broad appeal to necessity which does not address the central concerns of the hearsay doctrine. And it amounts to window dressing, for it implies an approach which courts do not take, and limits which the exception does not contain.

There are better explanations, the substance of which has already been intimated. One is that dual aspect coconspirator statements achieve a measure of reliability when the fact of utterance changes the position of the declarant, or suggests his coordinated effort with others, in ways consistent with his assertion. Another is that the assertive force in action statements takes strength from the element of declarant's conduct. Sensibly interpreted, the furtherance requirement tends to insure that coconspirator statements within these categories satisfy the exception. The apparent meaning of the furtherance requirement, however, is somewhat broader. And courts, not seeing the explanations suggested here, have not interpreted it with them in mind. So it is important to look directly at the reliabil-

96. FED. R. EVID. 803(3), discussed in 4 D. LOUISELL & C. MUELLER, *supra* note 32, § 442. *See id.* § 417 (statements as nonhearsay circumstantial evidence of state of mind).

ity problem, which is taken up separately hereafter.⁹⁷

Agency. The major premise of the agency theory expresses what seems an intuitively obvious substantive principle: Each member of the conspiracy is legally responsible for acts by others done in furtherance of the venture. Surely that principle is sound enough, but exactly what does it mean? It can be taken as descriptive of the situations in which conspiracy (1) requires an overt act, for here a furthering act by one conspirator completes the offense for all, or (2) carries with it a form of accomplice liability, for here the commission of an additional offense by one conspirator in furtherance of the venture imposes additional liability upon all. Under federal law, the first of these conditions is sometimes satisfied and sometimes not, since some statutes do and some do not require overt acts.⁹⁸ The second may be satisfied by virtue of the *Pinkerton* doctrine, under which federal crimes of conspiracy apparently carry with them a form of accomplice liability.⁹⁹ Modern thinking, however, holds that

97. See *infra* text accompanying notes 111-38.

98. Among the federal statutes that expressly require an overt act are the following: 18 U.S.C. § 371 (1982) (general conspiracy statute); 18 U.S.C. § 1117 (1982) (conspiracy to commit murder); 18 U.S.C. § 1201(c) (1982) (conspiracy to kidnap); 18 U.S.C. § 1751 (1982) (conspiracy to assassinate President or Vice President). See Final Report of the National Commission on Reform of Federal Criminal Laws, Federal Criminal Code § 1004, at 70 (Proposed Official Draft 1971) (including overt act requirement in definition of conspiracy).

In *Yates v. United States*, 354 U.S. 298 (1957), the Court, in construing the overt act requirement set out in 18 U.S.C. § 371, stated that the act need not be "the substantive crime charged in the indictment as the object of the conspiracy," nor need it "even be criminal in character," since the "function of the overt act requirement is simply to manifest 'that the conspiracy is at work,' . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Id.* at 333-34.

Among the federal statutes that contain no "overt act" requirement are the following: 15 U.S.C. § 1 (1982) (Sherman Act conspiracy "in restraint of trade or commerce"); 18 U.S.C. § 224(a) (1982) (conspiracy to bribe in connection with sporting contest); 18 U.S.C. § 2384 (1982) (seditious conspiracy); 18 U.S.C. § 2385 (1982) (conspiring to advocate forcible overthrow of government); 21 U.S.C. §§ 846 and 963 (1982) (conspiracy to commit drug offenses).

The Model Penal Code sometimes does and sometimes does not require an overt act. MODEL PENAL CODE § 5.03(5) (Tent. Draft No. 10, 1960). The accompanying Comment explains that the intent of the provision is to require an overt act to add minimal assurance "that a socially dangerous combination exists," but to exempt from the requirement conspiracies amounting to first or second degree felonies where "the importance of preventive intervention is *pro tanto* greater than in dealing with less serious offenses." *Id.* § 5.03(5).

99. The doctrine takes its name from the decision in *Pinkerton v. United States*, 328 U.S. 640 (1946) where the Court said:

The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same

such liability requires more in terms of encouraging or facilitating an offense than conspiracy alone implies, so the *Pinkerton* doctrine seems somewhat overbroad.¹⁰⁰

Obviously this interpretation of the substantive agency principle suggests, as a matter of relevancy, that when the words of one conspirator amount to an overt act or additional crime, they must be provable against another charged with conspiring (or with conspiring plus the additional crime). Consider again the common example: Statements by an alleged member of a drug ring seeking to make a sale and naming defendant as his supplier should at least sometimes be provable in a prosecution of the latter for conspiring and selling. The words might be proof of an overt act (if one were required),¹⁰¹ hence part of the evidence that defendant is guilty of conspiracy, or proof of the sale, hence part of the evidence of defendant's guilt (by complicity) of that additional crime.

If the substantive agency principle carries only the meanings suggested above, the necessary implication is that a court asked to apply the coconspirator exception should determine whether an overt act is required to establish conspiracy, whether there are issues of accomplice liability in the case, and whether a statement offered under the exception amounts to such an overt act or additional

principle.

Id. at 647. The Court notes, in what seems to be limiting language, that in this case the charged conspiracy required an overt act, and that it would be a

different case . . . if the substantive offense . . . was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

Id. at 647-48.

100. See, e.g., 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 156 (1970) (accomplice liability should require "something more than the attenuated connection resulting solely from membership in a conspiracy and the objective standard of what is reasonably foreseeable"); MODEL PENAL CODE § 2.04(3), comment (Tent. Draft No. 1, 1953) ("[l]aw would lose all sense of just proportion if in virtue of . . . [conspiring], each [member of the venture] were held accountable for thousands of offenses that he did not influence at all"); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 65 at 515 (1972) (*Pinkerton* doctrine "never gained broad acceptance," and opposition to it "has grown significantly").

But see R. PERKINS & R. BOYCE, CRIMINAL LAW 706-07 (3d ed. 1982) (acknowledging that in connection with "a large and complex conspiracy" accomplice liability should not be visited upon every member for "every substantive offense committed by any member in furtherance of his part of the complicated plan," but suggesting that the problems of "the large-scale criminal syndicate" should not "distort the law of simple conspiracy," and concluding that in simpler situations "complicity and conspiracy" are the same thing).

101. But in most prosecutions for drug-related conspiracies, no overt act is required. See, e.g., 21 U.S.C. § 846 (1982); *United States v. Gordon*, 712 F.2d 110, 114 (5th Cir. 1983) (21 U.S.C. § 846 (1982) does not require proof of overt act).

crime. Necessarily the implication is that the coconspirator exception should contain built-in limits insuring such restricted application. It is a striking fact, however, that courts pay no attention to such matters, and that the coconspirator exception is routinely invoked, regardless of whether an overt act is required or an issue of complicity appears, and regardless of whether the proffered statement amounts to a criminal act. And modern formulations of the exception, including the one found in rule 801(d)(2)(E), contain no suggestion of limits along these lines.

Interpreted in the manner suggested above, the substantive agency principle is narrower (hence less an explanation for the coconspirator exception) than one might otherwise suppose. Does the principle carry any broader meaning? The answer would seem to be yes and no. The principle does have broader meaning, but evidential and not substantive. That is, the agency principle may be read to explain the receipt, against the defendant in a conspiracy prosecution, of proof of an utterance by another member of the venture where in light of circumstances his act of uttering suggests the operation, hence the existence, of a conspiracy—that is, that declarant and defendant banded together (perhaps with others) and committed themselves to pursue an illegal end or a legal one by illegal means. This evidential notion is examined further below. The remarkable fact which must be noted here is that this extension of the agency principle (for that is what it is) supplies the only broad meaning which the principle carries, which is to say that in the run of cases, resort to it as an explanation for the coconspirator exception is question-begging: This principle says that a member of the venture is responsible for a statement by another because that statement is admissible in evidence against him, which leaves unanswered the question why.

Even if the exception were recast, and courts then took seriously the approach and limits suggested by the only substantive meaning which the agency principle carries, it would of course justify not a hearsay exception, but rather the nonhearsay use of coconspirator statements. An appeal to necessity has been thought to fill the gap, but it cannot: Even conceding that conspiracy must be prosecuted and that better proof is hard to come by, it simply cannot follow that persons merely charged with conspiring should be put at risk of conviction by proof not shown to be reliable.

In sum, the agency theory bears upon the relevancy of coconspirator statements but not their hearsay use, and suggests an ap-

proach and limits which have no reality. When offered as an explanation, the agency theory provides only a false mask for the coconspirator exception.

Evidential Theories. Both evidential theories set out here suggest that certain kinds of coconspirator statements are reliable. Both turn upon the coalescence in such statements of the elements of conduct and assertion. Both take advantage of the philosophy of the Rules in permitting the use of nonassertive conduct to prove the belief of the actor in a fact, hence the fact itself.

In ordinary experience, assertion and conduct are readily distinguished in understanding and perception. We think of talking as opposed to doing, words as opposed to deeds. Assertion connotes the writing or speaking of words to convey thoughts; conduct connotes physical activity. And in ordinary experience the distinction may persist while being essentially turned on its head: What we perceive as a physical act may be almost purely assertive (a nod; pointing; thumbs up), where in reality the assertive quality overwhelms the active; what we perceive as an assertion may be mostly a matter of action (signing on the dotted line; gesticulating in pain), where the active quality overwhelms the assertive.

What is easily overlooked is that behavior may combine act and assertion in a compound in which each element is important, affecting and adding meaning to the other. Both the action statement and the dual aspect statement, where the fact of speaking changes the position of the declarant or suggests his reliance upon others or upon factual conditions, fit this description. As to each it is a mistake to perceive the statement as a mere assertion.

Reconsider the example of the alleged conspirator seeking to make a sale and naming defendant as his source of drugs: His statements amount to acts insofar as they may suggest declarant's commitment to sell, or invite reliance in the listener, or subject declarant to risk of loss of business or reprisal if he cannot deliver. These facts indicate that the statement is true at least in suggesting that *somebody* stands behind the declarant and can supply the needed merchandise, and the inference comes from the act of the declarant, and not from the assertive quality of his statement. At least to that extent, circumstances suggest that in its assertive aspect the statement is reliable. The argument is not that the statement or the fact asserted is against the interest of the declarant, but that an unmitigated lie would be against his interest. The argument is not that the statement is nonhearsay circumstantial evidence of declarant's belief

simply because it does not directly describe that belief, but that the act of uttering which brings with it commitment and assumption of risk tends circumstantially to prove the belief.

And consider again the action statement, in which declarant identifies defendant as his source while trying to make the sale, then meets or communicates with him or takes the prospect to him: Here conduct by the declarant, taken in light of his utterance, indicates his belief. Again the circumstances may suggest commitment, induced reliance, and risk to the declarant in case of nonperformance later, and again these may tend to verify the statement in its assertive aspect, this time corroborating even the specific identity of defendant as declarant's source. Even in the absence of such factors, the physical conduct of the declarant means that something besides his assertion indicates the involvement of another and pinpoints defendant as that other.

Critical to both these evidential theories is the principle that nonassertive conduct is beyond the reach of the hearsay doctrine, even when offered to prove the actor's belief in a fact, hence the fact itself. Thus, for example, defense evidence that a third party fled the scene of the crime is not hearsay when offered to prove the latter's guilt, and consequently defendant's innocence. Analytically, flight suggests a "guilty mind," hence guilt in fact. A famous old English case took the contrary position, suggesting that the hearsay doctrine does embrace this use of nonassertive conduct,¹⁰² and this idea found occasional support in pre-Rules federal decisions.¹⁰³ The framers of the Federal Rules, however, unmistakably rejected this idea, despite the fact that proof of this sort presents "hearsay" risks of flawed memory, misperception, and ambiguity.¹⁰⁴ Four good reasons justify the decision to place this kind of evidence beyond the reach of the hearsay doctrine. First, the risk of insincerity is eliminated if indeed the conduct is nonassertive, and the trial judge may be trusted to determine this matter correctly. Second, the risks of flawed memory and misperception are reduced, at least where conduct exposes the

102. *Wright v. Tatham*, 7 Adolph. & E. 313, 112 Eng. Rep. 488 (Ex. Ch. 1837).

103. *United States v. Barash*, 365 F.2d 395, 399 (2d Cir. 1966), *later app.*, 412 F.2d 26 (2d Cir), *cert. den.*, 396 U.S. 832 (1969).

104. See FED. R. EVID. 801(a) advisory committee note, observing that this sort of evidence is admittedly "untested with respect to the perception, memory, and narration (or their equivalents) of the actor," but concluding that "these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds." The problem of insincerity is "virtually" eliminated, and factors such as motivation, the nature of the conduct, and reliance affect "weight" rather than admissibility.

actor to potential risks and consequences. Third, the jury may be trusted to see and appreciate the ambiguities affecting proof in this form, which are common to all circumstantial evidence, and which do not involve the treachery of language offered in its assertive aspect. And fourth, it is ingrained in judges and lawyers that hearsay means words offered to prove what they say (as the term itself implies), and bench and bar alike have failed over the years even to see the "hearsay" risks in nonassertive conduct, let alone to apply or develop the doctrine endorsed in the old English cases. If nonassertive conduct used in this way were to be embraced within the hearsay doctrine, the result would astonish both the bench and the litigating bar (who would require extensive retraining); it would also produce consequences not yet foreseen and cast doubt upon evidential conventions long observed.

Among those evidential conventions, it is submitted, is the one here considered — the coconspirator exception. The substantive agency theory has things mostly backwards. The reason coconspirator statements are so probative in conspiracy cases is not that the defendant is legally responsible for the acts and statements of his coventurers, but rather that these acts and statements suggest, often convincingly though circumstantially, the previous understanding of the parties — the central fact of conspiring. They do so by indicating the memory and belief of the declarant, making visible the assumptions and expectations under which he acts, and leading the trier reasonably to infer conspiracy. This inference may often be drawn without relying upon the assertive force of any statement made by the declarant, but by considering the way in which the act of uttering the statement changes his position or shows his dependence upon others, or by taking into account the manner in which his physical conduct acts out his understanding.

Of course this argument does not lead to the conclusion that *all* coconspirator statements which satisfy the conditions of the exception are by that token reliable. In the example in which declarant identified defendant as his drug source in a sales pitch, the act of speaking in this vein suggests that someone acts as declarant's source, but only the statement in its assertive aspect pinpoints defendant as that someone. In the examples of theft of Excedrin and insurance fraud, the act of uttering did not independently change the position of the declarant or demonstrate his reliance upon others, and any inference of that sort depends upon the statement in its assertive aspect or upon other proof. Yet in all three instances the

statement may well further the underlying venture and otherwise qualify for receipt under the exception. Many cases so hold in connection with statements by the would-be drug peddler. In the example of the alleged theft of Excedrin,¹⁰⁵ the reviewing court concluded that since T "identified his own interest in the goods, arguably in an effort to persuade [the shopkeeper] to allow the Excedrin to remain in the shop for a while," the statement could be "construed as an attempt to secure the storage space for the Excedrin in furtherance of the conspiracy."¹⁰⁶ So it was properly received in the prosecution of N, whom T implicated in his statement.¹⁰⁷ And in the insurance fraud example,¹⁰⁸ the reviewing court concluded that E's statements furthered the conspiracy because they helped "identify the role of one conspirator to another," thus revealing "the progress of the conspiracy" and "an explanation of payment," which was "the scheme's ultimate objective."¹⁰⁹ Therefore, those statements were properly received in the prosecution of H, whom E implicated in his statements.¹¹⁰ These examples amount to the hearsay use of coconspirator statements which satisfy the exception without necessarily being reliable.

