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THE COCONSPIRATOR'S STATEMENT: EVAULATING PRELIMINARY QUESTIONS OF ADMISSIBILITY UNDER RULE 801(d)(2)(E)

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When the Federal Rules of Evidence were circulated for comment, many respected voices raised objections to the idea of a rigid codification of the rules of evidence.[1] Nonetheless, the rules were passed,[2] and have proved to be less a monochromatic code than a set of generalized guidelines with specific gray areas to be interpreted through the judicial process.

Illustrative of this development of judicial interpretation of Federal Rules of Evidence is the coconspirator exception[3] to the hearsay rule.[4] Under that exemption, a statement made by a coconspirator is admissible against a party if made during the course and in the furtherance of the conspiracy.[5] Although most frequently involved in criminal litigation, the rule applies in both civil and criminal cases.[6] Since the passage of the Federal Rules of Evidence, several

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1. For example, as Judge Henry Friendly, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, argued: "Evidence is not the kind of subject that lends itself to codification. It is particularly a subject for the common law system of judicial development by examination of the actual facts in each case in an adversary setting." *Hearings before the Committee on the Judiciary, House of Representatives,* 93d Cong., 1st Sess. (1973).

2. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1929 (effective July 1, 1975).

3. FED. R. EVID. 801(d)(2)(E).

4. Under rule 801(c), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* 801(c).

5. *Id.* 801(d)(2)(E). Generally acts, unlike statements do not fall under the coconspirator rule. Lutwak v. United States, 344 U.S. 604, 618 (1953). "[T]he objection to the declarations is that they are hearsay. This reason is not applicable to acts which are not intended to be a means of expression. The *acts,* being relevant to prove the conspiracy, were admissible, even though they might have occurred after the conspiracy ended." *Id.* at 618 (emphasis supplied by the court). Acts that are intended to be a means of expression would be treated as statements. *See* FED. R. EVID. 801(a). Therefore, they would come within the ambit of rule 801(d)(2)(E).

6. United States v. Trowery, 542 F.2d 623, 626 (3d Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977).

courts have struggled with the issue whether the judge or the jury is to determine the admissibility of these statements, because of the flexibility left for this determination by rule 801(d)(2)(E).

As one writer has noted, the factual situation involving coconspirators recurs frequently, particularly in drug prosecutions:

> Pete Pusherman, known to the police as a small-time dope-seller, is on the corner dealing ounces. The cops are after bigger fish. Al, an undercover agent, makes a few buys to win Pete's confidence, then he proposes to buy a large load—more than Pete ever handles. Eventually, Al persuades Pete to identify or lead him to his source, Danny DeSleeze, making all manner of incriminatory statements about his drug business along the way. DeSleeze is charged with conspiracy and, most likely, with substantive narcotics offenses. Pete is a codefendant or is unwilling or unable to testify against DeSleeze. The prosecution calls Al to the stand to relate Pete's identification of Danny as a big-time dealer and other statements about his business, relying on the coconspirator exception to the hearsay rule.[7]

Although the origin of the exception of coconspirator's statements was created in the concept that partners in crime are agents of each other,[8] the agency theory is merely a convenient fiction and now coconspirator's statements are admitted into evidence on policy grounds because organized criminal activity is difficult to prove without these declarations.[9] Even so, under either theory the coconspirator's (Pete's) statements cannot be introduced unless the government can show that the declarant (Pete) and the defendant (DeSleeze) were involved in a conspiracy together. Who is to decide this preliminary question and by what standard are questions left open by rule 801(d)(2)(E) to judicial interpretation.

Indicative of the confusion reigning over rule 801(d)(2)(E) is its recent interpretation by the United States Court of Appeals for the

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7. White, *The Preliminary Question of the Existence of Conspiracy for Admitting Statements Under Federal Rules of Evidence 801(d)(2)(E) and 104(a): The Continuing Vitality of the Federal Common Law of Evidence*, 1 ATLA CRIM. REP. 37 (1978). From the appellate courts' viewpoint, the factual situation described occurred in fourteen of the twenty-one cases invoking the coconspirator rule which were abstracted in Federal Rules of Evidence News between August, 1977 and July, 1978.

8. United States v. Gooding, 25 U.S. (12 Wheat.) 460, 470 (1827) (prosecution of slaveship owner, using statements of ship's captain).

9. For discussion and criticism of the various rationales, see Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972); Oakley, *From Hearsay to Eternity: Pendency and the Co-conspirator Exception in California—Fact, Fiction and a Novel Approach*, 16 SANTA CLARA L. REV. 1 (1975).

Fifth Circuit. In *United States v. James*[10] the court, acting en banc, looked to rule 104 of the Federal Rules of Evidence in determining that the judge alone, and not the jury, shall decide the admissibility of coconspirator statements,[11] vacating the panel's decision to the contrary.[12] The scope of this article shall be to discuss the import of the *James* decision as well as other circuit decisions[13] upon rules 104 and 801(d)(2)(E), and to discuss the nature and method of proof that the government must now produce, as well as what evidence may be considered on the question.

THE COCONSPIRATOR EXCEPTION TO THE HEARSAY RULE

Although there has been general reliance on the coconspirator's statement in securing convictions in the vastly increasing number of conspiracy prosecutions,[14] there continues to be considerable disagreement over why these statements should not be classified as hearsay. The reason most often given is founded upon classical agency rationale:

> Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become *ad hoc* agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.[15]

Despite this rationale, the agency theory has been criticized for failing to provide an adequate explanation for the exclusion of co-

10. 590 F.2d 575 (5th Cir. 1979) (en banc).

11. *Id.* at 579.

12. *See* United States v. James, 576 F.2d 1121, 1132 (5th Cir. 1978), *vacated in part*, 590 F.2d 575 (5th Cir. 1979) (en banc).

13. *E.g.*, United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

14. *See Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959) ("[w]ith the growth of organized criminal activity the conspiracy indictment has become an increasingly important weapon in the prosecutor's armory"). *See also* Bergman, *The Coconspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99 (1976); Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back Into the Coconspirator Rule*, 5 HOFSTRA L. REV. 77, 79 (1976).

15. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926). *See generally* Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929). Furthermore, the coconspirator rule originated as dictum in an agency case. United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469 (1827); *accord*, Anderson v. United States, 417 U.S. 211, 218 n.6 (1974).

conspirators' statements from the operation of the hearsay rule.[16] Indeed, it has been suggested that "[c]onspirators' declarations are admitted out of necessity" because "[c]onspiracy is a hard thing to prove."[17] The shortcoming arising from a theory of necessity, however, is that the theory fails to account for limitations on the rule, such as the "in furtherance" or "in the course of the conspiracy" requirements.[18]

Under the Model Code of Evidence, there is a departure from the traditional agency theory for coconspirators' statements in the elimination of the "in furtherance" requirement.[19] The "in furtherance" condition spawns the conventional agency theory that the acts of an agent bind his principal only when the agent acts within the scope of his authority.[20] Accordingly, under this theory, a coconspirator's damaging statement would not be authorized unless it tends to advance the objects of the conspiracy, since otherwise, it would operate to frustrate rather than further the illegal object.[21] Rule 508(b) of the Model Code of Evidence puts aside the "in furtherance" condition and requires only that the coconspirator's statement be "relevant" to the conspiracy and be made during its existence.[22] Uniform Rule 63(9)(b) is to the same effect,[23] and this approach is analogous to the admissibility requirements for agent's statements incorporated in rule 801(d)(2)(D).[24]

16. *See* Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1163-65 (1954). *See generally* Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530 (1958).

17. Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1166 (1954).

18. *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 989 (1959).

19. "[T]he tendency in the authorities is to receive evidence of all declarations of a conspirator concerning the conspiracy when made during its pendency. These statements are likely to be true, and are usually made with a realization that they are against the declarant's interest." MODEL CODE OF EVIDENCE rule 508(b), Comment b (1942).

20. *See* Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1161 (1954).

21. Morgan, *Admissions*, 12 WASH. L. REV. 181, 194 (1937).

22. Rule 508(b) of the Model Code of Evidence provides that a statement is admissible if "the party and the declarant were participants in a plan to commit a crime or civil wrong and the hearsay declaration was relevant to the plan or its subject-matter and was made while the plan was in existence and before its execution was complete." MODEL CODE OF EVIDENCE rule 508(b) (1942).

23. Uniform Rule 63(9)(b) permits admissibility if "the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination." UNIFORM RULE OF EVIDENCE 63(9)(b) (1953 version).

24. FED. R. EVID. 801(d)(2)(D) categorizes an agent's statement as an admission if it is made about a matter within the scope of his employment while the relationship of agency exists. *Notes of the Advisory Committee on Proposed Rules*, 28 U.S.C. app. (Supp. V 1975);

RULE 801(d)(2)(E)

In drafting the Federal Rules of Evidence, the writers chose to maintain the traditional, limited agency approach toward coconspirators' statements "because they adjudged it a useful device for protecting defendants from the very real dangers of unfairness posed by conspiracy prosecutions."[25] Furthermore, rule 801(d)(2)(E) is consistent with the position set forth by the Supreme Court in *Krulewitch v. United States:*[26] "This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts."[27]

This idea was subsequently reaffirmed by the Supreme Court in *Wong Sun v. United States,*[28] in which the court noted that it has "consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking."[29] Nonetheless, scrutiny of the cases indicates that some courts have construed this aspect of the rule so broadly "that anything related to the conspiracy is found to be in furtherance of its objectives."[30]

Rule 801(d)(2)(E) also requires that the statement be made "by a coconspirator . . . during the course . . . of the conspiracy."[31] This language is significant in that there must be evidence establishing the conspiracy, as well as the defendant's participation in it, before any declarations are admissible against him.[32] The federal courts have long adhered to this policy.[33] Ordinarily, once a cocon-

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see Rule v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local Union No. 396, 568 F.2d 558, 569 n.17 (8th Cir. 1977).

25. 4 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(E)[01], at 801-145 (1978).

26. 336 U.S. 440 (1949).

27. *Id.* at 443-44.

28. 371 U.S. 471 (1963).

29. *Id.* at 490. *See also* Dutton v. Evans, 400 U.S. 74, 81 (1970).

30. *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 985 (1959); *see, e.g.,* United States v. Grant, 462 F.2d 28, 33 (2d Cir.), *cert. denied,* 409 U.S. 914 (1972); United States v. Weber, 437 F.2d 327, 336 (3d Cir. 1970), *cert. denied,* 402 U.S. 932 (1971); International Indem. Co. v. Lehman, 28 F.2d 1, 4 (7th Cir.), *cert. denied,* 278 U.S. 648 (1928).

31. FED. R. EVID. 801(d)(2)(E).

32. Thus, a post-apprehension statement is not one made in furtherance of the conspiracy. United States v. Muller, 550 F.2d 1375, 1379 n.3 (5th Cir.), *cert. denied,* 434 U.S. 971 (1977).

33. *See* Krulewitch v. United States, 336 U.S. 440, 443-44 (1949); Mares v. United States, 383 F.2d 805, 810 (10th Cir. 1967), *cert. denied,* 394 U.S. 963 (1969). *But see* Dutton v. Evans, 400 U.S. 74, 83 (1970) (evidentiary rule applied by state did not violate sixth

spirator's statement has been admitted, that statement is held admissible against all other conspirators, including those who joined the conspiracy after the statement was made, on the theory that the entering partner ratifies all prior action.[34] A statement made after he has left the conspiracy is not admissible against him, although this difference between prior and subsequent declarations has been questioned as difficult to justify "apart from the somewhat technical views of agency."[35] Frequently, however, it is impossible to ascertain the existence, duration or purposes of the conspiracy, or to identify the participants until after the conspirator's statements are admitted. At that time, it may first appear that the statement should not have been admitted because of a failure to meet all of the conditions of rule 801(d)(2)(E). If so, and if the statement does not qualify under some other exception to the hearsay rule,[36] then the jury should not have heard it. The question then arises what must the trial court do to cure the harm.

