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Inconsistencies In The Federal Circuit Courts' Application Of The Coconspirator Exception

INCONSISTENCIES IN THE FEDERAL CIRCUIT COURTS' APPLICATION OF THE COCONSPIRATOR EXCEPTION

The Federal Rules of Evidence[1] define hearsay as a statement,[2] other than a statement the declarant[3] made while testifying at a trial or hearing, offered into evidence to prove the truth of the matter asserted.[4] Hearsay statements are inadmissible[5] unless sanctioned by the Federal Rules of Evidence.[6] Federal Rule 801(d)(2)(E),[7] a codification of the com-

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[1] Pub. L. No. 93-595 § 1, Jan. 2, 1975, 88 Stat. 1926 (1975) (codified at 28 U.S.C. §§ 101-1103 (1976)).

[2] Rule 801(a) of the Federal Rules of Evidence defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(a). The Advisory Committee intended this definition to "exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion." Advisory Committee's Note, FED. R. EVID. 801(a) (1976).

[3] Rule 801(b) defines "declarant" as "a person who makes a statement." FED. R. EVID. 801(b).

[4] FED. R. EVID. 801(c). The definition of hearsay stated in the Federal Rules is similar to Dean McCormick's characterization. *See* Advisory Committee's Note, FED. R. EVID. 801(c) (1976). McCormick defined hearsay as comprising in court testimony and written evidence of out-of-court statements that the witness offered to show the truth of matters asserted. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 246 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[5] FED. R. EVID. 802. *See* Donnelly v. United States, 228 U.S. 243, 273 (1912). Hearsay statements are inadmissible because the declarant is unavailable for cross examination, the declarant did not make the statements under sanction of an oath, and the factfinder does not have the opportunity to observe the demeanor of the declarant. *Id.*; MCCORMICK, *supra* note 4, at § 245.

[6] FED. R. EVID. 802. Rule 803 lists exceptions to the hearsay rule which apply regardless of the declarant's availability to testify. FED. R. EVID. 803. Rule 804 enumerates additional exceptions that apply if the declarant is unavailable to testify. FED. R. EVID. 804. Rule 801(d) establishes two additional groups of statements that qualify as nonhearsay evidence. FED. R. EVID. 801(d).

[7] Rule 801(d) provides "[A] statement is not hearsay if . . . (2) [t]he statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy." The practice of admitting coconspirator statements developed not on a doctrine of the law of evidence but upon the substantive law of crime. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926). Theoretically, coconspirators are partners in crime and thus become each other's ad hoc agent. Anderson v. United States, 417 U.S. 211, 218 n.6 (1974); Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926). Thus, each coconspirator is liable for the other coconspirator's declarations. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926). The Advisory Committee to the Federal Rules of Evidence, however, labelled the agency theory of conspiracy a fiction. Advisory Committee's Note, FED. R. EVID. 801(d)(2)(E) (1976). Nevertheless, the agency theory continues to serve as a popular rationale for the coconspirator exception. *See* Marcus, *Co-Conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective*, 7 AM. J. CRIM. LAW 287, 289 (1979) [hereinafter cited as *Co-Conspirator Declarations*]; Note, *Inculpatory Declara-*

mon law coconspirator exception to the hearsay rule, furnishes prosecutors with a means to enter otherwise inadmissible hearsay into evidence.[8] Rule 801 (d)(2)(E) permits the admission of a coconspirator's out-of-court assertions as nonhearsay evidence[9] if the prosecution satisfactorily establishes all three of the rule's requirements.[10] The prosecution must prove that the conspiracy existed,[11] that the defendant had a connection with the conspiracy,[12] and that the coconspirator made

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tions Against Penal Interest and the Coconspirator Rule Under the Federal Rules of Evidence, 56 IND. L.J. 151, 155 n.23 (1980). For a discussion of the various theories used to explain the coconspirator exception, *see* M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 118 n.14 (1977). For a discussion of the common law origins and development of the coconspirator exception, *see* 37 LOU. L. REV. 1101, 1101-1109 (1977).

[8] 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 801(d)(2)(E)[1], 801-166 (1979).

[9] S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 460 (2d ed. 1977) [hereinafter cited as FEDERAL RULES MANUAL]. The distinction between terming an admissible coconspirator statement under rule 801(d)(2)(E) nonhearsay instead of an exception to the hearsay rule is purely semantic. United States v. Smith, 578 F.2d 1227, 1231 n.6 (8th Cir. 1978).

[10] FED. R. EVID. 801; United States v. James, 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575, 578 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); United States v. Petrozziello, 548 F.2d 20, 22 (1st Cir. 1977); United States v. Snow, 521 F.2d 730, 733 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976). The coconspirator exception does not require a declarant to be unavailable to testify. United States v. Snow, 521 F.2d 730, 733 (9th Cir. 1975). The prosecutor also has no duty to subpoena and produce all available witnesses before he can use the coconspirator exception. *Id.* at 736. *But cf.* Ohio v. Roberts, 448 U.S. 56, 65 (1980), *cert. denied*, No. 80-5068 (confrontation clause of sixth amendment demands that prosecutor either produce declarant or demonstrate declarant's unavailability). *See generally*, Note, *Co-Conspirator Declarations: Procedure and Standard of Proof for Admission Under the Federal Rules of Evidence*, 55 CHI-KENT L. REV. 577 (1979) [hereinafter cited as *Procedure and Standard of Proof*].

[11] *See* United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979). Although any provable criminal conspiracy most likely will satisfy the coconspirator exception, conspiracy as a concept of substantive criminal law is distinct from the evidentiary concept of conspiracy. *Id.* The crime of conspiracy requires a meeting of the coconspirators' minds, intent, and, where statutorally required, an overt act. *Id.* The party wishing to use the coconspirator exception does not have to allege or prove the substantive crime of conspiracy. *Id.* The exception operates independently of any conspiracy charge. *See, e.g.*, United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977) (although evidence was insufficient to submit conspiracy count to jury, court admitted hearsay on substantive charges under coconspirator exception); United States v. Trowery, 542 F.2d 623, 626 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) (prosecution does not need to allege conspiracy to use coconspirator exception). Parties in both civil and criminal cases can use the coconspirator exception. *See* United States v. Cahalane, 560 F.2d 601, 605 n.4 (3d Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978) (coconspirator exception applicable in criminal cases); South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 788 (6th Cir. 1970) (coconspirator exception applicable in civil actions).

[12] United States v. Glasser, 315 U.S. 60, 74-75 (1942). Circumstantial evidence can provide the necessary amount of independent proof of the defendant's connection with the conspiracy. *See* United States v. Weiner, 578 F.2d 757, 770 (9th Cir. 1978); United States v. Jones, 542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976); United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

the statements during the course of[13] and in furtherance of[14] the con-

[13] FED. R. EVID. 801(d)(2)(E). The "during the course" requirement mandates that the coconspirator must have made the statement while the declarant and defendant currently were engaged in a plan to commit crime. 4 J. WEINSTEIN, EVIDENCE § 801[01] at 801-151 (1975) [hereinafter cited as WEINSTEIN]. The issue that arises most frequently under this requirement is whether the arrest of the coconspirators terminates the conspiracy. *See* Krulewitch v. United States, 336 U.S. 440, 442-43 (1949) (coconspirator statements made after central aim of alleged conspiracy ended, and declarant and defendant arrested were inadmissible); United States v. Smith, 578 F.2d 1227, 1237 (8th Cir. 1978) (conspiracy could continue even after one coconspirator's arrest where evidence demonstrates that remaining coconspirators still are capable of carrying out conspiracy); United States v. Di Rodio, 565 F.2d 573, 575-76 (9th Cir. 1977) (statements made subsequently to arrest of declarant/codefendant were inadmissible); United States v. Caro, 569 F.2d 411, 416 n.9 (5th Cir. 1978) (declarant's assertive action inadmissible since made following declarant's arrest and serving no conceivable purpose of the conspiracy). Coconspirator statements made after the completion of the scheme are inadmissible under rule 801(d)(2)(E). FED. R. EVID. 801(d)(2)(E). *See* Grunewald v. United States, 353 U.S. 391, 401-02 (1957) (generally, once coconspirators have attained central criminal purpose, prosecutor cannot imply a subsidiary conspiracy to conceal if circumstantial evidence merely shows that conspiracy was kept secret); United States v. Mackey, 571 F.2d 376, 383 (7th Cir. 1978) (if concealment phase is part of conspirator's agreement, statements furthering concealment fit within coconspirator exception); United States v. Floyd, 555 F.2d 45, 48 (2d Cir.), *cert. denied*, 434 U.S. 851 (1977) (prosecutor cannot include in conspiracy any event occurring after main objective of conspiracy accomplished, regardless of how proximately related). For a discussion of when courts deem the conspiracy completed, *see* MCCORMICK, *supra* note 4, at 87.