B. *The Persistent Problem of Reliability*

Given the inadequacies in the substantive and evidential theories, it remains to be asked whether the coconspirator exception may be justified on a basis of reliability. Modern opinions find this question compelling because of the emptiness of the agency theory and apparent constitutional pressure, and rightly so. Courts have not adopted the theories suggested above, perhaps because the assertive quality in statements has blinded them to the element of action also present. But courts have engaged in commendable efforts to interpret existing elements in the exception in service of an overall purpose to insure reliability. And where such efforts have failed some courts have looked to other factors, such as the interest and motivation of the declarant, his deliberateness or spontaneity, and occasionally to the degree of fit or mesh among coconspirator statements.

Without repeating the previous arguments, which suggest that

105. *United States v. Trotter*, 529 F.2d 806 (3d Cir. 1976).

106. *Id.* at 813.

107. *Id.* at 811-13.

108. *United States v. Handy*, 668 F.2d 407 (8th Cir. 1982).

109. *Id.* at 408.

110. *Id.*

the furtherance requirement helps identify statements amounting to action or accompanying conduct which helps assure reliability, the ensuing discussion takes up these different factors in order. There follows a brief consideration of the constitutional constraint.

Elements in the Exception. The furtherance and independent evidence requirements intersect in a way which may make them useful in assessing reliability. A conclusion that a statement furthers the enterprise suggests that it makes sense in light of what else is known, and the presence of independent evidence means that more will in fact be known. Together, these requirements tend to assure that a statement satisfies the exception only when corroborated in some measure by circumstances. And some modern opinions take the position that these requirements should be interpreted in exactly this manner, with an eye toward assuring trustworthiness.¹¹¹

111. See *United States v. Ammar*, 714 F.2d 238, 256-57 & n.16 (3d Cir.) (declarant had personal knowledge of the conspiracy, little or no incentive to lie, and his statements were made to other members of venture in an effort to maintain trust and keep venture together; statements were therefore reliable), *cert. denied*, 104 S. Ct. 344 (1983). *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) (furtherance requirement is designed to assure reliability as well as declarant's authority to speak for defendant); *United States v. Kendricks*, 623 F.2d 1165, 1168 (6th Cir. 1980) ("statements made by coconspirator during and in furtherance of the conspiracy do not have the same unreliability as confessions"); *United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978) ("presence of sufficient 'indicia of reliability' may in some circumstances, permit . . . introduc[ing] out-of-court statements into evidence"), *cert. denied*, 440 U.S. 917 (1979); *United States v. Smith*, 520 F.2d 1245, 1247 (8th Cir. 1975) (coconspirator hearsay statement sought to be admitted must be uttered during the active life of the conspiracy under circumstances indicating reliability); see also *United States v. Fielding* 645 F.2d 719, 726-27 & n.13 (9th Cir. 1981) (furtherance requirement remains viable; here it was error to admit under the coconspirator exception statements which did not further the charged conspiracy and which related only "tangentially" to the underlying transaction; court notes that proof of conspiracy was adequate but "tenuous," adding support to its conclusion that "the special guarantee of reliability presumed to inhere in proper rule 801(d)(2)(E) situations is absent in the factual *gestalt* of this case").

Cf. United States v. James, 590 F.2d 575, 579-80 (5th Cir. 1979) (judge rather than jury should determine whether statement falls within coconspirator exception, in part because preliminary questions of "determining whether a conspiracy existed and whether the defendant and the declarant were members of it" involve procedures for "testing the trustworthiness of coconspirator statements," which juries should not be asked to perform), *modifying* 576 F.2d 1121, 1131 (1978) ("Only by requiring independent evidence to form the basis for admissibility will there be sufficient corroboration of the reliability of the statements."), *cert. denied*, 440 U.S. 976 (1979); *United States v. Santiago*, 582 F.2d 1128, 1133 (7th Cir. 1978) (application of exception for coconspirator statement raises question of competence which "is determined by whether or not the probability of its reliability is sufficiently great to permit its admissibility"); *United States v. Enright*, 579 F.2d 980, 984 (6th Cir. 1978) (question whether coconspirator exception applies is "more naturally" one of "admissibility for purposes of FED. R. EVID. 104(a), since it is "one of the basic reliability and fairness of admitting the evidence"); *United States v. Lang*, 589 F.2d 92, 99-100 (2d Cir. 1978) (purpose of furtherance requirement is to protect defendants by limiting applicability of the exception); *United States v. Bell*,

The furtherance requirement, however, seems an imperfect measure, even when combined with independent evidence. A statement may actually further a conspiracy simply by being plausible to its audience, which means that it may well fit within the circumstances without being true, and such a statement may appear to satisfy very well both the furtherance and the independent evidence requirements. Some courts give short shrift to the furtherance requirement, and some commentators suggest that it be discarded, arguing that because it came from the substantive agency theory it is in fact only substantive (thus affecting relevancy) and not evidential (thus affecting reliability).¹¹²

Interest and Motivation. Often coconspirator statements are against the penal interest of the declarant, in ways which bring into play the exception designed for such statements, which is presently found in rule 804(b)(3).¹¹³ Almost all coconspirator statements, for example, assert or at least imply an insider's knowledge on the part of the declarant concerning the venture,¹¹⁴ and in other contexts this factor alone has brought rule 804(b)(3) into play.¹¹⁵

573 F.2d 1040, 1044 (8th Cir. 1978) (independent evidence "is an important safeguard").

112. *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. 1982) (furtherance requirement "must not be applied too strictly," lest purpose of exception be defeated); *United States v. Peacock*, 654 F.2d 339, 350 (5th Cir. 1981) (same), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982).

Cf. C. McCORMICK, *supra* note 51, § 267 at 645-46.

113. *See e.g.*, *United States v. Perez*, 702 F.2d 33, 37 (2d Cir.) (statement within coconspirator exception is likely to be reliable "because a declaration in furtherance of a conspiracy would be against the penal interest of the declarant"), *cert. denied*, 103 S. Ct. 2457 (1983); *United States v. DeLuca*, 692 F.2d 1277, 1284 (9th Cir. 1982) (coconspirator statement was properly received and sufficiently reliable where it was, *inter alia*, "against [declarant's] penal interest"); *United States v. Mackey*, 571 F.2d 376, 383 n.9 (7th Cir. 1978) (approving receipt of coconspirator statement under FED. R. EVID. 801(d)(2)(E) and noting that it was "basically reliable, being a statement against penal interest and not dependent on [declarant's] recollection").

114. *See, e.g.*, *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) (statement was not within coconspirator exception, since it amounted to "idle chatter," but it was against declarant's penal interest, hence properly admitted under FED. R. EVID. 804(b)(3) because it suggested declarant's "knowledge of the furtive nature of [defendant's] activities," and was in any event "part and parcel of a larger conversation in which clearly self-incriminating statements were made").

115. *United States v. Benveniste*, 564 F.2d 335, 339-41 (9th Cir. 1977) (statements by alleged co-offender offered by the defense in drug conspiracy prosecution should have been received, as they fit within FED. R. EVID. 804(b)(3) insofar as they implicated declarant "as a key participant in a major drug sale negotiation," and would be admissible in a prosecution against her for conspiring because they "would show [that] she knowingly played an active role" in bringing together the various participants and had "detailed and intimate knowledge of the transaction"); *United States v. Barrett*, 539 F.2d 244, 249-53 (1st Cir. 1976) (alleged interstate transportation of stolen postage stamps, and related offenses; reversible error to ex-

Coconspirator statements may be against the penal interest of the declarant in other ways. Often the declarant describes or implies his own involvement in the conspiracy or in the substantive crimes which are its purpose,¹¹⁶ or his intent to participate in them.¹¹⁷ Such statements too are likely to qualify as declarations against interest. When they do, rule 804(b)(3) has been interpreted as paving the way for receipt of closely intertwined statements describing the conduct of a third party, as well as other statements which lend context to or expand the meaning of the declarant's remarks.¹¹⁸ It is perhaps noteworthy that in its one focused consideration of the constitutionality of the coconspirator exception, which occurred in the case of *Dutton v. Evans*,¹¹⁹ the Supreme Court upheld receipt of a post-conspiracy jailhouse statement (“[i]f it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now”), in part because “it was against [declarant's] penal interest to make” the statement, which provided one of five “indicia of reliability” found by the Court in the case.¹²⁰

clude evidence of statement by alleged co-offender asserting that defendant was not involved, inasmuch as statement satisfied FED. R. EVID. 804(b)(3) by suggesting that declarant “had an insider's knowledge of the crimes” and his “personal participation” in them).

116. *United States v. Lisotto*, 722 F.2d 85, 87-88 & n.1 (4th Cir. 1983) (declarants sought to purchase marijuana from undercover agents, and in doing so explained that the money was coming from Pittsburgh and that the marijuana would be flown to Pittsburgh; declarants also said that one of the men coming from Pittsburgh was a pilot [defendant was shown to be such], and told the agents after defendants arrived that “the people from Pittsburgh had arrived with the money”; reviewing court upholds receipt of these statements under coconspirator exception, noting that they were “reliable because they were against the [declarants'] penal interests and further established their complicity in the conspiracy”).

117. *See United States v. Mangan*, 575 F.2d 32, 42-45 (2d Cir.) (declarant described upcoming operations of conspiracy and defendant's role in it, indicating that declarant “would be doing most of the work” and that he planned therefore “to cheat [defendant] out of the latter's agreed half” of the proceeds; defense failure to raise the furtherance point was “dispositive” of this issue on appeal, but Constitution required closer scrutiny; the statement does pass muster: “Outlining a criminal design of this sort is not the kind of statement likely to be made as a boast or as idle gossip . . .”), *cert. denied*, 439 U.S. 931 (1978). The court in *Mangan* cites FED. R. EVID. 804(b)(3) but disclaims reliance upon it, suggesting that it recognizes the “veracity” of a statement “exposing a declarant to criminal liability.” *Id.* at 44-45 & n.14.

118. *See, e.g., United States v. Garris*, 616 F.2d 626, 630-31 (2d Cir.) (exception for against-interest statements embraces a remark “neutral as to declarant's interest” but “integral to a larger statement which is against the declarant's interest”), *cert. denied*, 447 U.S. 926 (1980); *United States v. Thomas*, 571 F.2d 285, 288-90 (5th Cir. 1978) (statement against interest in undermining declarant's plea of innocence); *United States v. Barrett*, 539 F.2d 244, 249-53 (1st Cir. 1976) (exception for against-interest statements embraces some “collateral” materials); 4 D. LOUISELL & C. MUELLER, *supra* note 32, § 489 (interpreting FED. R. EVID. 804(b)(3)).

119. 400 U.S. 74 (1970).

120. *Id.* at 88-89.

Ironically, some modern authority applying rule 804(b)(3) suggests that corroborative proof is needed, lest the exception undermine the protective policy served by the independent evidence requirement of the coconspirator exception!¹²¹

Spontaneity. In *Dutton*, the Court also cited the fact that the statement was “spontaneous” as one of the other “indicia of reliability.”¹²² Other courts have found that indications of “spontaneity” (in the sense of being suddenly blurted out, unrehearsed, off-the-cuff) or excitement on the part of a coconspirator suggest that his statement is reliable enough to be received.¹²³

Interlock. Sometimes the circumstances which bolster coconspirator statements are comprised of other coconspirator statements, and a pattern emerges in which one or more such statements “interlock” or fit together, each reinforcing others. While it seems clear enough that a trial judge cannot take as proof of the satisfaction of the conditions of the exception the very statement offered under it, a consideration of other statements (even though they have not yet been found admissible) may well escape this restriction.¹²⁴ The unlikelihood of an accidental match among independent falsehoods does suggest a basis for inferring reliability, and a plurality of the Supreme Court has endorsed a similar position.¹²⁵

121. *United States v. Alvarez*, 584 F.2d 694, 699-701 (5th Cir. 1978) (corroboration requirement for statements against penal interest implicating the accused is “necessary to a logical interrelation” between FED. R. EVID. 801(d)(2)(E) and 804(b)(3), since most coconspirator statements are against declarant’s interest in implying an insider’s knowledge of the crimes; such statements would fit within the coconspirator exception only if there were independent evidence of the conspiracy, and the involvement of declarant and defendant in it; without a corroboration requirement, the against-interest exception “will swallow the coconspirator’s exception with its attendant . . . safeguard”).

122. 400 U.S. at 89.

123. *United States v. Ammar*, 714 F.2d 238, 256-57 & n.16 (3d Cir.) (declarant had personal knowledge of the conspiracy, little or no incentive to lie, and his statements were made to other members of the venture in an effort to maintain trust and keep the venture together; “moreover, many of [his] statements were made under circumstances which indicate spontaneity, decreasing the likelihood of deliberate falsehood”; furthermore, they were corroborated by additional evidence), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. DeLuca*, 692 F.2d 1277, 1284 (9th Cir. 1982) (coconspirator statement was properly received and sufficiently reliable where it was, *inter alia*, “spontaneous”).

124. *See infra* notes 155-59 and accompanying text.

125. *See Parker v. Randolph*, 442 U.S. 62, 75 (1979) (“admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments”; plurality opinion to which four Justices subscribe; four dissent from the basic conclusion; one would find the *Bruton* error harmless).

Cf. United States v. Hamilton, 689 F.2d 1262, 1266-71 (6th Cir. 1982) (alleged illegal dealings in explosives, and related conspiracy; government introduced against defendants H1, H2, S, and W certain conversations involving alleged coconspirator R, then cooperating with

Constitutional Constraint. The impact of the Constitution upon the coconspirator exception is uncertain.

On the one hand, the Supreme Court has repeatedly invoked and approved the exception, acknowledging that it is "firmly established" in federal law.¹²⁶ In *Dutton*, the Court considered an actual challenge to the exception on constitutional grounds and rejected the attack in a plurality opinion which in effect sustained a state version of the exception which was broader than its federal counterpart. And the Court has held that the proper receipt of statements under "firmly rooted" hearsay exceptions is likely to survive constitutional scrutiny.¹²⁷ On the other hand, the Court has found that the Confrontation Clause and the hearsay doctrine protect similar values,¹²⁸ one of which holds that only reliable hearsay should be admitted. The Court has made it reasonably clear that when hearsay is offered against the accused, the question of reliability is a constitutional issue,¹²⁹ and in the list of hearsay exceptions which the Court has at

the prosecution, in which (1) H1 ordered more explosives and revealed knowledge of previous transactions forming subject of this prosecution, (2) H2 said that W and S had been paid and ordered more supplies, (3) S said he had not been paid and that the sum owed him was "uncollectable" or that W "was pulling a fast one", and (4) W denied that he had been paid and suggested that "they all confront [H2]" and "collect their money" by force if necessary; reviewing court concludes that furtherance requirement was satisfied, and that even if receipt of the statements was improper reversal would not be required: "Each defendant effectively hung himself and, as the statements of his coconspirators were essentially consistent, corroborative and cumulative, they simply provided more rope.", *cert. denied*, 103 S. Ct. 753, 754 (1983); *United States v. Brooklier*, 685 F.2d 1208, 1219-20 (9th Cir. 1982) (requirement that declarant's participation in the conspiracy be "corroborated by independent evidence" permits trial court to rely upon "their statements as independent evidence of their participation," which involves using their statements "not for their truth, but as verbal acts to show involvement"), *cert. denied*, 103 S. Ct. 1194 (1983).