If the hearsay is a substantial portion of the government's proof,[37] a mistrial is required if properly urged by the defendant in order to insure that the defendant is not unfairly prejudiced.[38] Short of a mistrial, one possible panacea is the limiting instruction. The efficacy of limiting instructions has been criticized,[39] however, and in the aftermath of *Bruton v. United States,*[40] it appears as though limiting instructions might be constitutionally defective in conspiracy cases.[41]

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amendment confrontation clause "merely because it did not exactly coincide with the hearsay exception applicable in the decidedly different context of a federal prosecution for the substantive offense of conspiracy"). *See generally* 4 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(E)[01], at 801-151 (1978).

34. United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948).

35. *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 987 (1959). *But see* United States v. Wentz, 456 F.2d 634, 637 (9th Cir. 1972).

36. Although the coconspirator's statement is generally accepted as an "exception" to the hearsay rule, rule 801(d)(2)(E) clearly states, in a technical departure from this idea, that these statments are not hearsay. United States v. Del Valle, 587 F.2d 699, 703 n.7 (5th Cir. 1979).

37. *See* United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970).

38. *Cf.* United States v. Green, 548 F.2d 1261, 1266 (6th Cir. 1977) (burden on government to make prima facie case).

39. *See* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied,* 285 U.S. 556 (1932).

40. 391 U.S. 123 (1968).

41. *See, e.g.,* Bruton v. United States, 391 U.S. 123, 126 (1968); United States v. Lyon, 397 F.2d 505, 510 (7th Cir.), *cert. denied,* 393 U.S. 846 (1968).

In *Bruton,* which concerned a joint trial, evidence was admitted that one defendant had made a confession to a postal inspector on two occasions following his arrest. In the second oral confession, the defendant implicated Bruton although he did not expressly name him. The declarant-defendant never took the stand, however, and the Supreme Court held that the court's instruction advising the jury that the confession could only be used against its maker was insufficient to overcome prejudice to the codefendant Bruton.[42] Furthermore, under the circumstances of the case, the admission of the confession violated the codefendant's right of cross-examination as guaranteed by the confrontation clause of the sixth amendment.[43] The Supreme Court commented in a footnote that a confrontation issue might not have been raised had the statement been usable against the codefendant because of a hearsay exception.[44] This question was answered two years later in *Dutton v. Evans,*[45] when the Supreme Court found that a statement admissible under a state's coconspirator's rule does not violate the confrontation clause.[46]

Dutton arose in Georgia, and the prosecution's chief witness was an accomplice who testified that he, the defendant and a codefendant had committed the murders. This testimony was corroborated by another witness who testified that Evans' codefendant had blamed the entire transaction on him. The defendant objected on the ground that the testimony was hearsay and violative of his right of confrontation. The Supreme Court disagreed, finding that merely because Georgia's coconspirator rule did not coincide with the federal counterpart was not enough to violate the sixth amendment's confrontation clause.[47]

When a statement does not fall within the coconspirator's rule, the question remains whether *Bruton* requires the trial court to grant a mistrial when the statement is erroneously admitted. As the Supreme Court stated in *Bruton,* "not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions."[48] In the judicial development of *Bruton,* the courts have relied upon this observation,

42. Bruton v. United States, 391 U.S. 123, 126 (1968).
43. *Id.* at 127-28.
44. *Id.* at 128 n.3.
45. 400 U.S. 74 (1970).
46. *Id.* at 87-88.
47. *Id.* at 81.
48. Bruton v. United States, 391 U.S. 123, 135 (1968).

while backing away from the implications of the decision, primarily by pegging their decisions upon the harmless error rule.[49] This issue may now be seeing a different light, however, under the new interpretation of rule 801(d)(2)(E) and the preliminary problems that are to be resolved in connection with coconspirators' statements.

IMPLEMENTATION OF THE COCONSPIRATOR EXEMPTION

The prevailing practice prior to the Federal Rules of Evidence was that the prosecution had to produce "substantial, independent evidence of the conspiracy, at least enough to take the question to the jury."[50] This emphasis on the burden of proof gives little regard to the first issue, whether the judge and/or the jury should decide the preliminary question of substantial, independent evidence of the conspiracy. By focusing on the issue of the decision maker and treating the level of proof as incident to that issue, several recent cases have made the preliminary determination a simpler and more rational process under the Federal Rules of Evidence.[51]

Prior to the passage of the Federal Rules of Evidence, the various courts had created a complicated sequence of decisions.[52] The trial judge was required, in nearly all of the circuits, to determine initially whether the prosecution had made out a prima facie case of conspiracy.[53] For example, in *United States v.*

49. *See* United States v. Fischetti, 450 F.2d 34, 41 (5th Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972); United States v. Fellabaum, 408 F.2d 220, 225 (7th Cir.), *cert. denied,* 396 U.S. 858 (1969).

50. United States v. Nixon, 418 U.S. 683, 701 n.14 (1974); *see* United States v. Vaught, 485 F.2d 320, 323 (4th Cir. 1973); United States v. Santos, 385 F.2d 43, 44 (7th Cir. 1967), *cert. denied,* 390 U.S. 954 (1968).

51. *See, e.g.,* United States v. Eubanks, 591 F.2d 513, 519 (9th Cir. 1979); United States v. DeFillipo, 590 F.2d 1228, 1236 (2d Cir. 1979); United States v. Milham, 590 F.2d 717, 723 (8th Cir. 1979).

52. *See generally* Bergman, *The Coconspirators' Exception: Defining the Standard of Independent Evidence Test Under the New Federal Rules of Evidence,* 5 HOFSTRA L. REV. 99 (1976); Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back Into the Coconspirator Rule,* 5 HOFSTRA L. REV. 77 (1976).