[14] FED. R. EVID. 801(d)(2)(E). Under the "in furtherance" requirement, the coconspirator's statements must advance the objectives of the conspiracy. WEINSTEIN, note 13 *supra*, § 801[01] at 801-143. *See* United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981) (coconspirator's statement identifying defendant as source of heroin was in furtherance of plot because made to induce defendant's continued participation in conspiracy). The in furtherance requirement guards defendants against idle chatter of criminal partners, misreported or fabricated evidence, and casual admissions of culpability. *See, e.g.*, United States v. Lieberman, 637 F.2d 95, 102-03 (2d Cir. 1980) (mere casual conversations between coconspirators in presence of nonconspirators amounts to idle chatter and is not in furtherance of the conspiracy); United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980) (coconspirator's statements to prosecution's witness inadmissible where nothing indicated coconspirator intended to further conspiracy by announcing plan to witness); United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979) (statements not in furtherance of the conspiracy and thus inadmissible were not intended to induce witness to join conspiracy or to assist conspirators in achieving objective). Despite attempts to remove the "in furtherance" requirement from the coconspirator exception, *see* United States v. Moore, 522 F.2d 1068, 1977 n.5 (9th Cir. 1975); MODEL CODE OF EVIDENCE rule 508(b) (1942), the Supreme Court has continued to endorse the requirement and rule 801(d)(2)(E) expressly retains this prerequisite. *See* Anderson v. United States, 417 U.S. 211, 219 (1974); Wong Sun v. United States, 371 U.S. 471, 490 (1963); Krulewitch v. United States, 336 U.S. 440, 443-44 (1949). Some courts construe the requirement so broadly, however, that any coconspirator admission related to the joint venture satisfies the in furtherance requirements. *See, e.g.*, United States v. McGuire, 608 F.2d 1028, 1032 (5th Cir. 1979) (courts should not apply in furtherance requirement too literally); United States v. Patton, 594 F.2d 444, 447 (5th Cir. 1979)(too strict an application of in furtherance requirement would defeat purpose of coconspirator exception). The in furtherance prerequisite is generally the easiest part of the prosecution's case to satisfy. *See Co-Conspirator Declarations, supra* note 7, at 290-293; *but see* United States v. Mangan, 575 F.2d 32, 43-44 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978) (court must carefully scrutinize conconspirator statements).

spiracy. Rule 801(d)(2)(E), however, fails to express clearly how courts are to apply the coconspirator exception.[15] Consequently, determining when the prosecutor has established an adequate foundational case of conspiracy to satisfy rule 801(d)(2)(E) is an issue upon which federal circuit courts disagree.[16] The circuit courts differ on the appropriate standard of proof required to satisfy the exception,[17] and the breadth of testimony the prosecutor can use to satisfy the exception.[18] Doubt also exists as to the propriety of the judge rather than the jury making the factual determination of whether the prosecution has met the exception's three requirements.[19]

Before passage of the Federal Rules circuit courts followed one of two different approaches to determine the admissibility of coconspirator statements.[20] Under the majority approach the judge and jury employed a two-step process in which they each participated in the admissibility determination.[21] In circuits using the two-step process the judge initially

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[15] FED. R. EVID. 801(d)(2)(E).

[16] *See* Note, *Evolution of the Coconspirator Exception to the Hearsay Rule in the Federal Courts*, 16 NEW ENG. L. REV. 617, 621 (1981) [hereinafter cited as *Coconspirator Hearsay Exception*].

[17] *See* United States v. Gresko, 632 F.2d 1128, 1131 (4th Cir. 1980) (preponderance standard); United States v. Jackson, 627 F.2d 1198, 1218-19 (D.C. Cir. 1980) (judge uses reasonable doubt standard); United States v. Petersen, 611 F.2d 1313, 1330-31 (10th Cir. 1979) (judge uses preponderance standard for ultimate decision); United States v. James, 590 F.2d 575, 579-82 (5th Cir. 1979) (judge uses preponderance standard); United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978) (preponderance standard); United States v. Enright, 579 F.2d 980, 986 (6th Cir. 1978) (preponderance standard); United States v. Weiner, 578 F.2d 757, 768 (9th Cir. 1978) (prima facie standard); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (preponderance standard); United States v. Stanchich, 550 F.2d 1294, 1299 n.4 (2d Cir. 1977) (preponderance standard); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977) (preponderance standard); United States v. Trotter, 529 F.2d 806, 811-12 (3d Cir. 1976) (preponderance standard).

[18] *See* United States v. Cawley, 630 F.2d 1345, 1350 (9th Cir. 1980) (independent nonhearsay evidence); United States v. Kendricks, 623 F.2d 1165, 1168 n.5 (6th Cir. 1980) (judge can consider all evidence including hearsay statements themselves in determining admissibility); United States v. Truong Dinh Hung, 629 F.2d 908, 930 (4th Cir. 1980) (independent nonhearsay evidence); United States v. Tilton, 610 F.2d 302, 306 (5th Cir. 1980) (independent nonhearsay evidence); United States v. Rios, 611 F.2d 1335, 1340-41, 1340 n.8 (10th Cir. 1979) (independent nonhearsay evidence); United States v. Cambindo Valencia, 609 F.2d 603, 631 (2d Cir. 1979) (independent nonhearsay evidence); United States v. McPartlin, 595 F.2d 1321, 1357 (7th Cir. 1979) (independent nonhearsay evidence); United States v. Schoenhut, 576 F.2d 1010, 1027 (3d Cir. 1978) (independent nonhearsay evidence); United States v. Macklin, 573 F.2d 1046, 1048 n.2 (8th Cir. 1978) (independent nonhearsay evidence); United States v. Haldeman, 559 F.2d 31, 118, 118 n.246 (D.C. Cir. 1976) (independent nonhearsay evidence); United States v. Martorano, 557 F.2d 1, 12 (1st Cir.), *rehearing denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) (judge can consider all evidence including hearsay statements themselves in determining admissibility).

[19] *See* text accompanying notes 48-64 *infra*.

[20] *Compare* United States v. Lawson, 523 F.2d 804, 806 (5th Cir. 1975) (judge and jury share authority in admissibility decision), *with* United States v. Nardone, 127 F.2d 521, 523 (2d Cir. 1942) (judge alone has complete authority to make admissibility decision).

[21] *See* United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575, 578 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979), *citing* Apollo v. United States,

decided whether the prosecution adequately had established by independent evidence the coconspirator exception's substantive requirements.[22] If the prosecution made this prima facie showing, the judge then instructed the jury on the conditional status of the coconspirator declarations that the prosecution was about to present.[23] If the prosecutor failed to make the requisite prima facie showing, the judge faced three alternatives.[24] The judge could instruct the prosecutor to rearrange the order of proof to establish the necessary showing,[25] conditionally admit the prosecutor's proposed evidence[26] and advise the jury accordingly,[27] or exclude any additional evidence and admonish the jury to disregard all statements previously heard.[28]

In the second step of the admissibility determination, the jury made the ultimate decision whether to admit the coconspirator statements.[29]

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476 F.2d 156, 163 (5th Cir. 1973); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom.*, Lynch v. United States, 397 U.S. 1028 (1970); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963).

[22] *See* United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969); text accompanying notes 11-14 *supra*.

[23] *See* United States v. James, 590 F.2d 575, 578 (5th Cir. 1979). After the prosecutor makes a prima facie showing of a conspiracy, the judge instructs the jury to consider the hearsay against the defendant only if the jury also determines that the prosecutor established the foundational requirements of the coconspirator exception. *Id.*; Myers v. United States, 377 F.2d 412, 417-19 (5th Cir. 1967).

[24] *See* notes 25-28 *infra*.

[25] *See* United States v. Turner, 528 F.2d 143, 162 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975) (separate opinion, Kilkenny, J.). Rule 611(a) retains trial judges' common law discretion to regulate the order of proof. FED. R. EVID. 611(a). *See* United States v. Vinson, 606 F.2d 149, 151-153 (6th Cir. 1979) (judge can require all nonhearsay evidence first, conditionally admit coconspirator statements subject to later proof of conspiracy, or order "mini hearing" on admissibility issue before any evidence admitted).

[26] *See* United States v. Turner, 528 F.2d 143, 162 (9th Cir. 1975) (separate opinion, Kilkenny, J.) (trial judge could admit evidence subject to motion to strike if prosecution subsequently failed to fulfill coconspirator exception's substantive requirements). The judge admits the evidence under the stipulation that the prosecutor later connect up by evidence of conspiracy the conditionally admitted coconspirator statements. *Id.* Courts allow prosecutors to enter evidence conditionally (subject to an order to strike) to facilitate the prosecution's proof and save court time. FED. R. EVID. 611(a). For example, a prosecutor may have a witness testify and want to use the coconspirator statements against all three defendants, A, B, and C. At the time the witness testifies, however, the prosecutor only may have established the foundational requirements of 801(d)(2)(E) as to A and B. Therefore, the witness' statements are only admissible against A and B. Nevertheless, the judge can allow the admission of the statements against A, B, and C, but subject to a motion to strike against C if the prosecutor does not subsequently satisfy rule 801(d)(2)(E)'s requirements as to C.