126. *Krulewitsch v. United States*, 336 U.S. 440, 443 (1949). *See cases cited supra* note 26.

127. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.").

Cf. Bruton v. United States, 391 U.S. 123, 128-29 & n.3 (1968) (pointedly Court would "intimate no view whatever" whether "any recognized exception to the hearsay rule" would "necessarily raise questions under the Confrontation Clause"; Court refers in same note to earlier decisions applying coconspirator exception).

128. *California v. Green*, 399 U.S. 149, 155 (1970) ("hearsay rules and the Confrontation Clause are generally designed to protect similar values," but it would be "quite a different thing to suggest that the overlap is complete," for past decisions "have never established such a congruence").

129. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)) ("the [Confrontation] Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule'"); *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972); *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

least tacitly endorsed the coconspirator exception does not appear.¹³⁰

Predictably, appellate courts take conflicting views as to the impact of the Constitution. Some repel constitutional attacks out of hand, implying that if the coconspirator exception is satisfied, so too is the Constitution.¹³¹ Some courts have found that the Constitution imposes a higher standard and requires further scrutiny even where statements satisfy the exception,¹³² and some have even sustained

130. *Ohio v. Roberts*, 448 U.S. 56, 66 & n.8 (1980) (listing, among those hearsay exceptions resting upon "such solid foundations" that statements within them are likely to satisfy the Constitution, the ones for (i) dying declarations, (ii) cross-examined prior trial testimony, (iii) public records, and (iv) business records).

131. *See, e.g., United States v. Bernal*, 719 F.2d 1475, 1479 (9th Cir. 1983) (implying that the coconspirator exception is one that is "firmly rooted," hence that statements within it satisfy constitutional requirements ipso facto); *United States v. Perez*, 702 F.2d 33, 37 (2d Cir.) (Appellant's argument that "the admission of [declarant's] statements violated his right of confrontation under the Sixth Amendment is unavailing"), *cert. denied*, 103 S. Ct. 2457 (1983); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981) (reliability of coconspirator statement could be inferred because it fell within firmly rooted exception); *United States v. Nelson*, 603 F.2d 42, 46-47 (8th Cir. 1979) ("it is the general rule in this circuit that the out-of-court declarations admitted in conformity with the coconspirator rule do not violate a defendant's sixth amendment confrontation right absent some unusual circumstance"); *United States v. Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977) ("the confrontation clause presents no bar to the use of extrajudicial statements of a co-conspirator admissible under Rule 801(d)(2)(E)").

Some courts in effect entertain a presumption that statements within the coconspirator exception satisfy constitutional requirements. *See, e.g., United States v. Kiefer*, 694 F.2d 1109, 1113 (8th Cir. 1982) ("absent some unusual circumstance," statements satisfying coconspirator exception generally do not violate defense confrontation rights); *cf. United States v. Castillo*, 615 F.2d 878, 882-83 (9th Cir. 1980) (even though statement failed to satisfy furtherance requirement and should not have been received under coconspirator exception, its receipt did not violate Constitution and amounted to harmless error).

132. *United States v. Ordonez*, 722 F.2d 530, 535 (9th Cir. 1983); *United States v. Arbelaez*, 719 F.2d 1453, 1459-60 (9th Cir. 1983); *United States v. Ammar*, 714 F.2d 238, 254-57 (3d Cir.) (FED. R. EVID. 801(d)(2)(E) does not embody a "firmly rooted hearsay exception" as the Supreme Court uses that term, inasmuch as (i) coconspirator statements "are not technically hearsay" and (ii) more importantly the rationale for the coconspirator doctrine does not turn, in the manner of most exceptions, upon trustworthiness; rather it exists because of the agency theory; hence satisfying FED. R. EVID. 801(d)(2)(E) does not mean that the Constitution is satisfied, and it must be "separately ascertained" whether coconspirator statements "are attended by adequate assurances of reliability"), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. DeLuca*, 692 F.2d 1277, 1284-85 (9th Cir. 1983) (even if furtherance and pendency requirements are met, coconspirator statements "must manifest sufficient indicia of reliability to satisfy confrontation demands"; here the statement was reliable, being "spontaneous, against [declarant's] penal interest, and within his personal knowledge"); *United States v. Fleishman*, 684 F.2d 1329, 1338-40 (9th Cir.) (mere satisfaction of coconspirator exception does not mean that a statement may be constitutionally received; the reliability factors discussed by the Supreme Court in *Dutton v. Evans*, 400 U.S. 74 (1970), must be assessed; they turn upon "(1) whether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection;

constitutional challenges to coconspirator statements which satisfy the exception (though holdings to this effect have not survived re-hearing), finding in particular instances that the constitutional requirement of reliability was not satisfied.¹³³ Surely the latter cases have the better of the argument. The elements of the coconspirator exception came from the substantive law, and do not assure reliability if mechanically interpreted. The Court's view that the exception is "firmly established"¹³⁴ should not foreclose constitutional attacks upon statements admitted under an exception susceptible of such interpretation. And the Court's view that the Constitution requires hearsay offered against the accused to be reliable¹³⁵ supports strongly the search undertaken in this article to find evidential bases for the exception which help assure reliability of statements admitted under it.

The constitutional constraint imposed by the Supreme Court in *Bruton v. United States*,¹³⁶ which is also based upon the Confrontation Clause and which holds that an admission by one defendant implicating another cannot be admitted against both over the latter's objection (since a limiting instruction is inadequate to prevent improper use against the objecting defendant), apparently does not reach statements that satisfy the exception.¹³⁷ This outcome seems

and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement"), *cert. denied*, 103 S. Ct. 464 (1982); *United States v. Perez*, 658 F.2d 654, 660-62 (9th Cir. 1981) (satisfying the coconspirator exception "does not automatically guarantee compliance with the confrontation clause"; court applies *Dutton* criteria, concluding that the statements in issue here were reliable); *United States v. Fielding*, 630 F.2d 1357, 1366-69 & n.9 (9th Cir. 1980) (court applies *Dutton* factors and notes that the Supreme Court has identified only two exceptions as being so firmly rooted that evidence complying with them satisfies the Constitution, i.e., the ones for dying declarations and "cross-examined prior-trial testimony").

133. *United States v. Ordonez*, 722 F.2d 530, 534-36 (9th Cir. 1983) (government failed to show that ledger books, offered under coconspirator exception, were reliable, so their receipt violated Confrontation Clause; conviction reversed for this and other reasons); *United States v. Fielding*, 630 F.2d 1357, 1364-69 (9th Cir. 1980) (receipt of coconspirator statements that did not further the venture violated both the coconspirator exception and defense confrontation rights), *withdrawn* 645 F.2d 719, 724-28 (1981) (new opinion simply finds reversible error in misapplying the exception, but does not reach constitutional issues).

134. *See supra* note 126 and accompanying text.

135. *See supra* note 129 and accompanying text.

136. 391 U.S. 123 (1968). For further discussion of the *Bruton* doctrine see *infra* text accompanying notes 194-99.

137. *United States v. Arruda*, 715 F.2d 671, 685 n.11 (1st Cir. 1983) (no *Bruton* problem with respect to statements within coconspirator exception); *United States v. Hamilton*, 689 F.2d 1262, 1271 n.5 (6th Cir. 1982) (same), *cert. denied*, 103 S. Ct. 753 (1983); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981) (same), *cert. denied*, 455 U.S. 1005, 457 U.S. 1136 (1982); *United States v. Rogers*, 652 F.2d 972, 976 (10th Cir. 1981) (same);

inconsistent with the better view suggested above, but it rests upon rather specific exempting language in *Bruton* itself,¹³⁸ and that decision came prior to many of the modern cases which have evinced a more general concern over the reliability of hearsay admitted against the defendant.

IV. THE PROCEDURAL THICKET

A. *Admitting and Excluding*

Confusion on a number of issues has long bedeviled administration of the coconspirator exception. The confusion has three sources. First, there is interplay and overlap between the hearsay and nonhearsay aspects of coconspirator statements which courts and commentators have often failed to see, let alone explain. Second, the exception presents what may best be described as a problem of coincidence, in that certain preliminary questions upon which its application depends coincide, in conspiracy prosecutions, with ultimate questions of guilt or innocence.¹³⁹ Third, the exception also presents what may best be described as a problem of circularity, in that coconspirator statements often assert or imply one of the very facts which must be established in order for the exception to apply.

The issues are five in number, and they are closely connected. First, who decides whether the exception applies, judge or jury? Second, must the proponent adduce evidence independent of the statement itself in order to satisfy the conditions of the exception? Third,

United States v. Kendricks, 623 F.2d 1165, 1167-68 (6th Cir. 1980) (same).

138. In a footnote the *Bruton* Court emphasized that the statement before it "was clearly inadmissible . . . under traditional rules of evidence," and cited its decisions in *Krulewitch v. United States*, 336 U.S. 440 (1949) and *Fiswick v. United States*, 329 U.S. 211 (1949), described *supra* note 65, which approved the coconspirator exception but disapproved its application to post-conspiracy statements. The Court added that it did not have before it "any recognized exception to the hearsay rule" and that it would "intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." *Bruton*, 391 U.S. at 128 n.3.

139. When no conspiracy is charged, the coincidence factor vanishes and the exception does not require that a conspiracy be charged. *United States v. Nixon*, 418 U.S. 683, 701 & n.14 (1974); *United States v. Kaatz*, 705 F.2d 1237, 1244 (10th Cir. 1983); *United States v. Kiefer*, 694 F.2d 1109, 1112 n.2 (8th Cir. 1982); *United States v. Everett*, 692 F.2d 596, 601 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1498 (1983); *United States v. Salisbury*, 662 F.2d 738, 740 (11th Cir. 1981), *cert. denied*, 457 U.S. 1107 (1982); *United States v. Kendricks*, 623 F.2d 1165, 1168 n.5 (6th Cir. 1980).

Even when a conspiracy is charged, sometimes the coincidence factor vanishes. See *United States v. Saimiento-Rozo*, 676 F.2d 146, 149 (5th Cir. 1982) (not necessary that the charged conspiracy be the one upon which admissibility of coconspirator statements is predicated); *United States v. Green*, 600 F.2d 154, 157 (8th Cir. 1979) (same).

may a coconspirator statement be provisionally admitted, before the conditions of the exception are shown to be satisfied, or must those conditions be satisfied first? Fourth, with respect to evidence offered to satisfy those conditions, what is the burden of persuasion which rests upon the proponent? And fifth, should the jury be instructed upon the applicability of the exception?

Since enactment of the Rules, most circuits have addressed and resolved these issues. A consensus has emerged, which is generally sound. Yet the consensus is fragile. The reason is not so much the differences in nuance and detail (for these are inevitable), but rather the fact that conflict remains on significant points, and confusing language appears in many opinions. Perhaps most important, few decisions or commentators have adequately set out the underlying logic.

The consensus is as follows:¹⁴⁰ The judge alone decides whether a statement falls within the coconspirator exception, and the proponent must establish the predicate facts by independent evidence. While it would be preferable to determine that the exception applies before admitting a statement under it, the exigencies of trial almost always require that statements be admitted provisionally, with the decision on the applicability of the exception reserved to the end of trial. It is the preponderance standard which applies in connection with preliminary questions concerning applicability of the exception, and the jury should not be instructed to determine anew whether or not a statement is within the exception.

This consensus did not always exist. Prior to enactment of the Rules, no fewer than six circuits held that the jury determined as a final matter whether the exception applied,¹⁴¹ and accordingly that

140. Detailed landmark opinions appearing within a year of each other, one by a panel of the Eighth Circuit and one by the Fifth Circuit sitting on rehearing en banc, became highly influential in establishing the consensus referred to in text. See *United States v. James*, 590 F.2d 575 (5th Cir. 1979) (en banc) (Clark, J.); *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978) (Matthes, J.). Two other groundbreaking opinions made the basic points lying at the heart of the consensus, i.e., that the trial judge should decide the issue and apply the preponderance standard. *United States v. Enright*, 579 F.2d 980, 986 (6th Cir. 1978) (Engel, J.); *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977) (Coffin, J.). See *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969) (remarkable pre-Rules opinion by Judge Friendly, anticipating the modern consensus), *cert. denied*, 397 U.S. 1028 (1970).

Perhaps the two most significant points of difference involve the standard of persuasion and resort to the statement offered under the exception as proof of the underlying preliminary facts. Only the Ninth Circuit consistently applies a standard of persuasion lower than a preponderance. See cases cited *infra* note 179. Only the First and Sixth Circuits seem to permit use of the statement as proof of the preliminary facts. See cases cited *infra* note 158.

141. Decisions in the First, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits allocated

the judge should give an instruction on the requirements of the exception.¹⁴² Coconspirator statements were to be received on the basis of a prima facie showing of the predicate facts,¹⁴³ but the jury was to view a statement as within the exception only if it concluded that the predicate facts were established beyond a reasonable doubt.¹⁴⁴

The five issues deserve a closer look.

1.—*Functions of Judge and Jury.* The consensus allocates to the trial judge the responsibility to determine whether a statement is within the coconspirator exception.¹⁴⁵ As is explored in detail below,

to the jury final responsibility to determine whether a statement satisfied the coconspirator exception. *United States v. Petrozziello*, 548 F.2d 20, 22 (1st Cir. 1977) (describing pre-Rules practice in that Circuit); *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973); *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965); *United States v. Santos*, 385 F.2d 43 (7th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968); *United States v. Sanders*, 463 F.2d 1086, 1088 (8th Cir. 1972); *United States v. Pennett*, 496 F.2d 293, 296-297 (10th Cir. 1974).

Decisions in the Second, Third, Fourth, and Ninth Circuits held that the judge alone resolves the matter. *See United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *United States v. Bey*, 437 F.2d 188, 191-92 (3d Cir. 1971); *United States v. Jones*, 542 F.2d 186, 203 & n.33 (4th Cir.) (describing pre-Rules practice), *cert. denied*, 426 U.S. 922 (1976); *Carbo v. United States*, 314 F.2d 718, 737 (9th Cir. 1963).

142. *United States v. Honneus*, 508 F.2d 566, 576-77 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *United States v. Apollo*, 476 F.2d 156, 163 (5th Cir. 1973); *United States v. Dorsey*, 290 F.2d 893, 894 (6th Cir. 1961); *United States v. Santiago*, 582 F.2d 1128, 1132 (7th Cir. 1978) (describing pre-Rules practice); *Rizzo v. United States*, 304 F.2d 810, 826-27 (8th Cir. 1962); *United States v. Pennett*, 496 F.2d 293, 296-97 (10th Cir. 1974).