53. Annot., 46 A.L.R.3d 1148, 1160-61 (1972). At least initially, most circuits retained the "prima facie" or "substantial evidence" test after the Federal Rules of Evidence became effective. *See* United States v. Gutierrez, 576 F.2d 269, 274 (10th Cir. 1978); United States v. Ochoa, 564 F.2d 1155, 1157 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 2853 (1978); United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir. 1977), *cert. denied,* 98 S. Ct. 1494 (1978); United States v. McManus, 560 F.2d 747, 750 (6th Cir. 1977), *cert. denied,* 98 S. Ct. 894 (1978); United States v. Scholle, 553 F.2d 1109, 1118 (8th Cir.), *cert. denied,* 98 S. Ct. 432 (1977); United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976); United States v. Buschman, 527 F.2d 1082, 1084-85 (7th Cir. 1976); United States v. Honneus, 508 F.2d 566, 572 (1st Cir. 1974), *cert. denied,* 421 U.S. 948 (1975) (before effective date of Rules). The Second and Third

Appollo[54] the United States Court of Appeals for the Fifth Circuit held that the trial judge's role is to make a preliminary determination whether the government has presented sufficient evidence, independent of the hearsay itself, to support a finding by the jury that the alleged conspiracy existed and that the declarant and the defendant against whom the statement is offered were members of the conspiracy.[55] If the judge is satisfied that this test has been met, then under *Apollo* the jury is instructed, both when the hearsay is introduced and at the final charge, that it may consider the hearsay against a particular defendant only if the jury itself first finds that the conspiracy existed, second, that the declarant and the defendant were members of it, and third, that the statement was made during the course of and in furtherance of the conspiracy.[56]

The *Apollo* court relied substantially upon *Lutwak v. United States*[57] as the source of the obligation on the trial court to give such a curative instruction to the jury.[58] In *Lutwak,* the Supreme Court held:

> In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the court at the time of the admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose.[59]

The order of admission of proof remained a matter within the discretion of the trial court. Testimony concerning the declarations

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Circuits require a "fair preponderance" although the Second Circuit's definition of preponderance is less than a prima facie case. *See* United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977); United States v. Trowery, 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977).

54. 476 F.2d 156 (5th Cir. 1973).

55. *Id.* at 163.

56. *See* United States v. Lawson, 523 F.2d 804, 806 (5th Cir. 1975); United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973).

57. 344 U.S. 604 (1953).

58. United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973).

59. Lutwak v. United States, 344 U.S. 604, 618-19 (1953).

of coconspirators could be admitted before the existence of the conspiracy was established by independent evidence so long as the court conditioned the minds of the jurors sufficiently so that none of the hearsay testimony would "bootstrap" the necessary independent establishment of the conspiracy.[60] The cases remained uniformly silent, however, on the standard that the jury was to apply to its initial determination. It was not uncommon for the jury to be instructed that it must find the existence of the conspiracy and the defendant's connection to it beyond a reasonable doubt before ever considering the hearsay of the conspirator.[61] This standard would seemingly render the hearsay totally superfluous, for if it is assumed that the jury has complied with its instructions, the hearsay testimony would not be available to it until the jury had already found the defendant guilty beyond a reasonable doubt.[62] This result undoubtedly flows from the realization that the preliminary facts necessary for admitting the hearsay coincide with the ultimate facts necessary for showing the existence of the conspiracy, the membership of the defendant in it, as well as obtaining a conviction.

Thus, the judge-jury-jury sequence of determination of admissibility of coconspirator's statements posed several problems. For example, if the jury found no conspiracy, they were nevertheless tainted by the prejudicial evidence and an instruction designed to undo the prejudice might not remove the impact. Furthermore, the jury could very well be confused by the double decision, particularly when conspiracy is charged. If the jury followed the instructions when criminal conspiracy was charged and found conspiracy beyond a reasonable doubt prior to considering the coconspirator's statements, the jurors had effectively decided the case and the statements were surplusage in the government's proof.[63]

60. United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973).

61. In the Second and Ninth Circuits, however, the jury was not given the second step. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); Carbo v. United States, 314 F.2d 718, 736-37 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). Other courts have been less clear concerning the procedure. *See United States v. Rodriquez*, 491 F.2d 663, 666 (3d Cir. 1974) (held that no instruction be given); *cf.* United States v. Krogstad, 576 F.2d 22, 24 (3d Cir. 1978) (court quotes instruction at length without commenting on its propriety).

62. United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *vacated in part*, 590 F.2d 575 (5th Cir. 1979) (en banc).

63. Judge Learned Hand discusses these problems in United States v. Dennis, 183 F.2d 201, 230 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). *See also* Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

RULE 104

To resolve these problems, examination of rule 104 is instructive. Rule 104 seeks to specify the province of the judge and jury in deciding preliminary questions of fact.[64] The relevant portions of rule 104 provide:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> (c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the 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.[65]

Thus, rule 104 adopts the orthodox position that the judge alone should decide the preliminary questions that relate to competence of evidence and the jury should decide those preliminary questions relating to the conditional relevancy of the evidence.

In *United States v. Petrozziello*[66] the United States Court of Appeals for the First Circuit held that rule 104(a) had changed the prior practice, requiring the judge to make the sole decision on admissibility.[67] Although Chief Judge Coffin's focus on the decision-maker issue was perceptive, the court's bare citation to rule 104(a) is unpersuasive, since neither the rule nor the Advisory Committee's Note lend guidance about whether the existence of conspiracy is properly before the judge under rule 104(a) or the jury under rule 104(b).[68] Judge Tjoflat in his special concurrence in *James* agreed that the question of admissibility should be reserved to the judge

64. United States v. James, 590 F.2d 575, 578-79 (5th Cir. 1979) (en banc).

65. FED. R. EVID. 104(a)-(c).

66. 548 F.2d 20 (1st Cir. 1977).

67. *Id.* at 22-23.