[27] *See* United States v. Tilton, 610 F.2d 302, 306 (5th Cir. 1980); United States v. James, 590 F.2d 575, 582 (5th Cir. 1979); United States v. Weiner, 578 F.2d 757, 768 (9th Cir. 1978) *citing* United States v. Knight, 416 F.2d 1181, 1185 (9th Cir. 1969) (trial judge has discretion to admit evidence subject to motion to strike if prosecution's proof of conspiracy is insufficient).

[28] *See generally* Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

[29] *See* United States v. Santiago, 582 F.2d 1128, 1132 (7th Cir. 1978).

Admissibility became a jury question once the judge unconditionally admitted the coconspirator statement or found that the prosecutor adequately "connected up" the coconspirator statement by proving the exception's substanative requirements.[30] The jury's admissibility determination was distinct from the judge's.[31] The judge only had to find a prima facie case of conspiracy.[32] The jury, on the other hand, had to find the existence of a conspiracy established beyond a reasonable doubt before the evidence became admissible.[33] In determining whether a conspiracy existed, the jury could use only evidence independent of the coconspirator's statements.[34] Upon acceptance of the coconspirator's statements into evidence, the jury then determined how much weight to assign the statements when deciding the guilt of the defendant.[35]

Courts rejecting the traditional two-step process involving both judge and jury delegated to the judge full authority to make the admissibility ruling.[36] Resting the determination solely with the judge coincided

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[30] *See id.;* United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

[31] *See* United States v. Santiago, 582 F.2d at 1132 *citing* United States v. Santos, 385 F.2d 43, 45 (7th Cir.), *cert. denied*, 390 U.S. 954 (1967). The jury's determination involved the complex task of sorting through all the evidence admitted and partitioning off the often prejudicial coconspirator statements. 582 F.2d at 1132. Without considering the coconspirator statements, the jury then had to determine whether the remaining nonhearsay evidence established the coconspirator exceptions preliminary requirements beyond a reasonable doubt. *Id.* If the jury found affirmatively, the coconspirator statements then became admissible for consideration upon the ultimate issues. *Id.* Cases involving multiple defendants in which the jury was to consider the statements against some defendants and not others further complicated the jury's determination. In such cases, the court instructions stipulated that if the jury first found the statements admissible, the jury could then consider the evidence only against certain defendants and not against others. Nash v. United States, 54 F.2d 1006, 1006 (2d Cir. 1932). As Learned Hand pointed out, correctly categorizing the evidence according to the individual defendant amounts to mental gymnastics beyond the capability of jurors. *Id.* at 1007. The belief that jury instructions can eliminate this confusion and accompanying prejudicial effect in such deliberations is questionable. Krulewitch v. United States, 336 U.S. 440, 453 (1949).

[32] *See* United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

[33] *See* United States v. Santiago, 582 F.2d 1128, 1131-32 (7th Cir. 1978); United States v. Enright, 579 F.2d 980, 983 (6th Cir. 1978); United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

[34] *See* J. WEINSTEIN & M. BERGER, 1 WEINSTEIN'S EVIDENCE ¶ 104[05] at 104-44.9 (1979).

[35] *See generally Procedure and Standard of Proof, supra* note 10.

[36] *See* United States v. Jones, 542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976). Although the Fourth Circuit decided *Jones* after enactment of the Federal Rules of Evidence, the court relied on prior case law to support the single-step judge determination. *Id.* Other circuits also endorsed having the judge alone determine admissibility. *See* United States v. Pisciotta, 469 F.2d 329, 332-33 (10th Cir. 1972); United States v. Bey, 437 F.2d 188, 191-92 (3d Cir. 1971); Carbo v. United States, 314 F.2d 718, 736-37 (9th Cir. 1963); United States v. Nardone, 127 F.2d 521, 523 (2d Cir. 19742).

with the general custom of allowing the court to rule on the admissibility of evidence.[37] Circuits delegating the decision to the judge reasoned that a bifurcated decisional process prejudiced the defendant when the preliminary and ultimate issues of the existence of a conspiracy corresponded.[38] Courts disregarding the two-step process reasoned that the judge should decide all factual issues which depend on the competency of the evidence.[39]

The Federal Rules of Evidence attempted to codify the existing case law principles for determining preliminary questions of fact, such as the existence of a conspiracy.[40] Subdivision (a) of Federal Rule 104 imposes upon the judge the duty to decide preliminary questions of fact dependent on the competency of the evidence.[41] Under rule 104(b) the jury is to determine preliminary questions of relevancy dependent upon the fulfillment of a condition of fact.[42] Rules 104(a) and (b), however, have not resolved conclusively whether the judge or the jury should determine

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[37] *See generally* Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1926) [hereinafter cited as *Preliminary Question*].

[38] *See* United States v. Pisciotta, 469 F.2d 329, 333 (10th Cir. 1972); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963). In *Carbo*, the bifurcated process threatened the defendant with prejudice because of the confusing directions the jury had to follow in determining admissibility. *Id.* *See* note 31 *supra* (note describes process jury had to adhere to).

[39] *See* Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963); United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). The Ninth Circuit in *Carbo* adopted the practice stated in *Dennis* of having the judge decide issues of fact on which the competency of the evidence depends. 314 F.2d at 737.

[40] *See* FED. R. EVID. 104, Advisory Committee's Note. The Advisory Committee stated that when the admissibility of evidence depends on the existence of a condition, then the judge must determine the existence of the condition. *Id.* At common law, the judge alone determined preliminary questions of fact relating to technical rules. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

[41] The pertinent parts of rule 104 provide:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
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> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
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> (c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests . . . .

FED. R. EVID. 104.

[42] FED. R. EVID. 104(b). *See* FEDERAL RULES MANUAL, *supra* note 9. "Relevancy" is a term of art describing the probative value of the evidence. *Id.* at 37. "Competency," on the other hand, describes whether a particular piece of evidence fits into a technical rule of evidence such as witness competency or the hearsay exceptions. *Id.* Commentators have also used "competency" as a term of art representing all the technical rules of evidence. *Id.*

the ultimate admissibility of coconspirator statements.[43] Coconspirator statements are suited both to classification under rule 104(a), as dependent on the competency of the evidence, and under 104(b), as dependent on a finding of conditional relevancy.[44] Federal Rule 104 failed to resolve this classification dilemma inherent in determining the admissibility of coconspirator statements.[45] Likewise, rule 801(d)(2)(E) is silent on who should determine whether the prosecutor has made the proper showing.[46]

Until 1977, circuit courts avoided applying rule 104 to the coconspirator exception and continued to endorse their pre-Rules procedure. The First Circuit initiated the application of rule 104 in *United States v. Petrozziello*.[47] The *Petrozziello* court determined that rule 104(a) gave the judge the final and only voice in determining the ultimate admissibility of coconspirator statements.[48] Although the First Circuit avoided discussing 104(a) within rule 104's framework of competence and conditional relevancy,[49] other circuits approvingly cited *Petrozziello* for applying rule 104(a).[50] Since *Petrozziello*, the circuits that previously allocated the admissibility determination to both judge and jury have followed the First Circuit's lead and have shifted full authority to the judge.[51]

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[43] United States v. James, 590 F.2d 575, 579 (5th Cir. 1979) (neither language of rule 104 nor Advisory Committee's Notes indicate whether coconspirator statements fall under rule 104(a) as competency questions or rule 104(b) as conditional relevancy questions); United States v. Enright, 579 F.2d 980, 984 (6th Cir. 1978) (unclear whether rule 104(a) or 104(b) governs admissibility); *see Procedure and Standard of Proof*, *supra* note 11, at 581.

[44] United States v. James, 576 F.2d 1121, 1128-29 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979). Advocates of rule 104(a) frame the admissibility question in terms of competency, inquiring whether the conspiracy and the accused's participation in the conspiracy render the hearsay declarations sufficiently reliable to warrant admission. United States v. Enright, 579 F.2d 980, 984 (6th Cir. 1978). Proponents of rule 104(b), in contrast, couch the admissibility issue in terms of relevancy, inquiring whether declarant's statements largely are irrelevant unless the defendant and declarant are joint members of a criminal conspiracy. *Id.*

[45] *See generally* Comment, *The Impact of Federal Rule of Evidence 104 on the Coconspirator Exception to the Hearsay Rule*, 28 EMORY L.J. 1115 (1979) [hereinafter cited as *Exception to the Hearsay Rule*]. Apparently, some legislative discussion centered on the difficulties of applying the coconspirator exception although the rules do not reflect this concern. *Id.* at 1119 n.27.

[46] FED. R. EVID. 801(d)(2)(E). *See* United States v. James, 590 F.2d 575, 578 (5th Cir. 1979).

[47] 548 F.2d 20 (1st Cir. 1977).

[48] *Id.* at 23.

[49] *See* notes 40 and 42 *supra*.

[50] *See* United States v. Andrews, 585 F.2d 961, 965-66 (10th Cir. 1978); United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978); United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978).