143. *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977) (describing pre-rules practice as requiring a "prima facie case"); *United States v. Oliva*, 497 F.2d 130, 132-33 (5th Cir. 1974) ("prima facie case"); *United States v. Mayes*, 512 F.2d 637, 651 (6th Cir.) (same), *cert. denied*, 422 U.S. 1008 (1975), 423 U.S. 840 (1975); *United States v. Santos*, 385 F.2d 43, 44-45 (7th Cir. 1967) (same), *cert. denied*, 390 U.S. 954 (1968); *United States v. Sanders*, 463 F.2d 1086, 1088 (8th Cir. 1972) ("credible and sufficient"); *United States v. Scholle*, 553 F.2d 1109, 1117 (8th Cir.) ("substantial independent evidence"; court equates this standard with the one announced in *Sanders*, 463 F.2d 1086), *cert. denied*, 434 U.S. 940 (1977); *United States v. Pennett*, 496 F.2d 293, 296 (10th Cir. 1974) ("substantial independent evidence").

144. *See United States v. James*, 590 F.2d 575, 580 (5th Cir.) (describing pre-rules practice), *cert. denied*, 442 U.S. 917 (1979); *United States v. Mayes*, 512 F.2d 637, 651 (6th Cir. 1975); *United States v. Santiago*, 583 F.2d 1128, 1131-32 (7th Cir., 1978) (describing pre-rules practice); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978) (describing pre-rules practice).

145. *See, e.g., United States v. Radseck*, 718 F.2d 233, 235-36 (7th Cir. 1983) (trial judge makes preliminary determination of predicate facts pursuant to FED. R. EVID. 104(a)); *United States v. Ammar*, 714 F.2d 238, 247 n.5 (3d Cir.) (same), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Nichols*, 695 F.2d 86, 89 (5th Cir. 1982) (underlying coconspirator exception raises "preliminary questions concerning admissibility to be determined by the court, FED. R. EVID. 104(a), rather than conditional facts determining relevancy, FED. R. EVID. 104(b)"); *United States v. Mastropieri*, 685 F.2d 776, 787-89 (2d Cir.) (FED. R. EVID. 104(a) endorses pre-Rules practice under which judge alone determines whether coconspirator statement may be admitted), *cert. denied*, 103 S. Ct. 260 (1982); *United States v. Fleishman*, 684 F.2d 1329, 1337-38 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982); *United States v. Chaney*,

the judge makes this decision on the basis of all the independent evidence in the case, usually at the end of the case. The point which must be made here is that the judge should make an actual decision, which is to say that in the end he weighs and assesses the evidence and resolves issues of witness credibility, though of course only for the purpose of determining whether or not the exception applies.¹⁴⁶

The consensus is right in giving this responsibility to the trial judge, for three reasons:

First, the jury is not competent to decide this question. The only reason for invoking the exception is to permit the jury to make hearsay use of a statement. But the hearsay doctrine is complex, and it is premised upon related judgments that out-of-court statements may not be reliable and that a jury cannot properly evaluate them. It follows that a jury cannot be expected to understand the hearsay doctrine, to sympathize with its purposes, or to apply it sensibly. Moreover, it is unlikely that a jury, once exposed to a statement having hearsay significance, would ignore its assertive aspect, and the resultant risk is magnified if indeed it is true (as the hearsay doctrine supposes) that juries cannot properly evaluate such statements.

662 F.2d 1148, 1153 (5th Cir. 1981); *United States v. Perez*, 658 F.2d 654, 658 (9th Cir. 1981); *United States v. Federico*, 658 F.2d 1337, 1342 (9th Cir. 1981); *United States v. Gantt*, 617 F.2d 831, 845-46 (D.C. Cir. 1980); *DeMier v. United States*, 616 F.2d 366, 371 (8th Cir. 1980).

146. *United States v. Nichols*, 695 F.2d 86, 91 (5th Cir. 1982) (in determining predicate facts, "judging the credibility of the witness is a matter for the trial court"); *United States v. Dean*, 666 F.2d 174, 179-80 (5th Cir.) (in determining predicate facts, trial judge "is obliged to consider the evidence of both the defendant and the government," and reviewing court here would not "fault the trial judge for making credibility choices unfavorable to the defense"), *cert. denied*, 456 U.S. 1008, 457 U.S. 1135 (1982); *United States v. Ricks*, 639 F.2d 1305, 1309 (5th Cir. 1981) ("determination of where the preponderance lies 'requires a measuring and weighing of all the evidence, pro and con,' whether 'supporting or attacking the proposition that the predicate facts exist'"); *United States v. Ciampaglia*, 628 F.2d 632, 638 (1st Cir.) (adoption of preponderance standard implicitly suggested "that the defendant's evidence would be taken into consideration," and the issues might be "dispositively affected" by that evidence; if trial judge determined the predicate facts on the basis of only the government's proof, such practice "would render almost meaningless any difference between" the preponderance and the now-discarded prima facie standards), *cert. denied*, 449 U.S. 956 (1980); *United States v. Enright*, 579 F.2d 980, 984-85 (6th Cir. 1978) (determination whether coconspirator exception applies "calls for the exercise of judicial fact-finding responsibilities by the trial judge, responsibilities which require him to evaluate both credibility and the weight of the evidence"); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978) (trial judge to make "final" decision of predicate facts "at the conclusion of all the evidence," deciding whether the government has carried its burden and making an "explicit determination" of the predicate facts); *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977) (trial judge to make "conclusive" decision of predicate facts for purpose of "determining" admissibility, applying preponderance standard).

In the end, passing to the jury the question whether the exception applies tends to defeat the protective policy of the hearsay doctrine.

Second, in conspiracy prosecutions the coincidence factor complicates matters. If the jury were given the task of applying the exception, it would receive an apparent message to consider the statement as evidence of guilt only if it concluded that defendant was guilty.¹⁴⁷

Third, in conspiracy prosecutions the circularity factor complicates matters further. Asked to apply the exception, the jury would receive an apparent message that the statement could be considered proof of what it asserts only if the jury has already concluded that what it asserts is so.

These complicating factors would produce what an alert juror would see as a senseless conundrum (actually a pair of them) conveyed in a single mystifying instruction. That instruction would advise the jury to consider the statement as proof that defendant and declarant conspired only if it concluded that defendant and declarant conspired. The message contains the two riddles already suggested: The statement may be taken as proof of guilt only after guilt has been determined, and as proof of what it asserts only after what it asserts has been found to be so. There is a possibility of escape: The prosecutor might seek to prove conspiracy only by means of other evidence, offering a coconspirator statement as proof only of some other charged offense. But such separate use of coconspirator statements is unlikely. And the lawyer's technical mind suggests another escape: The jury could be told that it must first decide, without reference to the statement and by the preponderance standard, whether defendant and declarant conspired, and that if it answers this question in the affirmative it should then decide, this time considering the statement and all the other evidence and applying the beyond-reasonable-doubt standard, whether defendant and declarant are guilty of conspiracy. But it is unrealistic to think that the jury could effectively look at different arrays of proof and apply different standards without losing its way, and it is wholly unrealistic to bifurcate the

147. *United States v. Santiago*, 582 F.2d 1128, 1132 (7th Cir. 1978) (under the traditional approach, jury could consider coconspirator statements only when "conspiratorial guilt had in theory already been established," whereupon the statements "could only confirm the judgment previously reached"; expecting jury to behave this way "must strain the confidence of even the most ardent admirers of the jury system"). The Court cited Judge Learned Hand's opinion in *United States v. Dennis*, 183 F.2d 201, 230-31 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) to support its position.

trial in order to allow the jury to perform such tasks on separate occasions.

It should be noted that the principal architect of the Federal Rules took very much the opposite view, rejecting in advance what has become the consensus. Professor Cleary endorsed the practice of admitting coconspirator statements on the basis of "a prima facie case" of conspiracy. Noting the transubstantiation effected by rule 801(d)(2)(E), which declares that coconspirator statements satisfying the coventurer, pendency, and furtherance requirements are "not hearsay," he argued that in truth such statements simply do not belong in "the category of hearsay," but rather "fall within the category of 'verbal acts,' which are not hearsay." Hence the preliminary questions have nothing to do with "administering a technical rule . . . against hearsay," but relate instead to "relevancy, in the broad sense." Thus the judge should perform only a "preliminary screening" to insure that there is adequate evidence to support a finding that there was a "conspiracy with defendant and declarant as members" and that declarant made the statement, passing to the jury the final decision on these points.¹⁴⁸ In sum, Professor Cleary apparently argues that applying the coconspirator exception raises an issue of "conditional relevancy" for the jury to determine under rule 104(b), rather than a question of "admissibility" for the judge to decide under rule 104(a).

There are three difficulties in the Cleary position. First, even statutory magic simply cannot make the assertive force in coconspirator statements disappear.¹⁴⁹ It is true that a statement within rule 801(d)(2)(E) is a verbal act, but this fact does not eclipse its hearsay significance. Indeed, if it were true that statements satisfying the coventurer, pendency, and furtherance criteria were simply beyond the reach of the hearsay doctrine, then that provision would be a redundancy in a scheme of otherwise terse statutory prose. Second, passing coconspirator statements to the jury on the basis of a

148. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 918 (1978); C. McCORMICK, *supra* note 51 § 53 (Supp. 1978).

149. *United States v. Hamilton*, 689 F.2d 1262, 1268 n.2 (6th Cir. 1982) ("technically coconspirator statements are not 'exceptions' to the hearsay Rule 802," but "they are in practice indistinguishable from the exceptions listed in Rules 803 and 804"), *cert. denied*, 103 S. Ct. 753, 754 (1983); *United States v. Smith*, 578 F.2d 1227, 1231 n.6 (8th Cir. 1978) (in deciding that judge alone determines applicability of coconspirator exception, court recognizes that FED. R. EVID. 801(d)(2)(E) provides that coconspirator statements are "not hearsay," but suggests that distinction between this category and the exceptions is "semantic" and "not determinative of the outcome of this case").

prima facie showing would lead to the sort of mystifying instruction described above. Third, the Cleary position seems to assume that the criteria of rule 801(d)(2)(E) have nothing to do with the criterion of reliability which traditionally underlies exceptions to the hearsay doctrine. It is far from clear that coconspirator statements may be received as proof of what they assert if they lack reliability, thus far from clear that the criteria underlying the provision are in fact dissimilar from the "technical" aspects of the hearsay doctrine.

Of course it is quite another matter where a coconspirator statement has only nonhearsay significance in the case. In the bank robbery example, which presents the simplest possible instance, the question whether to admit the perpetrator's demand that the teller turn over the money as proof of defendant's guilt of robbery by complicity (in virtue of having conspired with the perpetrator) should be answered in the end by the jury. Here, the Cleary position is correct: The allocation of responsibility between judge and jury is the one set out in rule 104(b). The task of the judge is to determine whether sufficient evidence connects declarant and defendant as conspirators, and to decide whether to require the prosecutor to adduce the connecting proof first, or to admit the statement subject to later connection. Presumably the trial judge will require evidence sufficient to support a finding beyond reasonable doubt that declarant and defendant conspired,¹⁵⁰ and the question whether they are connected in this way should then pass to the jury.

The text of rule 104 does not help in deciding whether the threshold question presented by coconspirator statements is one of "admissibility" under subdivision (a) or "conditional relevancy" under subdivision (b).¹⁵¹ Indeed the Rules leave the profession with something of the lament of Kipling's painted jaguar, whose mother

150. See 2 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 27.17 (3d ed. 1977) (if jury finds defendant guilty of conspiracy, it may also find him guilty of a substantive offense, provided that it finds that the essential elements of conspiracy have been established beyond reasonable doubt, and (i) that the substantive offense was committed pursuant to the conspiracy and (ii) that the defendant was a member of the conspiracy when the substantive offense was committed).

151. *United States v. James*, 590 F.2d 575, 579 (5th Cir.) (neither the "language" of FED. R. EVID. 104 nor the Advisory Committee's Notes reveal whether it is subdivision (a) or subdivision (b) which applies to determining the preliminary questions presented by the coconspirator exception, so court would "look beyond the language of the rule to its underlying policies"; court concludes in this landmark opinion that FED. R. EVID. 104(a) applies because jury cannot be trusted to make the decision and because coconspirator statements raise problems of "trustworthiness" rather than relevancy which require scrutiny by "the trained legal mind of the trial judge"), *cert. denied*, 442 U.S. 917 (1979).

told him that if he found a tortoise he should scoop it out of its shell and if he found a hedgehog he should hold it in water until it uncoils, but did not instruct him how to tell which was which.¹⁵² And courts sometimes contribute to the confusion by saying that in laying the predicate for the exception the prosecutor "connects up" the evidence¹⁵³ (those terms so suggestive of "conditional relevancy"), as if applying the exception were a task for the jury, when clearly they intend for the judge to perform it under rule 104(a).

Reviewing courts have not insisted upon a trial record which reflects express findings by the trial judge on all predicate facts, and have gone far to assume (sometimes despite strong indications to the contrary) that the trial judge applied the proper standard in the proper way.¹⁵⁴

152. R. KIPLING, *The Beginning of the Armadillos*, in *JUST SO STORIES FOR LITTLE CHILDREN* 101-02 (1902). For a modern and whimsical expression of the same sentiment in connection with FED. R. EVID. 104, see Kaplan, *Of Mabrus and Zorgs — An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987, 995 (1978).

153. *United States v. Monaco*, 702 F.2d 860, 877 n.29 (11th Cir. 1983) (trial court may admit coconspirator statements "subject to the government's 'connecting them up' with independent evidence" later); *United States v. Gantt*, 617 F.2d 831, 844-45 (D.C. Cir. 1980) (court determines admissibility of coconspirator statements, but "may admit declarations of co-conspirators 'subject to connection'"); *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979) (trial court alone decides whether coconspirator exception applies, and under the "preferred order of proof" the court decides first whether the statement has been "connected"), *cert. denied*, 442 U.S. 917 (1979).