68. *Compare* Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back Into the Coconspirator Rule*, 5 HOFSTRA L. REV. 77, 91 (1976) *with* Bergman, *The Coconspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99, 105 (1976).

under rule 104(a).[69] As he argued, statements by a coconspirator may be highly relevant even though the requirement of rule 801(d)(2)(E) cannot be satisfied.[70]

The preferable solution is to characterize the problem as one of competence, thus deciding the question under rule 104(a). This process eliminates the problem of asking the jury in effect to decide the issue of guilt before it may consider evidence that is probative of guilt. Furthermore, to give preliminary questions like this to the jury would violate the spirit of rule 104, which calls for preliminary determination by the judge in all cases involving a high potential for prejudice.[71]

Prior to the enactment of the Rules, the Second,[72] Third,[73] and Fourth[74] Circuits had adopted the procedure of allowing the judge alone to resolve the issue of admissibility, while other circuits gave a role to the jury.[75] Under the Federal Rules of Evidence, the First,[76] Fifth,[77] Sixth,[78] Seventh,[79] Eighth,[80] Ninth,[81] and Tenth[82] circuits have now acceded to this practice in explicitly holding that the admissibility of a coconspirator's statement is a preliminary question for the judge alone and not for the jury.

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69. United States v. James, 590 F.2d 575, 588 (5th Cir. 1979) (en banc) (Tjoflat, J., specially concurring).

70. *Id.* at 588 (Tjoflat, J., specially concurring). As Judge Tjoflat points out, the classic example is the post-arrest confession. Since it is made after the declarant has been arrested, it is not made during the conspiracy, and it stretches the imagination to argue that a confession is made in furtherance of the conspiracy. Nonetheless, a confession probably would be highly relevant. *Id.* at 588 (Tjoflat, J., specially concurring); *see* United States v. Warren, 578 F.2d 1058, 1074 (5th Cir. 1978) (en banc).

71. *See Notes of the Advisory Committee on Proposed Rules*, 28 U.S.C. app. (Supp. V. 1975).

72. United States v. Dennis, 183 F.2d 201, 230 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

73. United States v. Trowery, 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

74. United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976).

75. *See, e.g.*, United States v. Honneus, 508 F.2d 566, 577 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

76. United States v. Petrozziello, 548 F.2d 20, 22 (1st Cir. 1977).

77. United States v. James, 590 F.2d 575, 579-80 (5th Cir. 1979) (en banc).

78. United States v. Enright, 579 F.2d 980, 983 (6th Cir. 1978); United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977).

79. United States v. Santiago, 582 F.2d 1128, 1133 (7th Cir. 1978).

80. United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978).

81. United States v. Eubanks, 591 F.2d 513, 519 (9th Cir. 1979).

82. United States v. Andrews, 585 F.2d 961, 966 (10th Cir. 1978).

QUESTIONS OF ADMISSIBILITY

Characterizing the issue as one of compentency, however, "is not the end of the matter."[83] Serious questions remain concerning the evidence that the court may consider in making its determination, the order of proof and other procedures that the court should follow, the standard of proof to apply, and appropriate instructions for the jury. As one commentator has noted, "[t]hese apparently technical problems are of enormous significance in the conspiracy trial. Conspirator statements are often the central evidence in the case. The vitality of the conspiracy charge stems primarily from permissive evidentiary rules in conspiracy cases . . . ."[84]

Rule 104(a) of the Federal Rules of Evidence specifically states that the trial court is not bound by any rules of evidence in making its determination except those with regard to privileges.[85] Thus it could be argued that the trial court could consider hearsay, including the very statement in question, in determining whether the four criteria for admissibility have been met. The Supreme Court determined in *Glasser v. United States,*[86] long before the enactment of the Federal Rules of Evidence, that declarations by a member of a conspiracy "are admissible over the objection of an alleged coconspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. [Citations omitted]. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."[87]

At least one court, however, has expressed doubt about *Glasser*'s survival in light of rule 104(a). In *United States v. Martorano,*[88] decided subsequent to *United States v. Petrozziello,*[89] the United States Court of Appeals for the First Circuit disavowed *Glasser*:

> The rule provides that inadmissible evidence can be considered by the district court in making such determinations, making no distinction between inadmissible evidence generally and the statement seeking admission. And the reason behind the rule [is] that trial judges, because of their legal experience and training, 'will generally

83. United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

84. Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back Into the Coconspirator Rule,* 5 HOFSTRA L. REV. 77, 79 (1976).

85. FED. R. EVID. 104(a).

86. 315 U.S. 60 (1942).

87. *Id.* at 74-75.

88. 561 F.2d 406 (1st Cir. 1977), *cert. denied,* 98 S. Ct. 1484 (1978).

89. 548 F.2d 20 (1st Cir. 1977).

> be fully cognizant of [the] inherent weakness [of such evidence] . . . and will take such weakness into account in evaluating the preliminary question'. . . .. It seems that, once hearsay is placed before the district court, it would be a matter of indifference to the criminal defendant what its source is.
>
> The appellant's argument for the contrary view proceeds from the fact that *Glasser* was premised on the Court's desire to prevent 'bootstrapping' of the very hearsay utterance seeking admission to the level of competent evidence. We note first that the new rules permit precisely such bootstrapping in circumstances in which hearsay is trustworthy. [Citation omitted]. And we have to wonder whether a generalized abhorrence of bootstrapping is sufficient justification for barring all use of the trustworthy features of the hearsay statement seeking admission. But under any view of the law we would, as we said in our original opinion, require significant independent evidence of the existence of the conspiracy, deviating from the *Glasser* practice only to the extent of permitting the district court to consider the independent evidence in the light of the color shed upon it by the highly trustworthy and reliable portions of the hearsay utterance seeking admission. This approach would afford the criminal defendants most of the protections provided by the rule of *Glasser*, yet give free play to rule 104(a)'s policy of recognizing the trial judge's ability to assess the weight to be given otherwise inadmissible evidence.[90]