[51] *See* United States v. Jackson, 627 F.2d 1198, 1217-1218 (D.C. Cir. 1980) (D.C. Circuit based decision to follow 104(a) on Fifth Circuit's policy reasons and Seventh Circuit's characterization of admissibility as mainly question of competency); United States v. James, 590 F.2d 575, 579 (5th Cir. 1979) (Fifth Circuit decided that a rule which puts admissibility of

Currently all the circuit courts agree in endorsing the judge as the final arbiter of the admissibility question.[52] Although commentators dispute the merits of having the judge rather than the jury determine admissibility,[53] placing the decision on the judge is the better approach. Practical reasons as well as careful analysis of the issue support this conclusion. Having the judge determine admissibility eradicates the inherent difficulty expressed in *United States v. James*[54] of saddling the jury with both the admissibility question and the ultimate determination of guilt or innocence.[55] The Fifth Circuit in *James* noted the danger that the jury might convict the defendant on the basis of the coconspirator statements themselves without first dealing with the admissibility question.[56] Moreover, the trained legal mind of a judge can better resolve the admissibility question which involves applying technical rules of evidence.[57] Preliminary questions for the jury under 104(b) usually only contemplate common sense reasoning that rarely threatens the defendant with prejudice.[58]

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coconspirator statements in jury's hands fails to avoid danger that jury might convict on basis of statements without first deciding admissibility question); United States v. Andrews, 585 F.2d 961, 965 (10th Cir. 1978) (Tenth Circuit, like the Eighth, adopted *Petrozziello* without considering interplay between 104(a) and 104(b)); United States v. Santiago, 582 F.2d 1128, 1133 (7th Cir. 1978) (Seventh Circuit considered admissibility a matter of competency under 104(a), not conditional relevancy under 104(b)); United States v. Enright, 579 F.2d 980, 984 (6th Cir. 1978) (Sixth Circuit decided that admissibility is more question of basic reliability and fairness of admitting evidence than relevancy question of whether evidence has tendency to make fact in issue more or less probable than fact would be without evidence); United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978) (Eighth Circuit merely adopted 104(a) on strength of *Petrozziello* and failed to consider framework of 104(a) and 104(b)); text accompanying notes 40-45 *supra*.

[52] *See* United States v. Jackson, 627 F.2d 1198, 1217-1218 (D.C. Cir. 1980); United States v. James, 590 F.2d 575, 579 (5th Cir. 1979); United States v. Andrews, 585 F.2d 961, 965 (10th Cir. 1978); United States v. Santiago, 582 F.2d 1128, 1133 (7th Cir. 1978); United States v. Enright, 579 F.2d 980, 984 (6th Cir. 1978); United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); United States v. Jones, 542 F.2d 186, 203 (4th Cir. 1976); United States v. Bey, 437 F.2d 188, 191-92 (3d Cir. 1971); Carbo v. United States, 314 F.2d 718, 736-37 (9th Cir. 1963); United States v. Nardone, 127 F.2d 521, 523 (2d Cir. 1942). *See* text accompanying notes 40-63 *supra* and *infra*; *but see* text accompanying notes 163-167 *infra* (although judge has sole authority in admissibility determination, some circuits still send question to jury for ultimate determination).

[53] *Compare* 4 J. WEINSTEIN, EVIDENCE ¶ 104[05] at 104-39, 104-43 (1975) (rule 104(b) governs admissibility of coconspirator declarations) *and* Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back into the Coconspirator Rule*, 5 HOFSTRA L. REV. 77, 98 (1976) (jury must decide preliminary questions of fact) *with Procedure and Standard of Proof*, *supra* note 10, at 587 (preliminary review by judge is more reasonable and required by 104(a)) *and Exception to the Hearsay Rule*, *supra* note 45, at 1149 (courts properly moving towards judicial determination).

[54] United States v. James, 590 F.2d 575 (5th Cir. 1979).

[55] *Id.* at 579. *See* notes 31 and 38 *supra*.

[56] *Id.*

[57] *Id.*

[58] 28 U.S.C. app., Notes of Advisory Committee on Proposed Rules [of Evid.], Rule 104, Subdivision (b) (1976).

The analysis in *United States v. Enright*[59] further supports application of 104(a) to determine the admissibility of a coconspirator's out-of-court statements.[60] The *Enright* court compared 104(a) with 104(b) and concluded that the admissibility of a coconspirator's statements more closely resembles a 104(a) hearsay issue than a 104(b) relevancy issue.[61] The Sixth Circuit reasoned that admissibility of coconspirator out-of-court statements was mainly a question of the reliability and fairness of the evidence.[62] Since the purpose of the admissibility determination is to protect an accused from unreliable and potentially prejudicial statements, the *Enright* court held that the admissibility of out-of-court statements is a question of competency under 104(a).[63]

Although adoption of 104(a) resolved the issue of who should arbitrate the admissibility of coconspirator statements, rule 104(a) created two new issues. These new issues concern the type of evidence that judges may consider in determining the application of 801(d)(2)(E),[64] and the appropriate standard of proof that prosecutors must satisfy before courts may admit coconspirator statements into evidence.[65] Since rules 104(a) and 801(d)(2)(E) do not expressly resolve these questions, courts have had to determine whether the two rules' lack of mandate implictly endorses existing case law or directs the adoption of new procedures.[66]

With respect to the issue of what types of evidence judges may consider in making the threshold conspiracy determination under 104(a), circuit courts have had to decide whether judges may only consider independent nonhearsay evidence or whether judges may consider all proffered evidence, regardless of its hearsay nature.[67] In the pre-rule 104(a) decision of *Glasser v. United States*,[68] the Supreme Court prohibited judges from considering the coconspirator statements themselves when determining the availability of the coconspirator hearsay exception to those statements.[69] Under the *Glasser* requirement, judges may only consider independent evidence of the conspiracy in determining the admissibility of out-of-court statements of coconspirators.[70] Use of hearsay

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[59] 579 F.2d 980 (6th Cir. 1978).

[60] *Id.* at 984.

[61] *Id.*; *see Coconspirator Hearsay Exception*, *supra* note 16, at 626.

[62] 579 F.2d at 984.

[63] *See Exception to the Hearsay Rule*, *supra* note 43, at 1125.

[64] *See* text accompanying notes 67-97 *infra*.

[65] *See* text accompanying notes 98-185 *infra*.

[66] United States v. James, 590 F.2d 575, 578-81 (5th Cir. 1979).

[67] *See Co-Conspirator Declarations*, *supra* note 7, at 296-99; *Exception to the Hearsay Rule*, *supra* note 43, at 1135-38.

[68] 315 U.S. 60 (1942) (judge can use only evidence independent of hearsay itself in making preliminary determination of admissibility of coconspirator statements).

[69] *Id.* at 74-75.

[70] *Id.*

in admissibility decisions creates the potential for "bootstrapping,"[71] whereby a prosecutor conceivably could establish the prerequisite conspiracy by the very hearsay statement he seeks to admit.[72] With the exception of evidentiary rules regarding privileges, however, rule 104(a) releases a judge from the strictures of the rules of evidence.[73] Rule 104(a) seemingly permits judges to consider hearsay and other inadmissible evidence in making admissibility determinations under the rule 104(a).[74] Rule 104(a), therefore, arguably authorizes judges to do exactly what *Glasser* prohibitied.

Circuit courts have reached varying results on the compatability of *Glasser* and rule 104(a). The First[75] and Eighth[76] Circuits serve as analytical extremes. In *United States v. Martorano*[77] the First Circuit reasoned that 104(a) overruled *Glasser*.[78] The *Martorano* court held that the judge may consider out-of-court statements that the prosecutor seeks to admit under 801(d)(2)(E) in making the preliminary determination of whether the requisite 801(d)(2)(E) conspiracy exists.[79] The court observed that except for rules regarding privilege, the language of 104(a) expressly released judges from abiding by the rules of evidence when considering questions of competency.[80] Furthermore, the court

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[71] *See* United States v. Macklin, 573 F.2d 1046, 1048 n.2 (8th Cir. 1978). "Bootstrapping" means that the prosecutor lays the foundation for the introduction of the coconspirator statements by relying on the coconspirator statements themselves as proof of the conspiracy. United States v. DeFillipo, 590 F.2d 1228, 1236 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979).

[72] United States v. Petrozziello, 548 F.2d 20, 23 n.2 (1st Cir. 1977).

[73] FED. R. EVID. 104(a); *see* United States v. Santiago, 582 F.2d 1128, 1133 n.11 (7th Cir. 1978) (discussing conflict between *Glasser* and rule 104(a)).

[74] United States v. Petrozziello, 548 F.2d at 23 n.2 (1st Cir. 1977).

[75] *See* United States v. Martorano, 557 F.2d 1, 12 (1st Cir.), *rehearing denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) (judge can consider all evidence including hearsay in deciding admissibility question). The Sixth Circuit also follows the First Circuit's approach. *See* United States v. Kendricks, 623 F.2d 1165, 1168 n.5 (6th Cir. 1980) (judges need not predicate findings solely on evidence independent of hearsay); United States v. Vinson, 606 F.2d 149, 151-53 (6th Cir. 1979) (judge can consider hearsay statements themselves in resolving preliminary question of admissibility).

[76] *See* United States v. Macklin, 573 F.2d 1046, 1048 n.2 (8th Cir. 1978) (bootstrapping is unwarranted and was not contemplated in enactment of rule 104).