154. *United States v. Winship*, 724 F.2d 1116, 1121-22 (5th Cir. 1984) (failure to decide predicate facts expressly did not indicate that trial judge did not decide them and was not reversible error where record indicated that trial judge carefully considered them during trial); *United States v. Monaco*, 702 F.2d 860, 876-77 (11th Cir. 1983) (upholding receipt of coconspirator statements even though trial judge "did not expressly determine" that the threshold showing was made, since "he implicitly ruled that there was substantial evidence" of the predicate facts); *United States v. Margiotta*, 688 F.2d 108, 137-38 (2d Cir. 1982) (upholding receipt despite fact that trial judge "did not explicitly make the findings" required on the predicate facts, since "talismanic words" need not be uttered in performing the required judicial role), *cert. denied*, 103 S. Ct. 1891 (1983); *United States v. Whitley*, 670 F.2d 617, 620 (5th Cir. 1982) ("trial judge's failure to specifically articulate his findings and conclusions" on the predicate facts did not amount to reversible error); *United States v. Calabrese*, 645 F.2d 1379, 1386 (10th Cir.) (trial judge "did not explicitly say that the statements were made during the course of and in furtherance of the conspiracy," but record indicates that judge "understood his responsibility" and "clearly reveals that the statements satisfied this test"), *cert. denied*, 451 U.S. 1018 (1981); *United States v. Lutz*, 621 F.2d 940, 947 (9th Cir. 1980) (trial court not required to make "an explicit finding" of the predicate facts), *cert. denied*, 449 U.S. 859 (1980), 449 U.S. 1093 (1981); *United States v. Cambindo Valencia*, 609 F.2d 603, 630-31 (2d Cir. 1979) (trial judge "failed to make an explicit finding of sufficient independent evidence" of the predicate facts, but reviewing court would "infer that the finding was made implicitly when the court admitted the statements over the defense's objections"), *cert. denied*, 446 U.S. 940 (1980); *United States v. Williams*, 604 F.2d 1102, 1112 (8th Cir. 1979) (court notes that "[a]n explicit, on-the-record finding of admissibility [of coconspirator's statements] has never

2.—*Independent Evidence.* There is no dispute that the predicate facts of the coconspirator exception must be supported by evidence independent of the statement itself. Long ago the Supreme Court disapproved of a “bootstrapping” approach under which a coconspirator statement might establish, so to speak, its own provenance, proving the very points that make it admissible.¹⁵⁵ This independent evidence requirement survived enactment of the Rules, and means that the determination of the predicate facts must be made without taking the statement as proof of what it asserts — or, as the decisions often say, on the basis of non-hearsay evidence.¹⁵⁶ (Naturally, however, the content of the statement in question is important in deciding whether it furthered the venture,¹⁵⁷ and the real meaning of the independent evidence requirement is simply that the trial judge may not make a hearsay use of the statement in question in determining the predicate facts.)

Some post-Rules decisions, however, suggest that coconspirator statements may be considered along with the independent evidence

previously been required in this circuit. . . .” (quoting *United States v. Bell*, 573 F.2d 1040, 1045 (8th Cir. 1978)); *United States v. Continental Group Inc.*, 603 F.2d 444, 457-60 (3d Cir. 1979) (court satisfied that proper standard for finding existence of coconspirator relationship was applied below), *cert. denied*, 444 U.S. 1032 (1980).

Cf. United States v. Green, 600 F.2d 154, 158 (8th Cir. 1979) (trial court need not make on-the-record finding that coconspirator statement satisfies requirements of Confrontation Clause).

155. *Glasser v. United States*, 315 U.S. 60, 74-75 (1942). See *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974) (“as a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury.”).

156. *United States v. Garcia-Duarte*, 718 F.2d 42, 45 (2d Cir. 1983); *United States v. Ammar*, 714 F.2d 238, 246 n.3 (3d Cir.) (“preliminary determinations as to admissibility” of coconspirator statements “must be made on the basis of independent evidence;” this requirement survived enactment of the Rules; court expressly rejects notion that statements themselves may be considered), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Jefferson*, 714 F.2d 689, 696 (7th Cir. 1983) (conspiracy established by evidence that is “nonhearsay and independent of the statements the government wishes to have admitted”); *United States v. Terry*, 702 F.2d 299, 320 (2d Cir.) (independent nonhearsay evidence), *cert. denied*, 103 S. Ct. 2095 (1983); *United States v. Smith*, 692 F.2d 693, 697-98 (10th Cir. 1982); *United States v. Hartley*, 678 F.2d 961, 972-74 (11th Cir. 1982) (credible evidence independent of hearsay statements), *cert. denied*, 103 S. Ct. 815 (1983); *United States v. Tunsil*, 672 F.2d 879, 881-82 (11th Cir.), *cert. denied*, 103 S. Ct. 110 (1982); *United States v. Alvarez-Porras*, 643 F.2d 54, 56-57 (2d Cir.), *cert. denied*, 454 U.S. 839 (1981); *United States v. Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States v. Grassi*, 616 F.2d 1295, 1300 (5th Cir. 1980), *cert. denied*, 449 U.S. 956 (1980); *United States v. Baykowski*, 615 F.2d 767, 771 n.3 (8th Cir. 1980); *United States v. James*, 590 F.2d 575, 581 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

157. *United States v. Xheka*, 704 F.2d 974, 985-86 (7th Cir. 1983) (deciding whether a coconspirator statement “was in furtherance of the conspiracy must of necessity take into account the contents of the statement”).

in determining the preliminary questions.¹⁵⁸ These decisions rely upon the exempting phrase in rule 104(a), which states that in deciding questions of admissibility the trial judge "is not bound by the rules of evidence," apart from privileges.

In part, the independent evidence requirement is a consequence of the circularity factor: Since coconspirator statements so often assert a predicate fact which is a precondition to applying the exception, it is sensible to describe proof establishing that predicate as "separate" from or "independent" of the statement itself. But why not allow the judge to rely upon the statement as proof of the predicate facts, since he is not limited by evidence law in deciding these points? There are three answers.

One answer, more semantic than substantial, is that the requirement of independent evidence is woven into the warp and woof of the exception. Hence it is not merely a description of the *quality of proof* by which the predicates are to be established, but is itself rather a *fourth (unstated) predicate*. The exempting phrase addresses the manner of proof, and nothing in rule 104(a) sets out the points to be proved: Independent evidence is a point to be proved.

Another answer, somewhat more satisfying, is that the exempting phrase does not authorize the trial judge to decide irrationally. The question, after all, is whether a statement fits the coconspirator exception, and something apart from the statement must be known to answer this question in a reasonable fashion. The clear error standard, which applies to the review of a decision by the trial judge to admit a coconspirator statement,¹⁵⁹ already provides the necessary

158. *United States v. Luce*, 713 F.2d 1236, 1242 (6th Cir. 1983); *United States v. Piccolo*, 696 F.2d 1162, 1168 & 1169 n.7 (6th Cir. 1983) (court observes in a note that the hearsay "ought to be given little weight . . . in determining whether a proper foundation for admission has been established" and that it "ought not to be the *only* evidence" of the predicate facts; here the independent evidence satisfies the preponderance standard); *United States v. Guerro*, 693 F.2d 10, 12 (1st Cir. 1982) (court could consider the coconspirator statements themselves as additional evidence in determining whether coventurer requirement was satisfied); *United States v. Hamilton*, 689 F.2d 1262, 1268-69 & n.3 (6th Cir. 1982) (same), *cert. denied*, 103 S. Ct. 753 (1983); *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir., 1979) (same), *cert. denied*, 444 U.S. 1074 (1980).

159. *United States v. Correa-Arroyave*, 721 F.2d 792, 795 (11th Cir. 1983); *United States v. Yonn*, 702 F.2d 1341, 1348 (11th Cir.), *cert. denied*, 104 S. Ct. 187 (1983); *United States v. Gonzalez*, 700 F.2d 196, 203 (5th Cir. 1983); *United States v. Nichols*, 695 F.2d 86, 91 (5th Cir. 1982); *United States v. Rodriguez*, 689 F.2d 516, 518 (5th Cir. 1982); *United States v. Bolla*, 685 F.2d 929, 933 (5th Cir. 1982); *United States v. Patterson*, 644 F.2d 890, 894-95 (1st Cir. 1981).

But see United States v. Strauss, 678 F.2d 886, 891-92 & nn.10-11 (11th Cir.) (clear error standard of review does not apply where trial court applied only the substantial evidence

leeway to permit sensible administration of the exception. Allowing the trial judge to rely upon the proffered statement itself, in whole or in part, threatens to place even an irrational decision beyond review.

A third answer, more satisfying than both of the others, is that the coconspirator exception is one which, in its very nature and for good reason, calls out for corroborative proof. Permitting the trial judge to rely in whole or in part upon the statement puts in place a slippery slope which threatens or destroys the corroborative function.

3.—*Sequence*. Obviously it would be useful to know at the outset whether a statement offered pursuant to rule 801(d)(2)(E) does or does not satisfy the exception. Yet in virtue of the coincidence factor, the same facts which comprise the predicate are likely to be in hot dispute “on the merits” throughout the prosecutor’s case, hence not readily ascertainable when a coconspirator statement is offered.¹⁶⁰

Therefore, courts have been pushed to choose one of three alternatives: A coconspirator statement might be provisionally admitted, but this course carries with it the risk that if the predicate fails, a mistrial must be declared, or a new trial granted as a result of post-verdict motion or appellate review. Or, a coconspirator statement might be excluded until the end of trial, then admitted if the trial judge determines that the predicate facts are established, but this course would fragment the presentations of both government and defense cases, and further complicate what is already a complex task for each side. The third possibility is to require the government and the defense, in effect, to present their cases twice, once before the judge alone so that he might determine the preliminary questions, and once before the trier of fact for a decision on the merits, with the statement admitted or not as the judge decides on the basis of the “dry run,” but this course entails extraordinary duplication of effort and expenditure of time.¹⁶¹ Both the latter alternatives would

test and erred in failing to apply preponderance standard; here court would “review independently” the trial court’s “findings on the existence of a conspiracy”; reviewing court finds that evidence established conspiracy by a preponderance, hence that coconspirator statements were properly admitted; defense did not request a final ruling, court reconsidered its initial ruling on its own initiative and reviewing court noted that reconsideration “is required only if the defendant makes an appropriate motion”), *cert. denied*, 103 S. Ct. 218 (1982).

160. *Cf.* *United States v. Alvarez*, 696 F.2d 1307, 1310 (11th Cir.) (“evidence adduced in the jury’s presence” on the issue of guilt “tracked that offered [earlier] at the *James* hearing” on the issue of admissibility of coconspirator statements), *cert. denied*, 103 S. Ct. 1878 (1983).

161. The “dry run” became known in the trade as a *James* hearing, after a notable decision in the Fifth Circuit which implied that ordinarily such a hearing should be held

produce charges of unfairness and of improper attempts to use the first presentation as a discovery device.

In the end, the choice was simple. Many modern opinions endorse a "preferred order of proof,"¹⁶² in which the predicate facts are established first, but all concede that the exigencies of trial may not permit such a neat resolution of the problem.¹⁶³ Therefore, the trial judge has discretion to admit a coconspirator statement provisionally (meaning that it is proffered, and also heard by the jury),¹⁶⁴ though subject to the admonition that he may have to grant a mistrial if in the end the predicate facts are not established and a cura-

before trial. On rehearing *en banc*, the decision in that case was modified to make it clear that while the "preferred order of proof" involved a "showing to be made before admitting" the coconspirator statement, still such a statement may be admitted first if the trial court "determines [that] it is not reasonably practical" to follow the preferred order. *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979) (*en banc*), *modifying* 576 F.2d 1121 (5th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

162. *United States v. Behrens*, 689 F.2d 154, 158-59 (10th Cir. 1982) ("preferable" to establish conspiracy and defendants' connection to it before admitting coconspirator statements, and trial court should follow this order unless there exists "some substantial reason" to do otherwise; here trial judge did not depart from this preferred order, since he required government first to introduce "nonhearsay evidence of a conspiracy and the involvement of each defendant," and only admitted the coconspirator statements when "the requirement's safeguards had been substantially realized"; thereafter the trial judge applied the preponderance standard), *cert. denied*, 103 S. Ct. 573 (1982); *United States v. Calabrese*, 645 F.2d 1379, 1386-87 (10th Cir.) (preferred order of proof must be followed, absent "some substantial reason"), *cert. denied*, 451 U.S. 1018 (1981); *United States v. James*, 590 F.2d 575, 582 (5th Cir.) (because of the "danger" to the defendant if a coconspirator statement provisionally admitted does not satisfy the exception, and "because of the inevitable serious waste of time, energy and efficiency when a mistrial is required," trial judge should "whenever reasonably practicable," follow a "preferred order of proof" under which the predicate facts are established before the statement is received), *cert. denied*, 442 U.S. 917 (1979).

163. *See, e.g., United States v. Continental Group, Inc.*, 603 F.2d 444, 456-57 (3d Cir. 1979) (trial court's decision to admit such declarations "subject to later connection" permissible where "alternative approaches may have been unduly complex and confusing to the jury or to the Court"), *cert. denied*, 444 U.S. 1032 (1980).

164. *See United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983); *United States v. Ammar*, 714 F.2d 238, 246-47 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Gonzalez*, 700 F.2d 196, 203 (5th Cir. 1983); *United States v. Piccolo*, 696 F.2d 1162, 1167 (6th Cir. 1983); *United States v. Nicholl*, 664 F.2d 1308, 1311-12 (5th Cir.), *cert. denied*, 457 U.S. 1118 (1982); *United States v. Miller*, 664 F.2d 826, 827-28 (11th Cir. 1981); *United States v. Clark*, 649 F.2d 534, 539 (7th Cir. 1981); *United States v. Miranda-Uriarte*, 649 F.2d 1345, 1349 (9th Cir. 1981); *United States v. Zemek*, 634 F.2d 1159, 1169 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *United States v. Batimana*, 623 F.2d 1366, 1368-69 (9th Cir. 1980); *United States v. Nelson*, 603 F.2d 42, 44-45 (8th Cir. 1979); *United States v. Andrews*, 585 F.2d 961, 966 (10th Cir. 1978); *see also United States v. Roe*, 670 F.2d 956, 963 (11th Cir. 1982) (when trial judge decides to admit coconspirator statements provisionally instead of following the preferred order of proof, he need not "expressly determine that a *James* hearing was not reasonably practical"), *cert. denied*, 103 S. Ct. 126 (1983).

tive instruction seems unlikely to work.¹⁶⁵ He must then make his final decision at the end of trial¹⁶⁶ (as noted above,¹⁶⁷ in doing so he weighs the evidence and resolves issues of witness credibility), when all is said and done permitting the statement (already provisionally admitted) to be taken as proof of what it asserts only if the predicate facts are established by a preponderance of the evidence.¹⁶⁸ Of course the trial judge should not announce to the jury that he has found those facts, for the jury must resolve some of the same fact issues in determining guilt or innocence.¹⁶⁹ Some courts appear to suggest that the trial judge must at least decide, prior to admitting the statement (even provisionally) that the proponent has made out a *prima facie* case of the predicate facts,¹⁷⁰ but if the final determina-

165. *United States v. Ricks*, 639 F.2d 1305, 1308-09 (5th Cir. 1981) (revealing to the jury that an out-of-court statement incriminating the defendant "is strong medicine," and if the predicate facts are not shown defendant is "unlawfully and most seriously prejudiced," so that "waste of mistrial would be likely" and "restoration of fairness through corrective instruction would be difficult if possible at all"; provisional receipt of coconspirator statements "can rarely be eliminated by curative or cautionary instructions"); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978) (where witness is required "to recount an out-of-court declaration of an alleged coconspirator, the court . . . may conditionally admit the statement"); *United States v. Geaney*, 417 F.2d 1116, 1120 & n.3 (2d Cir. 1969) (if predicate facts not established after statement provisionally admitted, "the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility, . . . declare a mistrial if the defendant asks for it"), *cert. denied*, 397 U.S. 1028 (1970).