Judge Tjoflat also argued in his concurrence in *James* that rule 104(a) permits the trial judge to consider any matter, including the coconspirator's statement itself, that touches on the prerequisites to admissibility.[91] Rule 104(a) specifically provides that the trial judge is "not bound by the rules of evidence except those with respect to privileges," and thus, he reasons that the manifest intent of rule 104(a) is that the coconspirator's statement could be considered.[92] The *Glasser* argument that hearsay should not be permitted to lift itself by its own bootstraps to the level of competent evidence has

90. United States v. Martorano, 561 F.2d 406, 408 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 1484 (1978). The court acknowledged that other circuits although not specifically addressing the issue have assumed that the Federal Rules of Evidence have not affected *Glasser*. *Id.* at 408; *see, e.g.*, United States v. Burgard, 551 F.2d 190, 196 (8th Cir. 1977); United States v. Stanchich, 550 F.2d 1294, 1299 n.4 (2d Cir. 1977); United States v. Wood, 550 F.2d 435, 442 (9th Cir. 1976); United States v. Savell, 546 F.2d 43, 46-47 (5th Cir. 1977); United States v. Trowery, 542 F.2d 623, 626-27 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); United States v. Stroupe, 538 F.2d 1063, 1065-66 (4th Cir. 1976).

91. *See* United States v. James, 590 F.2d 575, 588 (5th Cir. 1979) (en banc) (Tjoflat, J., specially concurring).

92. *Id.* at 588 (Tjoflat, J., specially concurring).

only superficial appeal. For example, other hearsay statements may satisfy an exception by their own contents,[93] and furthermore, a document can be authenticated by its own contents.[94] Moreover, rule 104(a) specifically provides that the trial court may consider hearsay in making its determination of preliminary questions.[95]

In spite of the First Circuit's liberal approach, the majority of circuits have considered and rejected the *Martorano* theory, retaining the traditional rule of demanding independent proof of the conspiracy.[96] These courts believe the requirement of independent evidence is an important safeguard for the defendant, requiring the trial court to find from the independent evidence that "it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the declarant and the defendant were parties."[97]

Order of Proof and Other Problems

The trial judge plays an important role in the federal system of criminal justice. "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."[98] The trial judge is faced with situations as they arise, and must have broad power to "cope with the complexities and contingencies inherent in the adversary process"[99] in order to assure that the case is presented to the jury in a manner that is comprehensible. In order to do this, under rule 611(a) of the Federal Rules of Evidence the trial court may set forth generally the order in which parties will adduce proof, and the trial court's determination will be reviewed only for abuse of discretion.[100]

With regard to the coconspirator's statement, the question arises

93. *See* Fed. R. Evid. 804(b)(3) (statements against interest, incorporating objective test).

94. *Id.* 901(b)(4).

95. *Id.* 104(a).

96. *See* United States v. Smith, 578 F.2d 1227, 1232 (8th Cir. 1978); United States v. Macklin, 573 F.2d 1046, 1048 (8th Cir. 1978).

97. United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

98. Quercia v. United States, 289 U.S. 466, 469 (1933).

99. Geders v. United States, 425 U.S. 80, 86 (1976).

100. Fed. R. Evid. 611(a) provides:

> (a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

when must the trial judge determine whether the requirements of rule 801(d)(2)(E) have been met. Must the trial judge decide before admitting the coconspirator's statement, or can the statement be admitted subject to connection of the acts and statements to the existence of the conspiracy, with a limiting instruction to inform the jury to disregard the statement, except against its maker, if the court later determines that the requirements of rule 801(d)(2)(E) have not been satisfied? Because the trial judge is given wide latitude by rule 611(a) to decide at what point during the trial and in what manner the predicate for admissibility is to be developed, the judge might consider it prudent to permit the evidence conditionally. On the other hand, if the judge considers the potential for mistrial to be great if the admission of the evidence proves erroneous, he might require a full scale hearing under rule 104(c) outside the jury's presence in order to ensure that the statement should be admitted.[101] It has been suggested that although a "meticulous approach" would be desirable,[102] the exigencies of a multi-defendant conspiracy case are such that the trial court must have discretion to admit the statements conditionally.[103] Accordingly, several of the circuits have set out express guidelines for the trial court to consider in determining the order of proof for conspiracy cases under rule 801(d)(2)(E).

In *United States v. Bell,*[104] in which the defendant was convicted of the illegal sale of sawed-off shotguns, the trial judge admitted testimony from a government agent regarding statements made by the defendant's contact who had arranged the sale to the agent. Noting that the Federal Rules of Evidence have caused significant changes in the manner in which the coconspirator's exception to the hearsay rule is to be applied, the Eight Circuit determined that admissibility of the alleged coconspirator's statement is a threshhold question for the judge, not the jury, under rule 104(a).[105] The court then set out procedural steps for the district courts to use, outside the presence of the jury, when the admissibility of a coconspirator's statement is at issue. Initially, when the prosecutor propounds a question that would obviously require the witness to relate

101. *See* McCORMICK, EVIDENCE § 53, at 122 (2d ed. 1972).

102. United States v. Petrozziello, 548 F.2d 20, 23 n.3 (1st Cir. 1977).

103. *See* United States v. McCormick, 565 F.2d 286, 289 n.5 (4th Cir. 1977), *cert. denied,* 98 S. Ct. 747 (1978); Krana v. United States, 546 F.2d 785, 786 (8th Cir. 1976).

104. 573 F.2d 1040 (8th Cir. 1978).