[77] 557 F.2d 1 (1st Cir.), *rehearing denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) (conspiracy case reiterating *Petrozziello* holding and stating that Federal Rules of Evidence overruled *Glasser*'s independent evidence requirement).

[78] *Id.* at 12.

[79] *Id.*

[80] *Id. See* United States v. Matlock, 415 U.S. 164, 175 (1973) (where judge determines admissibility, exclusionary rules aside from rules of privilege should not apply; judge should have power to receive evidence and give evidence such weight as his judgment and experience counsel); United States v. James, 590 F.2d 575, 591-92, 592 n.9 (5th Cir. 1979) (Tjoflat, J., concurring) (language of rule 104(a) and Advisory Committee's Notes empower judge to consider proffered statements in determining admissibility of coconspirator statements).

reasoned that judges would recognize the inherent weaknesses in the hearsay statements.[81] The First Circuit consequently reduced *Glasser* to a warning that hearsay statements ordinarily have questionable credibility.[82]

A majority of circuits continue to adhere to *Glasser's* requirement that courts use only evidence independent of the coconspirator's out-of-court statements in determining the application of the rule 801(d)(2)(E).[83] Some circuit courts, however, have endorsed *Glasser's* independent evidence requirement without specifically considering the impact of 104(a).[84] In contrast, the Seventh[85] and Eighth[86] Circuits have considered and openly condemned the *Martorano* standard. In *United States v. Macklin*,[87] the Eighth Circuit noted the First Circuit's decision in *Martorano*, but rejected the suggestion in *Martorano* that under 104(a) judges may consider out-of-court statements themselves in determining the statements' admissibility.[88] Prior to *Macklin*, the Eighth Circuit stressed *Glasser* as an important safeguard to the reliability of evidence admitted at trial.[89] The need to guarantee the reliability of coconspirator

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[81] United States v. James, 590 F.2d 575, 579 (5th Cir. 1979).

[82] *See* 557 F.2d at 12; United States v. Petrozziello, 548 F.2d at 23 n.2. The First Circuit subsequently endorsed *Martorano* in *United States v. Mackedon*, 562 F.2d 103, 105 (1st Cir. 1977) (admissibility determination based on all the evidence). In *United States v. Nardi*, 633 F.2d 972 (1st Cir. 1980), however, the court seemed to back away from the *Martorano* determination. *Id.* at 975. Without citing *Martorano* or rule 104(a) the First Circuit concluded that the prosecution presented sufficient independent evidence to meet the preponderance standard. *Id.*

[83] *See* United States v. Cawley, 630 F.2d 1345, 1350 (9th Cir. 1980); United States v. Troung Dinh Hung, 629 F.2d 908, 930 (4th Cir. 1980); United States v. Rios, 611 F.2d 1335, 1340-41, 1341 n.8 (10th Cir. 1979), *cert. denied*, 101 S.C. 3054 (1981); United States v. Tilton, 610 F.2d 302, 306 (5th Cir. 1980); United States v. Cambindo Valencia, 609 F.2d 603, 631 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); United States v. McPartlin, 595 F.2d 1321, 1357 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); United States v. Schoenhut, 576 F.2d 1010, 1027 (3d Cir.) *cert. denied*, 439 U.S. 964 (1978); United States v. Macklin, 573 F.2d 1045, 1048 n.2 (8th Cir. 1978); United States v. Haldeman, 559 F.2d 31, 118, 118 n.246 (D.C. Cir. 1976). The District of Columbia Circuit has not addressed the independent evidence issue since enactment of the rules. Therefore, although the court decided *Haldeman* before the rules become effective, *Haldeman* remains persuasive authority. *See* United States v. Jackson, 627 F.2d 1198, 1216 n.34 (D.C. Cir. 1980) (court held it was not necessary to decision in *Jackson* to determine effect of Federal Rules on *Glasser*).

[84] *See* United States v. Trowery, 542 F.2d 623, 626-27 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); United States v. Wood, 550 F.2d 435, 442 (9th Cir. 1977); United States v. Stanchich, 550 F.2d 1294, 1299 n.4 (2d Cir. 1977); United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976).

[85] *See* United States v. Papia, 560 F.2d 827, 835 (7th Cir. 1977) (court remains mindful of duty to scrutinize strictly sufficiency of only nonhearsay evidence establishing conspiracy and accused's connection to conspiracy).

[86] *See* United States v. Macklin, 573 F.2d 1046, 1048 n.2 (8th Cir. 1978).

[87] 573 F.2d 1046 (8th Cir. 1978).

[88] *Id.* at 1048 n.2.

[89] *See* United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Lambros, 564 F.2d 26, 29-30 (8th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); United States v. Scholle, 553 F.2d 1109, 1117 (8th Cir. 1977), *cert. denied*, 434 U.S. 940 (1978).

statements justifies the majority's continued adherence to *Glasser*.[90] The independent evidence standard allows the judge to determine if sufficient corroborating evidence of conspiracy exists to insure reliability.[91]

Rather than disregarding either 104(a)'s language or *Glasser's* instructions, the Fifth Circuit in *United States v. James*[92] integrated the two rules. The *James* court held that rule 104(a) allows the trial judge to consider hearsay and other inadmissible evidence of conspiracy in determining the availiability of 801(d)(2)(E).[93] The Fifth Circuit stipulated, however, that the hearsay statements considered in the rule 801(d)(2)(E) determination must differ from the statements sought to be introduced at trial under 801(d)(2)(E).[94] The court concluded that 104(a) did not mean to imply that a judge may consider the very out-of-court statements sought to be admitted under 801(d)(2)(E).[95] Rather, the judge may consider in determining the availability of 801(d)(2)E) only those hearsay statements that differ from the out-of-court statements ultimately to be introduced at trial.[96] The Fifth Circuit's interpretation guards against "bootstrapping" while giving force to both *Glasser* and 104(a).[97]

In addition to the court's lack of concensus as to the type of evidence that the factfinder may use, the circuits are divided as to the quantum of proof the prosecution must present before coconspirator statements are admissible.[98] Rule 104(a)'s insistence on a one-party determination of admissibility dictates a need to change the quantum of proof in such determinations.[99] When the judge's determination is the only determination made, the prima facie standard used at common law fails to protect defendants adequately.[100] Accepting coconspirator statements into evidence following a mere prima facie showing risks subjecting the accused to unreliable evidence.[101] Moreover, continuing use of the prima

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[90] *See Exception to the Hearsay Rule*, *supra* note 45, at 1137-38.

[91] *Id.*

[92] 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575, 581 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* Subdivision (a) of 104 makes no distinction between hearsay offered for admission and other hearsay related to the question of admissibility. FED. R. EVID. 104(a). The Fifth Circuit reads this distinction into rule 104(a). *See* United States v. James, 590 F.2d 575, 581 (5th Cir. 1979).

[98] *See* text accompanying notes 98-185 *infra*.

[99] *See* United States v. Enright, 579 F.2d 980, 985 (6th Cir. 1978) (framers of 104(a) did not intend for judge to employ prima facie test for resolving preliminary questions under that section).

[100] *See* United States v. James, 576 F.2d 1121, 1130 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 595 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

[101] *Id.* A mere prima facie showing of the coconspirator exception's substantive requirements would have the unwanted effect of elevating the statements to admissible evidence. *Id.*

facie standard without the jury applying additionally the beyond a reasonable doubt standard would broadly expand the scope of the coconspirator exception.[102] To avoid expansion of the coconspirator exception and accomodate the judge's new role in determining admissibility, all the circuits except one[103] have abandoned the initial prima facie test and have adopted stricter standards.[104] Eight circuits have modified their requisite standards of proof since Congress enacted the Federal Rules of Evidence.[105] Three circuits have reaffirmed their standards used prior to

[102] United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). The Supreme Court and various commentators have expressed concern about expanding the coconspirator exception and emphasize the need to restrain the breadth of the exception. *See* Krulewitch v. United States, 336 U.S. 440, 443-44 (1949); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1170 (1954) [hereinafter cited as *Hearsay and Conspiracy*]; 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, 23 (1975). Overexpansion of the exception threatens the accused with confrontation of the prejudicial impact of unreliable evidence. *See* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972).