166. *United States v. Arruda*, 715 F.2d 671, 684 (1st Cir. 1983) (court to decide "at the close of all evidence" whether the coconspirator exception applies); *United States v. Rodriguez*, 689 F.2d 516, 518 (5th Cir. 1982) (court to apply preponderance standard "[a]t the end of the trial"); *United States v. Dean*, 666 F.2d 174, 179 (5th Cir.) (court to decide at "the close of all the evidence"), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Patterson*, 644 F.2d 890, 896 (1st Cir. 1981) (at "the conclusion of all the evidence").

But see *United States v. Correa-Arroyave*, 721 F.2d 792, 794 (11th Cir. 1983) (apparently approving final determination "at the conclusion of the government's case"); *United States v. Bolla*, 685 F.2d 929, 932-33 (5th Cir. 1982) (similar).

167. *See supra* note 146 and accompanying text.

168. *See infra* notes 174-86 and accompanying text.

169. *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979) (trial judge should not advise the jury of his findings on the predicate facts, nor describe government's burden of proof on the preliminary questions, for doing so "can serve only to alert the jury that the judge has determined that a conspiracy involving the defendant has been proven by a preponderance of the evidence," which "may adversely affect the defendant's right to trial by jury," since the opinion of the judge "is likely to influence strongly the opinion of individual jurors"), *cert. denied*, 444 U.S. 1074 (1980).

170. *United States v. Monaco*, 702 F.2d 860, 876 (11th Cir. 1983) ("before [a coconspirator] statement is made known to the jury, the trial judge should determine that there is substantial evidence" of the predicate facts, "independent of" the statement itself); *United States v. Alvarez*, 696 F.2d 1307, 1310 (11th Cir.) (if trial judge is satisfied after *James* hearing that there is "*substantial independent evidence*" of the predicate facts, "then he may

tion may properly be delayed until the end of trial, then insisting upon this point is like swallowing the camel and straining at the gnat.¹⁷¹

These decisions put upon defense counsel the burden of raising a demand that the trial judge make the requisite findings (a mere hearsay objection not being enough),¹⁷² and of repeating the demand at the end of trial if the statement has been provisionally admitted.¹⁷³

allow into evidence the statements of the coconspirator," making the final decision upon appropriate defense motion and on the basis of all the evidence by the preponderance standard), *cert. denied*, 103 S. Ct. 1878 (1983); *United States v. Kopituk*, 690 F.2d 1289, 1324 (11th Cir. 1982) ("in a pretrial context" the standard of proof for admitting coconspirator statements "is one of substantiality," meaning that there must be "substantial evidence, independent of the declarations," tending to show the predicate facts), *cert. denied*, 103 S. Ct. 2089 (1983); *United States v. Rodriguez*, 689 F.2d 516, 518 (5th Cir. 1982) ("[b]efore the jury may hear" coconspirator statements, "the trial court must believe that there is substantial independent evidence" of the predicate facts); *United States v. Gray*, 659 F.2d 1296, 1301 (5th Cir. 1981) (in order to admit "initially" a coconspirator statement, "the trial court must find by substantial independent evidence" the predicate facts); *United States v. Grassi*, 616 F.2d 1295, 1301 (5th Cir. 1980) ("preliminary requirement of substantial evidence is not very rigorous," but "it demands at the very least that the court should determine that there is enough merit in the prosecution's case to risk the admission of hearsay that might later prove inadmissible when the court makes its second, more scrutinizing analysis of the evidence").

171. See *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983) ("not an abuse of discretion for the court to allow the government to introduce coconspirator statements prior to establishing prima facie the existence of a conspiracy"); *United States v. Nichols*, 695 F.2d 86, 89-90 (5th Cir. 1982) ("[i]deally" prosecutor should offer "substantial independent evidence" of the predicate facts first; nevertheless trial judge need not hold "any hearing before trial," and in this case there was no error in failing to hold "an evidentiary hearing" first, and in admitting the hearsay on the basis of "a proffer hearing"); *United States v. Cranston*, 686 F.2d 56, 58 (1st Cir. 1982) (because the finding that the predicate facts are shown by a preponderance need only be made at the close of the evidence, reviewing court need not decide "whether there was sufficient evidence of a conspiracy" when the statement was first received; moreover, defense did not then object).

172. See *United States v. Lopez*, 709 F.2d 742, 745 (1st Cir.) (where defendant did not object to introduction of coconspirator statements, trial court was not obliged to determine that coventurer requirement was satisfied), *cert. denied*, 104 S. Ct. 187 (1983).

Cf. *United States v. Patterson*, 644 F.2d 890, 896 & n.4 (1st Cir. 1981) (coconspirator statements were offered during government's case, and defense "argued the merits of the proposed ruling on the basis of evidence up to that point," not suggesting that the ruling was premature and failing thereafter to request reconsideration; this failure bars defense from raising the point as error now).

173. *United States v. Monaco*, 702 F.2d 860, 875-78 (11th Cir. 1983) (trial court admitted coconspirator statements provisionally, on basis of substantial evidence of conspiracy, and defense did not "expressly renew" its motion for a *James* hearing at the end of trial: "[A] court need not reconsider its initial determination unless the defendants make an appropriate motion . . ."); *United States v. Strauss*, 678 F.2d 886, 891 n.10 (11th Cir. 1982) (same); *United States v. Bulman*, 667 F.2d 1374, 1380 (11th Cir.) (same), *cert. denied*, 456 U.S. 1010 (1982); *United States v. Ciampaglia*, 628 F.2d 632, 638 (1st Cir.) (trial court determined predicate facts before any defense evidence came in, but defense "failed to make any objection

4.—*Standard of Persuasion.* The vast bulk of post-Rules authority holds that the preponderance standard applies to the determination of the predicate facts of the coconspirator exception.¹⁷⁴ The burden rests upon the government, as proponent.¹⁷⁵

Of course it would be possible to set the standard either lower or higher. The proponent might be required, for example, simply to introduce some independent evidence of the predicate facts. Or he might be required to introduce “sufficient evidence” or to make out a “prima facie case” of the predicate facts (those terms seeming in this context to be equivalent), which could mean proof enough to enable a factfinder reasonably to find those facts either (i) by a preponderance, (ii) beyond reasonable doubt (in either of these cases the terms set what might be called a “defined” prima facie standard), or (iii) by some unquantified and unknowable standard (in which case the terms set what may fairly be called an “empty” prima facie standard, devoid of meaning except insofar as they continue to require *some* independent evidence). Pre-Rules decisions often spoke of “proof *aliunde*” (to use the Latinism),¹⁷⁶ and the variousness in the language of the opinions suggests at one time or another all these possible meanings.¹⁷⁷

setting forth the reasoning that he now persuades us to adopt,” under which the decision should be made on the basis of all the evidence; this failure brings into play the plain error standard, and there was no plain error), *cert. denied*, 449 U.S. 956, 1038 (1980); *United States v. Baykowski*, 615 F.2d 767, 772 (8th Cir. 1980) (similar); *United States v. Pappas*, 611 F.2d 399, 404-05 (1st Cir. 1979) (after provisionally admitting coconspirator statements only against declarants, judge ruled on government motion that they could be received against all defendants under coconspirator exception, finding that government had made prima facie showing; failure of defense at this time to seek ruling on basis of preponderance standard brought into play the “plain error” standard of review; no plain error); *United States v. Bell*, 573 F.2d 1040, 1045 (8th Cir. 1978) (“[a]ppellant failed to request the finding” of admissibility; no plain error).

Contra *United States v. Radeker*, 664 F.2d 242, 243-44 (10th Cir. 1981) (upon proper objection by defendant, trial court must determine predicate facts; reviewing court rejects government contention that duty to make this determination arises “only if the defendant specifically requests” it).

174. *United States v. Radseck*, 718 F.2d 233, 235-36 (7th Cir. 1983) (trial judge correctly applied preponderance standard); *United States v. Ammar*, 714 F.2d 238, 247-49 (3d Cir.) (same), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Jarrett*, 705 F.2d 198, 207 (7th Cir. 1983) (independent evidence “more than sufficient to meet the preponderance test”); *United States v. Piccolo*, 696 F.2d 1162, 1167-68 (6th Cir. 1983).

175. *United States v. Radeker*, 664 F.2d 242, 244 (10th Cir. 1981); *United States v. Ricks*, 639 F.2d 1305, 1308 (5th Cir. 1981).

176. *See, e.g.*, *Glasser v. United States*, 315 U.S. 60, 74-75 (1942) (over the objection of a defendant, a coconspirator’s statement is admissible against him “only if there is proof *aliunde* that he is connected with the conspiracy”).

177. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 701 & n.14 (1974) (speaking of a

If the conditions of the exception make sense, then it seems that *someone* should determine whether they are satisfied. That is, someone should determine the predicate facts, for purposes of applying or not applying the exception. Hence merely requiring independent evidence or the "empty" prima facie case makes no sense.¹⁷⁸ Either would mean that the exception applies because there is some indication that it might apply. (Modern opinions sometimes continue to endorse application of the coconspirator exception on only a "prima facie" showing,¹⁷⁹ but most holdings using such terminology appear

"sufficient showing, by independent evidence," and calling for "substantial, independent evidence," meaning "at least enough to take the question to the jury," and noting that the question whether the standard has been satisfied is "a question of admissibility . . . to be decided by the trial judge"); *United States v. Vaught*, 485 F.2d 320, 323 (4th Cir. 1973) ("prima facie proof"; no reference to standard of persuasion); *United States v. Morton*, 483 F.2d 573, 576 (8th Cir. 1973) ("prima facie case"; no reference to standard of persuasion); *United States v. Spanos*, 462 F.2d 1012, 1014 (9th Cir. 1972) ("*prima facie* case," meaning "'one which would support a finding,'" meaning in turn "substantial independent evidence"; no reference to standard of persuasion); *United States v. Santos*, 385 F.2d 43, 44-45 (7th Cir. 1967) ("*prima facie* showing"; "substantial evidence *aliunde*"; no reference to standard of persuasion), *cert. denied*, 390 U.S. 954 (1968); *National Dairy Products Corp. v. United States*, 350 F.2d 321, 337 & n.10 (8th Cir. 1965) ("other independent evidence"; reviewing court approves instruction to jury to consider coconspirator statement only if it finds predicate facts "beyond a reasonable doubt"); *United States v. Hoffa*, 349 F.2d 20, 41-42 (6th Cir. 1965) ("prima facie case" and "substantial evidence"; no reference to standard of persuasion); *United States v. Ross*, 321 F.2d 61, 68 (2d Cir.) ("amount of proof *aliunde*" required "is not as high as the amount needed to warrant submission of a conspiracy charge to the jury"), *cert. denied*, 375 U.S. 894 (1963); *Glover v. United States*, 306 F.2d 594, 595 (10th Cir. 1962) ("independent evidence"; no reference to standard of persuasion); *Landers v. United States*, 304 F.2d 577, 580 (5th Cir. 1962) ("some independent evidence" may be required before admission of coconspirator statements; no further reference to quantum; no reference to standard of persuasion); *Fowler v. United States*, 242 F.2d 860, 863 (5th Cir. 1957) ("other proof"; no other reference to quantum; no reference to standard of persuasion); *United States v. Carminati*, 247 F.2d 640, 644 (2d Cir.) ("independent evidence" and mere suspicion of guilt not enough; no other reference to quantum or to burden of persuasion), *cert. denied*, 355 U.S. 883 (1957).

178. See *United States v. Ammar*, 714 F.2d 238, 247-49 (3d Cir. 1983) (it would have been error if trial court had "reduced the burden on the government" to a prima facie case; trial court correctly applied preponderance standard), *cert. denied*, 104 S. Ct. 344 (1983).

Cf. *United States v. Williams*, 668 F.2d 1064, 1070, 1072 (9th Cir. 1981) (error to admit coconspirator statements without determination by trial judge that predicate is satisfied).

179. *United States v. Perez*, 658 F.2d 654, 658 (9th Cir. 1981) (independent evidence requirement means that "the prosecution must establish a *prima facie* case through the introduction of substantial independent evidence other than the contested hearsay"); *United States v. Mason*, 658 F.2d 1263, 1269-70 (9th Cir. 1981) (with respect to the predicate facts, reviewing court suggests that "the prosecution need only show slight evidence connecting the defendant to the conspiracy," although with respect to the question of guilt "the 'slight connection' language means . . . that the defendant need play only a slight part in the conspiracy"); *United States v. Federico*, 658 F.2d 1337, 1342-43 & n.7 (9th Cir. 1981) ("substantial independent evidence" making out "a prima facie case of conspiracy"); *United States v. Miranda-Uriarte*, 649 F.2d 1345, 1349 (9th Cir. 1981) ("sufficient substantial evidence"); *United States*

to mean simply that the trial judge may provisionally admit coconspirator statements on that basis,¹⁸⁰ with the final decision to be made under the preponderance standard.) If the someone who is to decide whether the exception applies is the trial judge, then requiring the proponent even to make a "defined" prima facie case makes no sense either: This approach would mean that a coconspirator statement gets in because a jury if asked might decide (although of course it will not *be* asked, because applying the exception is not the task of the jury), by a preponderance or beyond reasonable doubt, that the exception applies. In short, it would mean that the trial judge would apply the exception by admitting statements under it when the proponent has made out a "defined" prima facie case even though the judge does not believe that the exception applies (either because he simply has not formed an opinion or because he actually disbelieves the prosecutor's evidence), though acknowledging that someone else (such as the jury, which, to say it once again, will not be asked) might believe it.

If the trial judge is actually to determine the predicate facts, then the standard of proof must say how the issues are to be resolved if the evidence conflicts or is for some reason subject to doubt. The lowest standard which does so is the preponderance standard, which would direct the judge to apply the exception if he finds on the evidence that the preliminary facts are more probably true than not.

The question which remains is whether the standard should be higher than a preponderance, and a categorical response seems impossible.

It seems that the proponent should not have to satisfy the requirements of the exception by proof beyond a reasonable doubt,¹⁸¹

v. Zemek, 634 F.2d 1159, 1170 (9th Cir. 1980) (same); United States v. Gresko, 632 F.2d 1128, 1131 (4th Cir. 1980) ("sufficient" independent evidence "at least to take the question" of the predicate facts "to the jury," though proof beyond reasonable doubt not required); United States v. Batimana, 623 F.2d 1366, 1368-69 (9th Cir.) ("substantial evidence apart from the statements which establishes a prima facie case of the conspiracy and the defendant's slight connection to the conspiracy"), *cert. denied*, 443 U.S. 1038 (1980).

180. *E.g.*, United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1983); United States v. Yonn, 702 F.2d 1341, 1348 (11th Cir. 1983) ("substantial independent evidence").