105. *See id.* at 1044.

an out-of-court declaration of an alleged coconspirator, the defendant is required to make a timely and appropriate objection.[106] The court then may conditionally admit the statement, but should caution the parties as follows:

> (a) That the statement is being admitted subject to defendant's objections;
>
> (b) That the government will be required to prove by a preponderance of the independent evidence that the statement was made by a coconspirator during the course and in furtherance of the conspiracy;
>
> (c) That at the conclusion of all the evidence the court will make an explicit determination for the record regarding the admissibility of the statement; and
>
> (d) That if the court determines that the government has failed to carry the burden delineated in (b) above, the court will, upon appropriate motion, declare a mistrial, unless a cautionary instruction to the jury to disregard the statement would suffice to cure any prejudice. . . .[107]

Under the Eighth Circuit's reasoning, the trial court may submit the case to the jury after a ruling is made on the record that the out-of-court declaration is admissible under rule 801(d)(2)(E).[108] The court is not to instruct the jury on the admissibility of the coconspirator's statement, but should merely instruct the jury that the government is required to prove the defendant's ultimate guilt beyond a reasonable doubt.[109] The court may also give an appropriate instruction on the credibility of witnesses, and the jury should also be instructed with regard to the weight and credibility to be accorded a coconspirator's statement.[110]

A less clear-cut order of proof was designed by the Court of Appeals for the Seventh Circuit in *United States v. Santiago*.[111] In *Santiago* the defendant and three others were charged with distribution of heroin; the defendant was tried separately and convicted by a jury. On appeal, the defendant argued that the trial judge had failed to make a proper preliminary determination regarding the admissibility of the declarations of the joint venturers.[112] The appel-

106. *Id.* at 1044.
107. *Id.* at 1044.
108. *Id.* at 1044.
109. *Id.* at 1044.
110. *Id.* at 1044. The court did not delineate what this instruction should entail.
111. 582 F.2d 1128 (7th Cir. 1978).
112. Apparently, the defendant in *Santiago* first raised the question of admissibility prior to trial by way of a motion *in limine* to exclude the use of the conspiracy declarations

late court determined without discussion that rule 104 does require an initial determinaton to be made by the trial judge concerning the competence of the coconspirator's declaration.[113] The court concluded that this competency determination revolves around whether or not the existence of the conspiracy has been sufficiently established, and whether under rule 801(d)(2)(E) the statement was made during the course and in furtherance of the conspiracy.[114] The Seventh Circuit retained the trial judge's option of conditionally admitting a coconspirator's statement prior to the independent establishment of the conspiracy, but subject to the later fulfillment of that critical condition.[115] Should the government fail to subsequently prove the existence of the conspiracy by independent evidence, then the trial court may be required to grant a mistrial; in any event, the appellate court noted that "an instruction for the jury to disregard the statements would be in order."[116]

Perhaps the most thoughtful analysis to emerge on the issue of order of proof has come from the Court of Appeals for the Fifth Circuit. In *United States v. Ochoa*[117] the Fifth Circuit rejected the *Petrozziello* classification and instead ruled that the preliminary question of admissibility is one of conditional relevancy, citing rule 104(b), which leaves these decisions to the jury.[118] Following *Ochoa* came a series of narcotics cases similar to the paradigm set forth in the introduction in which the Fifth Circuit uniformly ruled that the impact of rule 104 on prior practice was an open question to be decided in the appropriate case.[119] That case proved to be another

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of his codefendants. The trial court denied that motion after a hearing, making "a somewhat vague but sufficient finding that a *prima facie* showing of the existence of the conspiracy had been established," and thus permitting the jury to consider the coconspirators' declarations. *Id.* at 1131. The Seventh Circuit found support for the trial court's reliance on the preliminary pretrial proceedings for ruling on the question of admissibility of coconspirators' statements in United States v. Haldeman, 559 F.2d 31, 107 (D.C. Cir.), *cert. denied*, 431 U.S. 933 (1976), a case decided before the effective date of rule 104.

113. *See* United States v. Santiago, 582 F.2d 1128, 1131 (7th Cir. 1978).

114. *Id.* at 1130-31.

115. *Id.* at 1131 (citing United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977)); *accord*, United States v. McCormick, 565 F.2d 286, 289 n.5 (4th Cir.), *cert. denied*, 434 U.S. 1021 (1977); United States v. Brown, 555 F.2d 407, 422-23 (5th Cir.), *cert. denied*, 435 U.S. 904 (1977).

116. United States v. Santiago, 582 F.2d 1128, 1131 (7th Cir. 1978). The court was unclear whether this instruction should be one in which the jury should not consider the evidence until it had found on its own that a conspiracy existed and that the defendant was a member of it.

117. 564 F.2d 1155 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 2853 (1978).

118. *Id.* at 1157 n.2.

119. *See* United States v. Dominguez, 573 F.2d 366, 367 (5th Cir. 1978); United States

drug prosecution, *United States v. James.*[120] In *James* Judge Tuttle, writing for the three-judge panel,[121] set forth the judge-jury-jury sequence employed in the Fifth Circuit prior to the enactment of the rules, but found no clear guidance from Congress on the issue under the rules.[122] The court concluded that the threshhold question must aim at preventing the jury's determination of guilt from being infected by inadmissible evidence.[123] Furthermore, the panel decision reasoned that "under Rule 104, the court must not admit a coconspirator's declarations until it has determined that the government has made the required threshhold showing," thus affecting the discretion accorded the trial judge under rule 611 of the Federal Rules of Evidence to control the order of proof at trial.[124]

Several months later the Fifth Circuit acting, en banc, vacated that portion of the panel opinion in *James* dealing with coconspirators' statements, and developed a different outlook regarding the interaction between rules 104 and 801(d)(2)(E).[125] In *James* the defendants moved for a pretrial hearing outside the presence of the jury in order to permit the trial judge to determine the admissibility of coconspirator statements, and in support of their motion, they argued that rule 104(a) allocates to the trial judge alone the responsibility for deciding the admissibility of those statements. They further argued that the complexity of their case called for this to be accomplished at a separate, non-jury hearing as permitted under rule 104(c). The trial court denied the defendants' motion and gave the traditional, cautionary *Apollo* instruction.[126] The appellate court

v. Ashley, 569 F.2d 975; 985 (5th Cir. 1978); United States v. Caro, 569 F.2d 411, 419 (5th Cir. 1978); United States v. Hansen, 569 F.2d 406, 409 (5th Cir. 1978); United States v. Tenorio, 565 F.2d 943, 945 (5th Cir. 1978).

120. 576 F.2d 1121 (5th Cir. 1978), *vacated in part*, 590 F.2d 575 (5th Cir. 1979) (en banc).