[103] *See* United States v. Batimana, 623 F.2d 1366, 1368 (9th Cir. 1980), *cert. denied*, 449 U.S. 1038 (1980). The Ninth Circuit expressly has retained the prima facie standard. United States v. Testa, 548 F.2d 847, 853 n.2 (9th Cir. 1977). The Ninth Circuit requires the prosecution to present sufficient, substantial evidence to establish a prima facie case of conspiracy and the defendant's involvement in the conspiracy before the coconspirator exception applies. United States v. Weiner, 578 F.2d 757, 768 (9th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978); United States v. Testa, 548 F.2d 847, 853 n.2 (9th Cir. 1977); United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). The Ninth Circuit reasoned that the Supreme Court's sufficient, substantial evidence requirement in *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974) implied a prima facie showing. United States v. Testa, 548 F.2d 847, 852-53 (9th Cir. 1977). *See* notes 112-122 and accompanying text *infra*. Since the *Nixon* Court relied exclusively on circuit court cases employing the prima facie standard, including two Ninth Circuit cases, to substantiate the Court's sufficient, substantial evidence requirement, the Ninth Circuit concluded that the Court's language required a prima facie showing. *Id.*

[104] *See* United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). The *Petrozziello* court reasoned that prior to enactment of rule 104(a), the judge's use of the prima facie standard was adequate since the jury ultimately determined admissibility based on the reasonable doubt standard. *Id.* Under 104(a), however, since the judge's determination is final, a higher standard must be implicit in the judge's new role. *Id.* The court therefore adopted the preponderance of the evidence standard. *Id.*

[105] *See* United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980) (judge initially should use substantial independent evidence standard for conditionally admitted coconspirator statements and then reevaluate admissibility question using all the evidence to determine whether jury might fairly conclude guilt beyond reasonable doubt); United States v. Petersen, 611 F.2d 1313, 1330-31 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980) (judge should base decision on preponderance of evidence); United States v. James, 590 F.2d 575, 580-83 (5th Cir. 1979) (judge should use preponderance of evidence standard for ultimate test of admissibility); United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978) (adopted preponderance of evidence standard); United States v. Enright, 579 F.2d 980, 986 (6th Cir. 1978) (adopted preponderance of evidence standard); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (adopted preponderance of evidence standard); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977) (adopted preponderance of evidence standard);

adoption of the rules.[106] The standards of proof used today include prima facie,[107] preponderance,[108] substantial independent evidence,[109] and beyond a reasonable doubt.[110] The standards imposed should be strict enough to protect the defendant adequately, yet not so broad as to exclude trustworthy, relevant evidence.[111]

The coconspirator exception rules are silent on which standard of proof the evidence of conspiracy must satisfy.[112] The United States Supreme Court has provided little guidance. The *Glasser* Court conspicuously failed to designate the standard of proof *aliunde*[113] necessary for admissibility.[114] The Supreme Court added to the uncertainty concerning the standard of proof *aliunde* in *United States v. Nixon*[115] immediately prior to enactment of the Federal Rules of Evidence. The *Nixon* Court stated in dictum that the prosecution must make a "sufficient showing, by independent evidence . . . " before coconspirator statements are admissible.[116] In an accompanying footnote, the Court stated that "as a preliminary matter, there must be substantial, independent evidence . . . to take the question to the jury."[117]

Circuit courts have reacted to the confusing dicta in several ways.[118] Some circuits have recited the *Nixon* substantial independent evidence language but have not adopted the dicta as a standard.[119] Other circuits

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United States v. Jones, 542 F.2d 186, 203 (4th Cir. 1976) (adopted preponderance of evidence standard).

[106] United States v. Weiner, 578 F.2d 757, 768-69 (9th Cir. 1978) (reaffirming prima facie standard); United States v. Stanchich, 550 F.2d 1294, 1299 n.4 (2d Cir. 1977) (reaffirming preponderance of evidence standard); United States v. Trotter, 529 F.2d 806, 811-12 (3d Cir. 1976) (reaffirming preponderance standard).

[107] *See* text accompanying notes 163-170 *infra*.

[108] *See* text accompanying notes 146-162 *infra*.

[109] *See* text accompanying notes 123-145 *infra*.

[110] *See* text accompanying notes 171-185 *infra*.

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

[112] *See* FED. R. EVID. 801(d)(2)(E); FED. R. EVID. 104(a) & (b); note 7 & 41 *supra*.

[113] *See* Glasser v. United States, 315 U.S. at 74-75. "Proof *aliunde*" refers to the independent, nonhearsay evidence necessary to constitute a threshold showing. *See id.*

[114] *Id.*

[115] 418 U.S. 683 (1974).

[116] *Id.* at 701 (footnote omitted).

[117] *Id.* at 701 n.14.

[118] *See* Bergman, *The Coconspirator's Exception: Defining the Standard of the Independent Evidence Test Under the New Rules of Evidence*, 5 HOFSTRA. L. REV. 99, 103 (1976) [hereinafter cited as *The Coconspirators' Exception*]. The meaning of Chief Justice Burger's reference in *Nixon* to substantial independent evidence to take the question to the jury is unclear. If the Court intended "substantial" to mean "reasonable doubt," the Court expressly could have said so. *Id.* If the Court equated "substantial" with "less than a reasonable doubt," then the Court should not have spoken of enough "independent evidence" to "take the question to the jury." *Id.*

[119] *See, e.g.*, United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976) (substantial independent evidence language is dictum); United States v. Wiley, 519 F.2d 1348, 1350-51 (2d Cir. 1975) (substantial independent evidence language in *Nixon* is "pure dictum").

have equated the substantial independent evidence language with the prima facie standard.[120] Since all the circuit court cases cited in the *Nixon* footnote as authority for the substantial independent evidence requirement applied the prima facie test, the interpretation of substantial independent evidence as a prima facie standard has support.[121] Noticeably absent from the *Nixon* Court's list of authority are any circuits that had previously applied the preponderance of the evidence standard to the coconspirator exception.[122]

Only three circuits utilize the substantial independent evidence standard.[123] The Fifth[124] and Tenth[125] Circuits use the substantial independent evidence standard in the preliminary step of their admissibility determination.[126] The District of Columbia Circuit also uses the substantial independent evidence standard but only when the court admits coconspirator statements conditionally.[127] Absent conditionally admitted coconspirator statements, the District of Columbia,[128] like seven other circuits,[129] determines admissibility in a one-step judidical determination

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[120] *See, e.g.*, United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978) (substantial independent evidence means enough evidence to make prima facie case); United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976) (Fourth Circuit has expressed substantial independent evidence language before in terms of prima facie proof of conspiracy but also in terms of proof by fair preponderance of independent evidence).

[121] *See* 418 U.S. at 701 n.14 *citing* United States v. Vaught, 485 F.2d 320, 323 (4th Cir. 1973); United States v. Morton, 483 F.2d 573, 576 (8th Cir. 1973); United States v. Spanos, 462 F.2d 1012, 1014 (9th Cir. 1972); United States v. Santos, 385 F.2d 43, 45 (7th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968); United States v. Hoffa, 349 F.2d 20, 41-42 (6th Cir. 1965), *aff'd on other ground*, 385 U.S. 293 (1966); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). *See also* United States v. Trotter, 529 F.2d 806, 811-12 (3d Cir. 1976).

[122] *See* 418 U.S. at 701 n.14; United States v. Trotter, 529 F.2d 806, 812 (3d Cir. 1976); United States v. Wiley, 519 F.2d 1348, 1350-51 (2d Cir. 1975). The Third Circuit recognized that the Supreme Court's failure to cite the Second and Third Circuits may indicate the Court's intention to overrule *sub silentio* the preponderance test used by both circuits. 529 F.2d at 812. The Second Circuit in *Wiley* reasoned that because the Supreme Court after *Nixon* refused to grant certiorari to several Second Circuit cases in which the court applied the fair preponderance standard, the Supreme Court in *Nixon* had not intended to overrule the preponderance standard. 519 F.2d at 1351.

[123] *See* United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980); United States v. Gantt, 617 F.2d 831, 845-46 (D.C. Cir. 1980); United States v. Grassi, 616 F.2d 1295, 1300-01 (5th Cir. 1980); United States v. Petersen, 611 F.2d 1313, 1330-31 (10th Cir. 1979); United States v. James, 590 F.2d 575, 581 (5th Cir. 1979).

[124] *See* United States v. Grassi, 616 F.2d 1294, 1300-01 (5th Cir. 1980); United States v. James, 590 F.2d 575, 581 (5th Cir. 1979).

[125] *See* United States v. Petersen, 611 F.2d 1313, 1330-31 (10th Cir. 1979).

[126] *See* text accompanying notes 131-139 *infra*.

[127] *See* United States v. Jackson, 627 F.2d 1198, 1218 (D.C. Cir. 1980) (establishing procedure for conditionally admitted coconspirator statements).

[128] *See* United States v. Gantt, 617 F.2d 831, 844-45, 845 n.6 (D.C. Cir. 1980) (reiterating preponderance test in situation where coconspirator statements admitted unconditionally).

[129] *See* note 146 *infra* (list of circuits using single step process). Under rule 611(a), however, the judge may exercise considerable discretion in directing the prosecutor's presentation of evidence. United States v. James, 590 F.2d 575, 590-91 (5th Cir. 1979)

based on a preponderance of the evidence.[130]

In deciding whether a conspiracy exists, the judge employs the substantial independent evidence standard.[131] The judge normally makes the substantial independent evidence ruling during the prosecutor's case-in-chief.[132] In adopting the substantial independent evidence standard, both the Fifth and Tenth Circuits determined that the preponderance test was inappropriate for a ruling usually made during the initial stages of a proceeding.[133] The preponderance test, unlike substantial independent evidence, contemplates weighing the prosecution's case against the defendant's case following presentation of all the evidence.[134]

The Tenth Circuit describes substantial independent evidence as more than a scintilla.[135] "Substantial" means an amount, less than the weight of the evidence, that a reasonable mind would deem sufficient to support a conclusion.[136] The Fifth Circuit defines substantial as at least enough evidence to justify the court in risking the admission of hearsay that may prove inadmissible at the ultimate determination of admissibility.[137] If the judge admits statements that later prove inadmissible, the hearsay has prejudiced the defendant.[138] The risk the judge must justify, therefore, is that he may later have to issue protective jury instructions or declare a mistrial to safeguard the accused.[139]

Following presentation of the accused's defense, the judge reevaluates the admissibility question based on all the evidence presented.[140] In the Fifth and Tenth Circuits the judge enters the coconspirator statements into evidence if a preponderance of the independent evidence favors admissibility.[141] The District of Columbia Circuit, in contrast, first has the judge determined if the prosecutor adequately substantiated or

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(Tjoflat & Ainsworth, JJ., specially concurring). Although circuit courts have procedures normally followed for the admission of coconspirator statements, rule 611(a) grants the judge and authority to deviate from that procedure to save court time, protect a witness, or aid the ascertainment of truth. 590 F.2d at 590; FED. R. EVID. 611(a).