181. *See* United States v. Kelly, 718 F.2d 661, 663 (4th Cir. 1983) (government need not establish conspiracy beyond reasonable doubt in order to invoke the exception); United States v. Perez, 658 F.2d 654, 658 (9th Cir. 1981) (evidence of the preliminary facts must "establish a *prima facie* case" and "need not compel a finding of conspiracy beyond a reasonable doubt"); DeMier v. United States, 616 F.2d 366, 371 (8th Cir. 1980) ("standard is not proof beyond a reasonable doubt"); United States v. James, 590 F.2d 575, 580-81 (5th Cir. 1979) (endorsing a higher standard than preponderance while cautioning that standard ought not to be "so high as to exclude trustworthy, relevant evidence"); United States v. Enright,

for three reasons. First, the coincidence factor introduced by the coventurer requirement means that doing so would in effect force the prosecutor to have evidence independent of the coconspirator statement sufficient to convict, which would in turn mean that the coconspirator statement is theoretically unnecessary for conviction, that it is but makeweight or a hedge against overdrawn jury sympathy. Coconspirator statements seem to have far greater importance in conspiracy cases than this view concedes. Second, the only point in requiring proof beyond a reasonable doubt would be to insure reliability. The present elements of the exception, however, are only roughly geared to this purpose, and even the evidential theories here discussed are imperfect guarantors of reliability. There is something vaguely futile in requiring an essentially perfect demonstration that imperfect criteria are satisfied, and it seems more worthwhile to focus attention upon the criteria themselves. Third, the beyond-reasonable-doubt standard, the highest one known to the law, has never been thought applicable to hearsay exceptions, and does not even apply in connection with constitutional objections.¹⁸² Applying it to evidential questions of this sort would seem to introduce protections substantially greater than the very considerable safeguards to which the accused has been traditionally entitled.

How about imposing the intermediate clear-and-convincing standard? In proceedings seeking involuntary hospitalization, the Supreme Court has found that the Constitution imposes this standard,¹⁸³ and in connection with certain kinds of deportation cases the Court has imposed a similar standard, apparently as a matter of statutory construction.¹⁸⁴ Most circuits apply it to one evidential question: When evidence of a prior misdeed by the defendant is of-

579 F.2d 980, 985-86 (6th Cir. 1978) (judge "ruling on the admissibility of evidence . . . should not be bound by the reasonable doubt standard"); *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977) (similar).

182. *Lego v. Twomey*, 404 U.S. 477, 484-87 (1972) (preponderance standard applies in hearings upon voluntariness of confession; the Court suggests that while involuntary confession might be unreliable, allocating the issue to the judge has nothing to do with concern for accuracy of jury verdicts).

183. *Addington v. Texas*, 441 U.S. 418, 433 (1979) (standard of persuasion for civil commitment actions must be "equal to or greater than the 'clear and convincing' standard which we hold is required to meet due process guarantees").

184. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966) (in deportation cases, government must establish its case by "clear, unequivocal, and convincing evidence"); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (same standard in denaturalization proceedings); *Schneiderman v. United States*, 320 U.S. 118, 159 (1943) (same).

But cf. Vance v. Terrazas, 444 U.S. 252, 267 (1980) (Congress may adopt preponderance standard in expatriation cases).

ferred under rule 404(b) on such points as intent or *modus operandi*, the prosecutor must establish the fact of such misdeed by clear and convincing evidence.¹⁸⁵ (The idea is to confine the inevitable risk of prejudice of those cases in which the court can at least be certain that a legitimate inference may properly be drawn.) The Supreme Court, however, has approved use of the lesser preponderance standard in resolving the constitutional question whether a confession was voluntary, although apparently qualifying its holding by noting that reliability was not the issue.¹⁸⁶ None of these examples bears much resemblance to the problem of applying the coconspirator exception, although coconspirator statements do present the reliability problem and thus do not fit the holding for confessions.

5.—*Instructing the Jury.* Coconspirator statements formerly generated two jury instructions which should no longer be given. One was a preliminary instruction, given at the time such a statement was received: It advised the jury that the statement had not yet been ruled admissible, and therefore that it could not yet be taken as evidence against the defendant.¹⁸⁷ The second was an instruction on applying the exception, given at the end of trial: It said that a coconspirator statement could be considered as evidence against the defendant only if the jury first found, on the basis of independent evidence, the existence of the predicate facts of conspiracy, pendency, and furtherance.¹⁸⁸

The problems with the latter instruction have already been examined. It asks a question which the jury is not competent to answer, and the factors of coincidence and circularity produce a message which can only seem self-contradictory and mystifying. Since the trial judge now determines whether the exception applies, the instruction has become superfluous as well. Sometimes the defense, having failed to persuade the trial judge that the exception does not apply, has hoped with the aid of the instruction to persuade the jury to disregard the statement. The defense, however, is not entitled to such a "second bite" on the underlying hearsay issues, and any resultant confusion might hurt some defendants in the case and cannot, in

185. See, e.g., *United States v. Wagoner*, 713 F.2d 1371, 1375-76 (8th Cir. 1983); *United States v. Wormick*, 709 F.2d 454, 459-61 (7th Cir. 1983); *United States v. Shelton*, 628 F.2d 54, 57 (D.C. Cir. 1980).

Contra *United States v. Beechum*, 582 F.2d 898, 910-13 (5th Cir. 1978) (preponderance standard applies), *cert. denied*, 440 U.S. 920 (1979).

186. See *supra* note 182 and accompanying text.

187. *United States v. Apollo*, 476 F.2d 156, 163-64 (5th Cir. 1973).

188. See sources cited *supra* note 141.

any event, aid the defense in any legitimate way. Hence, the instruction should not be given.¹⁸⁹

It is also unnecessary to give a preliminary instruction. Such an instruction made sense as a means of preparing the jury for its later role in determining whether the coconspirator exception applies,¹⁹⁰

189. See *United States v. Monaco*, 702 F.2d 860, 876 n.28, 877-78 (11th Cir. 1983) ("erroneous instruction" advising jury to consider coconspirator statements only if it found predicate facts "afforded even greater protection than" required by proper procedure; the giving of the instruction "was simply an oversight," and it did not mean that the trial judge actually followed the wrong procedure in passing the question to the jury; defendants did not object to the instruction at trial, and "cannot argue that they were prejudiced"); *United States v. Mastropieri*, 685 F.2d 776, 789-90 (2d Cir.) (trial judges should not only determine admissibility of coconspirator statements, but should refrain from giving "second bite" instruction, which "allows the jury to disregard declarations which it ought to consider"), *cert. denied*, 103 S. Ct. 260 (1982); *United States v. Elam*, 678 F.2d 1234, 1249-50 & n.26 (5th Cir. 1982) (trial judge correctly refused defense request for instruction to jury advising it to consider statements by one alleged conspirator as evidence against another only if it finds beyond reasonable doubt that the two were coconspirators; judge properly determined that exception applied, thus there was "no occasion for the requested jury instruction"); *United States v. Bulman*, 667 F.2d 1374, 1379 & n.5 (11th Cir.) (clear error for trial judge, after correctly deciding that coconspirator statement was inadmissible against defendant J, although admissible against other defendants, to instruct jury in effect that it could consider the statement against defendant J if it determined beyond a reasonable doubt that J and declarant conspired: "By this instruction, the court incorrectly gave the jury the right to consider and overturn his own ruling that the statements of coconspirators were inadmissible against [J]."), *cert. denied*, 456 U.S. 1010 (1982); *United States v. Chaney*, 662 F.2d 1148, 1154 & n.9 (5th Cir. 1981) (after properly admitting coconspirator statement, trial judge "erred by permitting the jury to consider the admissibility question," but defendant, "having been given two bites at the apple, was afforded greater protection than required"; in a note, court observes that its holding does not mean that such an instruction "can never constitute reversible error," for it might have such "prejudicial effect" that reversal would be required); *United States v. Federico*, 658 F.2d 1337, 1342 n.6 (9th Cir. 1981) (instruction advising jury to consider coconspirator statements only if it finds that conspiracy has been shown beyond a reasonable doubt by independent evidence was "unnecessary" and "probably not correct"; it did not, however, "require reversal," since the instruction may have "favored the defendant"); *United States v. Lutz*, 621 F.2d 940, 946 & n.2 (9th Cir.) (instructing jury to redetermine applicability of coconspirator exception was "surplusage" and government objection was "well taken"; the instruction was not, however, reversible error, as it simply gave defendants "unnecessary double protection" in the form of hearings before both judge and jury), *cert. denied*, 449 U.S. 859 (1980); *United States v. Hemming*, 592 F.2d 866, 869-70 (5th Cir. 1979) (instructions were inadequate under the former procedures; on retrial under the new procedure mandated by *James* the judge will apply the criteria of the exception "rather than instructing the jury as to how to apply them" under the discarded procedure).

Contra, *United States v. Kenny*, 645 F.2d 1323, 1336 (9th Cir. 1980), *cert. denied*, 452 U.S. 920, 454 U.S. 928 (1981).

190. *Cf. United States v. Salinas*, 601 F.2d 1279, 1294-95 & nn.24-25 (5th Cir. 1979) (following the older procedure, trial court cautioned jury as the coconspirator statements were being admitted that the statements could have been considered as evidence against defendant only after the preliminary facts are established; this was "a proper cautionary instruction" under the now-discarded procedure), *modified on other grounds*, 610 F.2d 250 (5th Cir.

but it is the judge who performs this function. If in the end he determines that the exception applies, the preliminary instruction would have to be in some way undone, with the result of highlighting the coconspirator statement unnecessarily.¹⁹¹ Any benefit conveyed by the preliminary instruction is better handled by means of the standard instruction advising the jury to reserve judgment until all the proof is in. If in the end the coconspirator exception is ruled inapplicable, the appropriate remedy is an instruction at that time to disregard the statement, or a mistrial if such instruction is ineffective.

Of course the defense is entitled to argue to the jury that a coconspirator statement is unreliable, and to adduce evidence impeaching the declarant.¹⁹² And an instruction directing the jury to consider carefully the weight of such statements and the credibility of the declarant remains proper.¹⁹³

It should be noted too that sometimes a coconspirator statement is admissible against one defendant but not another. In any such case the latter is entitled, upon request, to an instruction that the statement is not to be considered as evidence against him.¹⁹⁴ If a coconspirator statement actually refers to and implicates a defendant against whom the statement is inadmissible, the *Bruton*¹⁹⁵ doctrine warns that an instruction does not suffice as a constitutional matter, and other remedies are necessary: The statement must be excluded altogether, or the trial severed, or the statement redacted to delete reference to the complaining defendant,¹⁹⁶ or the declarant must be

1980).

191. *United States v. Patterson*, 644 F.2d 890, 896-97 (1st Cir. 1981) (upon concluding that coconspirator statements were within the exception, trial judge "sought to retract certain limiting instructions," and in the process made a "regrettable" and "unfortunately phrased" statement which "could have been taken to imply [that] the court itself felt that a conspiracy existed"; due to absence of motion for mistrial or objection, reversal was not required).

192. *Cf. FED. R. EVID.* 806 (1975) (credibility of declarant of coconspirator statement "may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness").

193. *United States v. Baykowski*, 615 F.2d 767, 772 (8th Cir. 1980); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978).

Cf. 1 E. DEVITT & C. BLACKMAR, *supra* note 150, § 15.06 (in general extrajudicial statements or conduct should be considered with caution and weighed with great care).

194. *FED. R. EVID.* 105 (1975); *Lutwak v. United States*, 344 U.S. 604, 618-19 (1953); *United States v. Sutherland*, 656 F.2d 1181, 1200 (5th Cir. 1981) (harmless error to give instruction permitting jury to consider coconspirator statements against all defendants, where government failed to prove that two of the defendants were involved in the conspiracy), *cert. denied*, 455 U.S. 949 (1982).

195. *Bruton v. United States*, 391 U.S. 123 (1968).

196. In *Bruton* itself, the Court referred to redaction as one of the "alternative ways" in which the prosecutor can use a confession by one defendant that implicates another against

cross-examinable.¹⁹⁷ (*Bruton* errors may, however, be harmless,¹⁹⁸ and there exists a possibility that there is no constitutional error if the statement "interlocks"¹⁹⁹ with a confession by the complaining defendant.)

B. Judge and Jury Coordinated

For reasons previously considered, it is wise to put the trial judge in charge of deciding whether the coconspirator exception applies. In two ways this arrangement also assists judge and jury to perform effectively their respective tasks in conspiracy cases. There are drawbacks, but these are by comparison minor and almost academic in nature.

The first benefit in this arrangement is that it involves the trial judge in a unique preliminary assessment of the evidence in conspiracy cases. Upon a defense motion to exclude a coconspirator statement, likely made during the government's case but decided at the end of trial, the judge examines all the other evidence in the case, both that produced by the government and that produced by the defense, and decides whether it establishes by a preponderance that defendant and declarant conspired. Of course he scrutinizes the evidence in a second and different way upon a defense motion for a judgment of acquittal: Here he examines the government's proof (including the coconspirator statement in its assertive aspect if the exception applies, though not otherwise), and puts the case to the jury on the merits only if a reasonable person could conclude beyond a reasonable doubt that defendant and declarant conspired.

whom it cannot be received. *Id.* at 134 n.10. And many cases uphold receipt of suitably redacted confessions. *See, e.g.*, *United States v. Belle*, 593 F.2d 487, 493 (3d Cir. 1979) (collecting authorities on point).

197. Where the declarant testifies at trial and is cross-examinable about his prior statement, the Supreme Court has indicated in several cases that its receipt does not violate defendant's confrontation rights. *See Nelson v. O'Neil*, 402 U.S. 622 (1971) (statement to police, where declarant took the position at trial that the statement was false); *California v. Green*, 399 U.S. 149 (1970) (statement to police, where declarant claimed at trial not to remember the underlying events). And in this circumstance courts have taken the position that there is no *Bruton* violation. *See United States v. Weinrich*, 586 F.2d 481, 495-96 (5th Cir. 1978); *United States v. Olander*, 584 F.2d 876, 886 (9th Cir. 1978).

198. *Brown v. United States*, 411 U.S. 223, 231-32 (1973); *Schneble v. Florida*, 405 U.S. 427, 429-32 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969).

199. *Parker v. Randolph*, 442 U.S. 62, 75 (1979) (plurality opinion endorses receipt of "interlocking confessions with proper limiting instructions" as not violative of defendants' constitutional rights) (plurality opinion by four Justices, with four dissenters; swing opinion siding with result reached by majority would simply find *Bruton* error harmless). *See cases cited supra* note 125.

Under this double scrutiny, the coconspirator exception is likely to apply only where the government's proof is strong enough to take a conspiracy charge to the jury on the merits.²⁰⁰ That is to say, a trial judge who decides that the independent evidence establishes conspiracy by a preponderance is likely also to conclude that the government's evidence (with the statement) suffices to support a decision beyond a reasonable doubt that defendant and declarant conspired. While neither a conviction of conspiracy, nor in the end even a charge of conspiracy, is required in using the exception, this arrangement makes it unlikely that it will be invoked where a conspiracy theory is thin.

The second benefit is that this arrangement holds out some hope of preventing improper use of the exception. The case is at least imaginable in which a trial judge concludes on the basis of the independent evidence that declarant and defendant probably did not conspire, while conceding that a jury might find defendant guilty beyond reasonable doubt, on the basis of either (1) the independent evidence alone, or (2) all the evidence, including coconspirator statements. In either situation, sending the case to the jury with a "conditional relevancy" instruction may lead to conviction on the basis of hearsay which is viewed by the only competent authority in the tribunal (the judge) as falling outside the only relevant exception — the one for coconspirator statements. Putting the trial judge in charge of applying the exception, however, enables him in the first situation to instruct the jury to disregard the statement or to grant a mistrial, and in the second situation to take from the jury all charges dependent upon the coconspirator statements.