[130] *See* text accompanying 146-162 *infra.*

[131] United States v. James, 590 F.2d 575, 581 (5th Cir. 1979).

[132] *Id.*

[133] *Id.*; United States v. Petersen, 611 F.2d 1313, 1330 (10th Cir. 1979).

[134] *Compare* United States v. James, 590 F.2d 575, 582 (5th Cir. 1979) *with* United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

[135] United States v. Petersen, 611 F.2d 1313, 1330 n.1 (10th Cir. 1979).

[136] *Id.*

[137] United States v. Grassi, 616 F.2d 1295, 1301 (5th Cir. 1980).

[138] *See* United States v. James, 590 F.2d 575, 582 (5th Cir. 1979); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

[139] *See* United States v. James, 590 F.2d 575, 582 (5th Cir. 1979); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969). The course of remedial action the judge selects must shield the defendant from the prejudice of the inadmissible coconspirator statements. *See* 590 F.2d at 582; 417 F.2d at 1120.

[140] United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980); United States v. James, 590 F.2d 575, 582 (5th Cir. 1979).

[141] *See* United States v. Petersen, 611 F.2d 1313, 1330 (10th Cir. 1979); United States v. James, 590 F.2d 575, 582 (5th Cir. 1979).

"connected up" the coconspirator statements that the court previously admitted.[142] The judge must then determine whether, considering both the hearsay and independent evidence, he should submit the entire case to the jury.[143] The judge submits the case to the jury if the prosecution satisfies the standard enunciated in *Curley v. United States*.[144] The *Curley* standard requires the judge to find that upon the evidence, giving the jury full authority to weigh the evidence, determine credibility, and draw justifiable inferences, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.[145]

Eight circuits have the judge determine admissibility in a one-step determination based on the preponderance of the evidence standard.[146] Unlike the Fifth and Tenth Circuits, which also use the preponderance standard for their ultimate determination of admissibility, these eight circuits do not have a built-in preliminary step.[147] Rather, the judge determines admissibility in one step.[148] To satisfy the preponderance of the evidence standard, the prosecutor's evidence must be of greater weight or more convincing than the defendant's evidence.[149] Under the preponderance test the judge must carefully measure both the credibility and the weight of the evidence.[150] The prosecutor satisfies the preponderance test if the judge concludes that the evidence as a whole indicates that the conspiracy and the defendant's participation in the conspiracy were more probable than not.[151]

Courts that make a one-step admissibility determination using the preponderance standard disagree over when the judge must make the admissibility determination.[152] Some courts allow the judge to make the

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[142] *See* United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980); *Coconspirator Hearsay Exception*, *supra* note 19, at 632.

[143] *See* United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980); *Coconspirator Hearsay Exception*, *supra* note 19, at 632.

[144] 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); *see* United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980).

[145] 160 F.2d at 232.

[146] *See* United States v. Kendricks, 623 F.2d 1165, 1167-68, 1168 n.5 (6th Cir. 1980); United States v. Thompson, 621 F.2d 1147, 1153 (1st Cir. 1980); United States v. Provenzano, 620 F.2d 985, 1000 (3d Cir. 1980); United States v. Gantt, 617 F.2d 831, 844-45, 845 n.6 (D.C. Cir. 1980); United States v. Baykowski, 615 F.2d 767, 771 (8th Cir. 1980); United States v. McPartlin, 595 F.2d 1321, 1356-57 (7th Cir. 1979) (Pell, J., concurring); United States v. Jones, 542 F.2d 186, 203 (4th Cir. 1976); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

[147] *See* text accompanying notes 124-130 *supra*.

[148] *See* United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977) (judge determines admissibility in one step); *but cf.* United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978) (judge has authority to proscribe alternative procedures, such as admitting coconspirator statements conditionally where circumstances require).

[149] MCCORMICK, *supra* note 4, § 339, 793-94 (2d ed. E. Cleary 1972).

[150] *See* United States v. Enright, 579 F.2d 980, 985; FEDERAL RULES MANUAL, *supra* note 9, at 465.

[151] *See Procedure and Standard of Proof*, *supra* note 10, at 594.

[152] *See* text accompanying notes 143-147 *supra*.

admissibility determination prior to the close of all the evidence.[153] Other circuits, however, indicate that the trial judge's determination of admissibility on less than all the evidence could constitute reversible error.[154] Implicit in the preponderance standard is the idea of weighing the prosecution's evidence against the defendant's.[155] Therefore, the factfinding logically should occur following presentation of the defendant's case.[156] A court's determination after hearing only the prosecutor's case negates any difference in timing between the prima facie test and the preponderance standard.[157]

Proponents of the preponderance standard can draw support for the adoption and continued use of the standard by analogy to situations involving the admissiblity of a defendant's confession. Improperly admitted defendant's confessions, like coconspirator statements[158] prejudice the defendant by allowing the factfinder to use the inadmissible evidence

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[153] *See* United States v. Baykowski, 615 F.2d 767, 771-72 (8th Cir. 1980) (slight deviation from normal determination at end of all evidence allowed where substantial rights unaffected). In *Baykowski* the Eighth Circuit deviated from the First Circuit's one-step approach. *Id.*; *see* United States v. Fontanez, 628 F.2d 687, 689-90 (1st Cir. 1980); United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980), *cert. denied*, 449 U.S. 956 (1980). Prior to *Baykowski* the Eighth Circuit required the judge to reserve the ruling until after the defendant's case. *See* United States v. Bell, 573 F.2d 1040, 1044 (judge should make determination following presentation of all evidence). *But cf.* United States v. Littlefield, 594 F.2d 682, 686 (8th Cir. 1979) (*Bell* procedure is flexible and not infallible, and court should hesitate to fault trial court for failure to comply literally with *Bell* procedures). The trial court in *Baykowski* made the admissibility ruling at the close of the government's case-in-chief. 615 F.2d at 771. The *Baykowski* court determined that this minor deviation from the usual procedure did not affect the defendant's substantive rights. *Id.* at 771-72. Consequently, the Eighth Circuit did not disturb the lower court's ruling.

[154] *See* United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980); United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977). The First and Second Circuits have stated that the judge has to offer the defendant an opportunity to disprove the conspiracy. *See* 628 F.2d at 638, 550 F.2d at 1298.

[155] *See* United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980).

[156] *See id.*; United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977). *But cf.* United States v. James, 590 F.2d 575, 591 n.8 (5th Cir. 1979) (Tjoflat, J., specially concurring) (parties most likely would want review of evidence following government's case-in-chief so they know precisely what evidence is in record and will go to jury. Unless court determines just what evidence is in record, court may have difficulty determining motions for judgment of acquittal or for mistrial).

[157] *See* United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980) (unless defendant presents evidence before court's ruling, prima facie and preponderance standards both applied following government's case-in-chief).

[158] *See* United States v. James, 576 F.2d 1121, 1129 (5th Cir. 1978). With coconspirator statements, the danger the *James* court tried to avoid was that the jury would use the coconspirator statements before or without first determining the question of admissibility. *Id.* In terms of defendants' confessions, courts feared that the jury's belief that although the confession was coerced, the confession also was true, would influence the voluntariness determination. *Id.* Both situations prejudice the accused by the factfinder's use of improperly admitted evidence. *Id. See also* United States v. Matlock, 415 U.S. 164, 177 n.14 (1974) (courts also apply preponderance standard in suppression hearings).

in resolving the question of guilt.[159] In *Lego v. Twomey*,[160] the Supreme Court refused to abandon the preponderance standard in determining the voluntariness of a defendant's confession.[161] Since the preponderance standard affords adequate protection in confession cases, the standard must offer at least commensurate protection in coconspirator declaration cases. *Lego* implies that the Supreme Court would endorse the preponderance standard for determining the admissibility of coconspirator declarations. Several circuits have based in part their adoption of the preponderance standard upon this interpretation of *Lego*.[162]

Only one circuit has retained the prima facie standard[163] used at common law.[164] The prima facie standard is equivalent to the standard employed by judges to determine whether enough evidence exists to overcome a motion for a directed verdict.[165] At the end of the government's case-in-chief,[166] the judge evaluates the evidence in a light most favorable to the government.[167] The judge then admits the declaration if the independent proof creates a reasonable inference sufficient to support a finding that a conspiracy existed and that the defendant was part of the conspiracy.[168] The prosecution's proof only needs to be strong enough to support a jury finding, not compel one.[169] Moreover, the evidence presented does not have to compel to finding beyond a reasonable doubt.[170]

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[159] *See* United States v. James, 576 F.2d 1121, 1129 (5th Cir. 1978); *Exception to the Hearsay Rule*, *supra* note 45, at 1127-28.

[160] 404 U.S. 477 (1972).

[161] *Id.* at 488. The majority in *Lego* based its refusal to abandon the preponderance standard for determining the admissibility of confessions on two points. First, the Court stated that no evidence existed to suggest that admissibility rulings based on the preponderance standard infringed on the accused's constitutional rights. *Id.* The Court also weighed the benefit in deterring unlawful conduct of police and prosecutors by placing a greater burden of proof upon the prosecution against the public interest in presenting more evidence to the jury by using a lower burden of proof. *Id.* at 489. The majority concluded that a greater standard would not serve as a worthwhile deterrant compared to the reduction in admissible evidence that would ensue from a greater standard. *Id.*

[162] *See* United States v. Enright, 579 F.2d 980, 985 (6th Cir. 1978); United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

[163] *See* United States v. Zemek, 634 F.2d 1159, 1170 (9th Cir. 1980), *cert. denied*, 101 S.C. 1359 (1981); United States v. Batimana, 623 F.2d 1366, 1368 (9th Cir. 1980), *cert. denied*, 449 U.S. 1038 (1980); United States v. Weiner, 578 F.2d 757, 768-69 (9th Cir. 1978).

[164] *See* United States v. Zemek, 634 F.2d 1159, 1170 (9th Cir. 1980) (coconspirator statements admissible if substantial independent evidence establishes prima facie case).

[165] *See* United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); MCCORMICK, *supra* note 4, § 338 at 789-90; *see* FED. R. CIV. P. 50.

[166] *See Procedure and Standard of Proof*, *supra* note 10, at 593.

[167] *See* United States v. Rosales, 584 F.2d 870, 872 (9th Cir. 1978); United States v. Nelson, 419 F.2d 1237, 1242 (9th Cir. 1969).

[168] *See Procedure and Standard of Proof*, *supra* note 10, at 592.

[169] United States v. Trotter, 529 F.2d 806, 812 n.8 (3d Cir. 1976) (prima facie standard only requires enough evidence to take question to jury).

[170] United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975).

None of the circuit courts expressly require the prosecution to satisfy the reasonable doubt standard. Judges in some jurisdictions, however, have resubmitted the question of admissibility to the jury.[171] When the judge instructs the jury to make the ultimate admissibility determination, the jury employs the reasonable doubt standard.[172] Several circuits have condoned the practice of sending the issue to the jury by ruling that the trial judge's submission of the admissibility question to the jury did not constitute reversible error.[173] Certain courts reasoned that this "added layer of factfinding" could rarely prejudice the defendant.[174] However, this process of resubmitting the admissibility question to the jury is "internally inconsistent" and "potentially confusing."[175] For instance, the judge could find that the coconspirator statements were admissible and the jury could then reach a contrary result. Several circuits have therefore spoken out against allowing the jury to second guess the judge's determination.[176]

Several commentators have endorsed the reasonable doubt standard.[177] At least one commentator argues that in the case of a criminal defendant, exposure to unreliable evidence conceivably violates the accused's sixth amendment right to confront the declarant.[178] A plurality of the Supreme Court concluded in *Dutton v. Evans*[179] that coconspirator statements must bear sufficient indicia of reliability in order not to deny a criminal defendant his constitutional right of confrontation.[180] Cocon-

[171] *See* United States v. Kahan, 572 F.2d 923, 936 (2d Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.), *cert. denied*, 434 U.S. 924 (1977); United States v. King, 552 F.2d 833, 849 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1978).

[172] *See* Dennis v. United States, 346 F.2d 10, 16 (10th Cir. 1965), *rev'd on other grounds*, 384 U.S. 855 (1966).

[173] *See* United States v. Nickerson, 606 F.2d 156, 158 (6th Cir. 1979); United States v. Petrozziello, 584 F.2d 20, 23 (1st Cir. 1977); United States v. Knight, 416 F.2d 1181, 1186 (2d Cir. 1969).

[174] United States v. Nickerson, 606 F.2d 156, 158 (6th Cir. 1979); United States v. Petrozziello, 584 F.2d 20, 23 (1st Cir. 1977).

[175] United States v. Enright, 579 F.2d 980, 987 (6th Cir. 1978).

[176] *See id.*, (trial court should have sole responsibility for ruling on admissibility of evidence); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (court should not charge jury on admissibility of coconspirator statement); United States v. Bey, 437 F.2d 183, 192 (3d Cir. 1971) (judge should not give jury opportunity to second guess his admissibility determination). *Accord* United States v. Trowery, 542 F.2d 623, 627-28 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977). *But cf.* United States v. Smith, 578 F.2d 1227, 1232 n.7 (8th Cir. 1978) (court agrees with *Petrozziello* that additional layer of fact-finding is not prejudicial).

[177] *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 104-44 (1977); Bergman, *The Coconspirator's Exception, supra* note 11, at 106; *but see* Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 303-04 (1975) [hereinafter cited as *Standard of Proof*] (reasonable doubt standard too demanding on prosecutor).

[178] *See* 28 DRAKE L. REV. 198, 208-09 (1978-79). *But see* United States v. Marks, 585 F.2d 164, 170 n.5 (6th Cir. 1978) (if the evidence satisfies the coconspirator exception, the confrontation right under the sixth amendment is not violated).

[179] 400 U.S. 74 (1970).

[180] *Id.* at 90-92.

spirator statements accepted into evidence on less than a reasonable doubt standard arguably have questionably reliability and therefore threaten to violate the confrontation clause.[181]

The arguments favoring the preponderance standard outweigh the merits of the reasonable doubt standard. Advocates of the reasonable doubt standard have failed to present substantial proof of buttress their claim that the preponderance standard permits the use of unreliable evidence.[182] Even if potential unreliability and prejudice to the defendant indicate the need to apply the reasonable doubt standard, the prosecution's intense need for evidence makes the likelihood of courts adopting the standard remote.[183] Use of the reasonable doubt standard unfairly would burden unfairly the prosecutor in presenting the state's case.[184] Courts reason that since the judge is ruling on the question of admissibility and not the ultimate question of guilt, the preponderance standard if more appropriate.[185]

As in all situations where adversary parties collide, lawmakers must strive for a fair resolution of the competing interests involved. The defendant confronted with coconspirator declarations has a right to examine his witnesses and have a prejudice-free trial.[186] The state has an obligation to protect society and punish those who violate the laws. Judges must decide whether to allow the prosecutor to enter a coconspirator's statement at the risk of subjecting the accused to hearsay evidence. The substantial independent evidence and prima facie standards unduly expose the defendant to unreliable evidence.[187] The

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[181] *See* 28 DRAKE L. REV. 198, 210 (1978-79).

[182] *See id.* at 205.

[183] *See Exception to the Hearsay Rule*, *supra* note 45, at 1134. A further problem with using the reasonable doubt standard arises in cases involving the criminal charge of conspiracy. If the factfinder in a conspiracy case can admit the coconspirator statements only when convinced beyond a reasonable doubt that a conspiracy existed, then the factfinder never can consider the evidence in reaching its determination. Carbo v. United States, 314 F.2d 718, 736 (2d Cir. 1963). The factfinder first would have to find the defendant guilty, and the coconspirator statements then would serve only confirm what the jury already had decided. *Id.* In other words, the coconspirator statements could not serve any purpose if the factfinder already was convinced that a conspiracy existed. *Id.*

[184] *See Standard of Proof*, *supra* note 177, at 303. The crime of conspiracy, by its very nature, is difficult for prosecutors to substantiate. *See Hearsay and Conspiracy*, *supra* note 102, at 1160. Direct proof of the coconspirators' intent is unavailable and written evidence of the agreement is rare. *Id.* Consequently, prosecutors have a great need for the court to admit as much evidence as possible. *Id.* at 1163-66. Forcing prosecutors to prove admissibility beyond a reasonable doubt would make the prosecutor's search for evidence more difficult. *Standards of Proof*, *supra* note 177, at 303. *But see* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 61 at 455 (1972) (conspiracy is one of the most easily proven of all crimes).

[185] *See* United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

[186] U.S. CONST. amend. VI.

[187] *See* text accompanying notes 112-145 *supra*; *and* text accompanying notes 163-170 *supra*.

reasonable doubt standard unfairly aids the accused in concealing his guilt beyond his constitutional safeguards.[188] The preponderance of the evidence standard most fairly balances the competing interests of the prosecutor and the accused.[189]

CARY RICHARD BOND

[188] *See* FEDERAL RULES MANUAL, *supra* note 9, at 333; *Exception to the Hearsay Rule*, *supra* note 45, at 1134 (admissibility standard should not be so high as to preclude prosecutors from proving their case).

[189] *See* text accompanying notes 146-162 *supra*.