One of the two drawbacks in this arrangement is suggested in

200. *United States v. Geaney*, 417 F.2d 1116, 1119-20 (2d Cir. 1969) (coconspirator statements, admitted on the basis of independent evidence of conspiring, which the judge appraises under a standard "lower than the standard of evidence sufficient to submit a charge of conspiracy to the jury," may tip the scale in favor of guilt), *cert. denied*, 397 U.S. 1028 (1970). See *United States v. Alvarez-Porras*, 643 F.2d 54, 56-58 (2d Cir. 1981) (reaffirming *Geaney*).

Of course the point made in the text does not always hold true. The case is at least imaginable in which the trial judge (1) determines by the preponderance standard that the independent evidence establishes a conspiracy between declarant and defendant (and the other predicate facts of pendency and furtherance), but (2) concludes that all the evidence properly before the jury in the case, including the coconspirator statement now admitted for all purposes, still would not justify conviction under the beyond-reasonable-doubt standard on substantive or conspiracy charges, hence (3) grants a defense motion for a judgment of acquittal. Such a possibility is perhaps made slightly more likely by the fact that the trial judge, while bound to apply the exception on the basis of independent evidence, might still take into account other proof which the jury does not hear.

the description above, and it results from the sequence problem. Putting the trial judge in charge of applying the exception leads to the possibility that he will have to instruct the jury to disregard a coconspirator statement, or declare a mistrial. Yet this point pales in significance when compared with the only other option, which is a mystifying instruction to the jury to apply an exception which it does not understand.

The other drawback arises from the fact that the judge and jury may reach conflicting conclusions on the question whether defendant and declarant conspired. Consider the case in which two defendants are prosecuted for conspiracy and related substantive offenses, and a statement by one implicating the other in a substantive offense is offered against them both under the coconspirator exception. One form of conflict arises where (i) the trial judge excludes the statement on a finding that the independent evidence does not establish conspiracy by a preponderance but puts the case to the jury anyway, and (ii) the jury convicts defendants of conspiring but acquits them on the substantive charges. Another arises where (i) the judge admits the statement on a finding that the independent evidence establishes by a preponderance that defendant and declarant conspired and puts the case to the jury, and (ii) the jury acquits defendants of conspiring but convicts them on the substantive charges.²⁰¹

In both instances the conflict suggests that either the judge or the jury made a mistake on a "merits" issue, and in both the view of

201. Not surprisingly, such instances appear in the reported cases. See *United States v. Xheka*, 704 F.2d 974, 986 (7th Cir. 1983) (declarant's acquittal of conspiracy "does not retroactively undermine" application of coconspirator exception in connection with conviction of appellants of conspiracy and related substantive charges, inasmuch as standard of proof beyond reasonable doubt, which applies to question of appellants' guilt, "is not the standard for determining admissibility under the coconspirator exception"); *United States v. Robinson*, 651 F.2d 1188, 1195-96 (6th Cir. 1981) (defendant's acquittal of conspiracy did not require reversal of his conviction on substantive counts, obtained in part on basis of coconspirator statements; reviewing court notes "substantial difference in the elements and burden of proof between the admissibility of extrajudicial statements by co-conspirators and the crime of conspiracy"), *cert. denied*, 454 U.S. 875 (1982); *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979) (in dictum, referring to difference between what must be proved for substantive purposes and what must be proved in applying the exception, and also to differences in burdens of proof, and suggesting that "neither collateral estoppel nor res judicata automatically bars the use of statements by a person who has been acquitted of the crime of conspiracy"); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972) (defendant was convicted on substantive charges but acquitted of conspiracy; reviewing court rejects claim of defendant that coconspirator statements "were no longer properly in evidence once he had been acquitted of the conspiracy count," hence that trial court "should have declared a mistrial" or "at least have instructed the jury to disregard" those statements), *cert. denied*, 409 U.S. 1128 (1973).

the trial judge has decisive impact in the case. In the first instance, the inference of mistake seems compelling: Addressing the same question of fact and considering the same proof, the jury thought the higher beyond-reasonable-doubt standard was satisfied, and the judge thought that the lesser preponderance standard was not satisfied. And the opinion of the judge on this point led to exclusion of evidence which might have led to conviction on the substantive charges. In the second instance, the inference of mistake is possible but not compelling: Again judge and jury addressed the same fact question, but this time the former thought that the lesser standard was satisfied while the latter thought that the greater standard was not satisfied. Thus the conflict might be explained simply as a function of the differing standards of proof, but it should be remembered that the jury had one item of evidence which the trial judge presumably did not consider (the coconspirator statements themselves), so the conflict might not be explained away quite so readily. Again, the opinion of the trial judge had considerable impact: It led to receipt of evidence which might well have caused the jury to convict on the substantive charges.

There is no entirely satisfying solution. Morgan took comfort from the fact that judge and jury have different responsibilities and play by different rules when they decide the identical fact question, concluding that they are not "bound" to agree and that any "inconsistency" in their decisions on the same point would be "entirely immaterial."²⁰² This view has something of an empty rhetorical flavor where the judge's decision controls the jury's on the same point. Yet the outcome is still the best one possible, being a necessary by-product of assigning the only responsibilities to each for which each is suited, and of an unusual hearsay exception burdened down with the coincidence factor.

202. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 187-88 (1929).

See *Clayton v. Anthony*, 27 Va. (6 Rand.) 285, 300-01 (1828) ("In order to determine whether [a coconspirator statement] was or was not admissible, it devolved on the Court to determine, for itself, not for the Jury, whether the other facts were sufficiently proved, and whether these facts were prima facie sufficient proof, that the parties had combined to effect the fraudulent design And if so, then the proof of [the statement] was admissible evidence . . . , not because it was necessary, in order to satisfy the Court as to the fraudulent design of the transaction, of which the Jury was finally to judge, but as fit evidence to be considered by the Jury, in forming their judgment upon the whole case. Nor is this an improper interference, on the part of the Court, with the province of the Jury, but the necessary effect of the constitution of our Judicial Tribunals, consisting of Courts and Juries.").

V. TRIMMING THE FOLIAGE

A. *Should the Exception Be Amended?*

The answer to the question put in the heading is Yes. This conclusion comes despite the warning, spoken by a voice deep in the psyche of the profession and repeated by a great modern innovator in the judiciary, that "when it is not necessary to do anything it is necessary to do nothing."²⁰³ It is true that the existing definition comes close to what it should be. And it is true that the main problems with the exception come from lack of understanding and the procedural awkwardness of administering it.

It is, however, necessary to do something to discard forever any idea that the coconspirator exception is simply a creature of substantive law. It is necessary to acknowledge the central hearsay concern, which is trustworthiness. It is also necessary to bring out the evidential purpose for including, in a provision authorizing use of coconspirator statements to prove what they assert, requirements drawn from substantive law.

Rule 801(d)(2)(E) should be amended to include a trustworthiness requirement, added to the existing conditions.²⁰⁴ The language change would be minor, and would make express what some courts have already come to regard as implicit in the present wording. Under the changed language, the proponent should carry the burden of satisfying the trustworthiness requirement, just as he now carries that burden with respect to the coventurer, pendency, and furtherance requirements. The new language would not necessarily impose a heavier burden, as the factors which satisfy the existing requirements often make coconspirator statements trustworthy. In such cases the new language would simply focus the preliminary inquiry upon the trustworthiness issue. It would, and ought to, increase the burden only where the present factors do not by themselves show trustworthiness.

Prior proposals to change the exception have been of three varying types. One would delete the furtherance requirement. Morgan argued that a criterion derived solely from substantive law had no

203. *Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., 247 (1973) (testimony of Judge Henry J. Friendly).

204. If amended, rule 801(d)(2)(E) would provide that a statement is not hearsay if it is "offered against a party and is . . . (E) a statement *shown to be trustworthy and made by a coconspirator of a party during the course and in furtherance of the conspiracy*" (new language indicated in italics).

place in the hearsay exception, and that courts had eviscerated the requirement anyway, by reading it to mean only that statements had to relate to acts furthering the venture.²⁰⁵ A second proposal would essentially replace the present exception with one authorizing receipt of statements against the penal interest of the declarant. Morgan himself favored this solution, though he read the latter in a way which would foreclose one rather obvious application of it in coconspirator cases.²⁰⁶ A detailed version of this proposal appeared in a major journal, but it too would result in the exclusion of most coconspirator hearsay from conspiracy prosecutions.²⁰⁷ The third approach resembles the one taken here. It would make express in the coconspirator exception a requirement of reliability. During congressional scrutiny of the Rules, one Senator suggested amending rule 801(d)(2)(E) in this way, but this proposal generated no support.²⁰⁸ None of the others have been any more successful, except in finding their way into model codes.

The furtherance requirement should be retained. Interpreted with an eye toward trustworthiness, it helps to identify statements which amount to acts by the declarant, and those intertwined with

205. Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 464-65 (1929). See C. McCORMICK *supra* note 51, § 267; MODEL CODE OF EVIDENCE Rule 508(b) (1942); UNIFORM R. EVID. 63(9) (1953).

206. Morgan, *supra* note 205, at 464-65, 480-82 (criticizing use of the coconspirator exception to admit statements by one alleged member of the venture inciting another to action and statements which simply relate to the activities of the venture without actually furthering it; suggesting too that the exception for statements against interest should be utilized in this context, but only where "the fact stated is consciously against the interest of the declarant" and that this approach would require "repudiation of those decisions admitting self-serving or neutral declarations").

207. Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1394-97 (1972) (only coconspirator statements that are against the penal interest of the declarant or amount to crimes or overt acts should be admitted, but not those that implicate the defendant).

208. *Rules of Evidence: Hearings Before the Subcomm. on Reform of the Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 56-59 (Supp. 1971) (proposal by Senator McClellan of a coconspirator exception that would embrace a statement "by a co-conspirator of a party during the course of the conspiracy, relating to the character or the execution of the conspiracy" if there are "facts and circumstances from which its trustworthiness may be inferred"). See 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 386 (1970) (favoring a coconspirator exception providing that a "hearsay declaration is admissible against a defendant where the court finds that — (a) the declaration was made by the declarant while he was participating in a conspiratorial relationship; (b) the declaration was made under circumstance from which trustworthiness may be inferred; (c) the declaration relates to the conspiratorial relationship; and (d) the declaration was made prior to or during the time the defendant was participating in the conspiratorial relationship").

his conduct indicating a belief consistent with them. In serving this function, it intersects with the independent evidence requirement, which also should be retained because it insures that enough will be known about the surrounding circumstances to enable the judge to assess the impact of the active element in declarant's behavior upon the probable trustworthiness of his statement.

The exception for statements against penal interest contained in rule 804(b)(3) is not an adequate substitute. It is at risk of being too broad, since nearly every coconspirator statement is likely to be against the penal interest of the declarant in suggesting his guilty knowledge of the venture. And if apparent guilty knowledge does not satisfy the against-interest requirement the exception is likely to be too narrow, for a statement implicating another can satisfy this requirement only if connected with a statement implicating the declarant.²⁰⁹

The pendency and coventurer requirements should be retained as well. The furtherance requirement implies them both, and no one has even suggested their abolition. The coventurer requirement seems implicit in the very idea of a coconspirator exception, and it has the positive virtue of assuring that declarant has a stake in the matters about which he speaks.

B. *Sound Administration*

There would seem to be four keys to the sensible administration of the coconspirator exception:

First, the trial judge should decide whether the coconspirator statement has only nonhearsay significance in the case. If so, the question whether to admit raises only issues of relevancy, and the coconspirator exception is not involved. It may be that the statement will be relevant only if other proof connects the declarant to the defendant: If so, the trial judge may prefer to admit the statement only after such other proof has been adduced, or to receive it immediately subject to the condition that the other proof be later adduced. In either case, the question of "connection" is for the jury to decide pursuant to rule 104(b), and the trial judge only determines whether the other evidence is sufficient to permit the jury to find the necessary connection.

209. See generally the discussion of rule 804(b)(3) in 4 D. Louisell & C. Mueller, *supra* note 32, § 489, at 1137-43, 1171-79 (exception embraces accompanying statements which are neutral but provide contexts, as well as those which expand the meaning of against-interest declarations, and those which are intertwined or closely connected with them).

Second, the trial judge should decide whether a coconspirator statement has hearsay significance in the case. If so, he should consider whether the statement also has some other significance in the case which satisfies the furtherance requirement. Does it amount to an overt act which must be proved to establish conspiracy, or to a substantive crime of which defendant may be guilty by complicity in virtue of his participation in the conspiracy? Does the act of uttering change the position of the declarant in a way which suggests his belief in the existence of a relevant fact? Does it suggest his expectation of cooperation by others? Does his conduct accompanying the statement so indicate? In making these inquiries, the trial judge acts pursuant to rule 104(a), and necessarily examines evidence apart from the statement itself.

Third, the trial judge should determine whether satisfying the coventurer, pendency, and furtherance requirements makes the statement trustworthy. Are the stakes for the declarant high enough to warrant confidence that he reached the right conclusions? Does the nonassertive aspect of his behavior sufficiently corroborate his assertion? (Again the trial judge acts pursuant to rule 104(a), and examines evidence apart from the statement itself.)

Fourth, if satisfying the express requirements does not make the statement sufficiently trustworthy, the trial judge should consider whether the statement is reliable for other reasons, such as the presence of against-interest elements, spontaneity, or an interlock with other coconspirator statements. (Still the trial judge acts pursuant to rule 104(a) and still he examines evidence apart from the statement itself.)

CONCLUSION

The most serious problem in the federal coconspirator exception stems from the tenacity of the agency theory — the one explanation which fails to explain — and a consequent inability to resolve (even to see) evidential issues. A change in the content of the exception is needed, in order to bring to it a requirement of trustworthiness, which some courts have already imposed. What is needed even more is a change in approach: There is reason to suppose that many coconspirator statements are reliable, but no reason to think that they may be identified by continued resort to the agency theory.

A better approach begins with recognizing the element of action in the behavior of the coconspirator declarant, and proceeds with determining whether and to what extent this element verifies what his

statement asserts. The act of uttering, considered in light of circumstances, may show that the statement is trustworthy, or accompanying conduct by the declarant may do so. When such factors do not support the statement, necessarily the inquiry must turn elsewhere. It is critical that assessments of these sorts be undertaken.

Fortunately, the agency theory has not prevented federal courts from soundly resolving, at long last, the procedural problems which the exception brings with it. In this context they have implicitly recognized that it is a hearsay exception which they administer, hence that the trial judge must be put in charge. There are some costs in this allocation of responsibility, but they are small in comparison with the benefits, and small indeed when compared to the costs of passing responsibility to the jury. Perhaps the understanding which courts have achieved in resolving the procedural issues will lead to a better appreciation of the character of the exception, hence to a better handling of the central hearsay issue.