121. Judges Tuttle, Clark and Edenfield comprised the panel. *Id.* at 1121.

122. *See id.* at 1129. "Clearly we must look beyond the language of Rule 104 to its underlying policies in order to determine who should decide the preliminary questions and what standad of proof should control. . . ." *Id.* at 1129.

123. *Id.* at 1129.

124. *Id.* at 1131. The procedure the panel devised constituted a "minitrial". The panel construed FED. R. EVID. 104 and 611(a) to require the trial judge to conduct a hearing outside the jury's presence so that the judge could conclude whether a sufficient preponderance of the evidence had been presented to allow the jury to hear the coconspirator's out-of-court declaration. *Id.* at 1131-32.

125. United States v. James, 590 F.2d 575, 578 (5th Cir. 1979) (en banc).

126. United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *vacated in part*, 590 F.2d 575 (5th Cir. 1979) (en banc). In Apollo v. United States, 476 F.2d 156 (5th Cir. 1973), the Fifth Circuit held that the judge's role is to make a preliminary determination whether the government has presented sufficient evidence, independent of the hearsay itself, to sup-

determined that the defendants had presented an appropriate opportunity for the court "to overrule *Apollo* and to establish a new standard and procedure for handling the admissibility of coconspirator statements in criminal conspiracy trials."[127]

The court looked beyond the language of rule 104 to its underlying policies in making its decision concerning preliminary questions. The court reasoned that "[a] rule that puts the admissibility of coconspirator statements in the hands of the jury does not avoid the danger that the jury might convict on the basis of these statements without first dealing with the admissibility question."[128] This rationale lead the court to the conclusion that those preliminary questions of conditional relevance envisioned by rule 104(b) were those that did not vitiate the rights of the defendant, such as "questions of probative force rather than evidentiary policy."[129] Moreover, the court reasoned that coconspirator's statements should be evaluated by the trained legal mind of the trial judge because they are so highly prejudicial and could conceivably taint other evidence, regardless whether precautionary instructions were given to the jury."[130]

By rejecting *Apollo,* the court acknowledged that the order of proof at trial in some cases might be affected.[131] It is obviously dangerous to a defendant in a conspiracy trial for the government to offer a coconspirator's statement prior to laying the predicate for its admission. Should these statements be admitted subject to being

port a finding by the jury that the alleged conspiracy existed and that the declarant and the defendant against whom the statement is offered were members of that conspiracy. *Id.* at 163. This is the "prima facie" standard enunciated in United States v. Oliva, 497 F.2d 130, 132 (5th Cir. 1974). If the judge is satisfied that this test has been met, then under *Apollo* the jury is instructed both when the hearsay is introduced and at the final charge that it may consider the hearsay against a particular defendant only if it first finds the conspiracy existed, that the declarant and the defendant were members of it, and that the statement was made during the course of and in furtherance of the conspiracy. Apollo v. United States, 476 F.2d 156, 163 (5th Cir. 1973).

127. United States v. James, 590 F.2d 575, 578 (5th Cir. 1979) (en banc). The court specifically left open the question of the applicability of rule 104 to coconspirator statements in civil cases and non-conspiracy criminal cases.

128. *Id.* at 579. As the court noted, the Supreme Court was motivated by this same danger in *Jackson v. Denno* in holding that a defendant is entitled to have a "reliable and clear-cut determination of the voluntariness of [his] confession, including the resolution of disputed facts upon which the voluntariness issue may depend" done by the judge, rather than by the jury. *Id.* at 579 (quoting Jackson v. Denno, 378 U.S. 368, 391 (1964)). Rule 104(c) specifically provides for this.

129. United States v. James, 590 F.2d 575, 579 (5th Cir. 1979) (en banc).

130. *Id.* at 579.

131. *Id.* at 581.

connected up later, then the defendant would suffer no prejudice in the order of proof if the connection is made.[132] But if this proper predicate fails to materialize, the defendant is harmed because the jury has heard the inadmissible evidence.[133] After discussing the action taken by other circuits,[134] the court decided:

> Both because of the 'danger' to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency when a mistrial is required in order to obviate such danger, we conclude that the present procedure warrants the statement of a preferred order of proof in such a case. The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.[135]

Nonetheless, the court concluded that an additional safeguard is necessary at the end of a conspiracy trial. On appropriate motion the trial court now makes a factual determination whether the prosecution has satisfied the requirements of rule 801(d)(2)(E) "by a preponderance of the evidence independent of the statement itself."[136] Should the court find that the prosecution has failed to bear its burden of proof, the court must exclude the evidence from the jury's consideration.[137] If this situation arises, the trial court "must decide whether the prejudice arising from the erroneous admission of the coconspirator's statement can be cured by a cautionary instruction to disregard the statement, or whether a mistrial is required."[138]

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132. *Id.* at 581.

133. *Id.* at 581-82.

134. *See* United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977).

135. United States v. James, 590 F. 2d 575, 582 (5th Cir. 1979) (en banc).

136. *Id.* at 582. The court set out three factors to be proven pursuant to rule 801(d)(2)(E): "(1) that the conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement was made during the course and in furtherance of the conspiracy." *Id.* at 582.

137. *Id.* at 582-83.

138. *Id.* at *582-83.* The court relied upon United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) and United States v. Stanchich, 550 F.2d 1294, 1297-98 (2d Cir. 1977) in reaching this conclusion. *See* United States v. James, 590 F.2d 575, 583 (5th Cir. 1979) (en banc).

STANDARD OF PROOF

Those courts that have moved to a judicial determination of admissibility under rule 104 have recognized that a higher standard of proof is appropriate because the jury will no longer have the final word. The courts, however, frequently express problems in deciding which standard is adequate. In *Speiser v. Randall*[139] Justice Brennan cautioned about the crucial nature of fact finding procedures:

> To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.[140]

Traditionally, the question what degree of proof is required has been left to the courts to decide.[141] The choice of an appropriate burden of proof depends in large measure on society's assessment of the stakes involved in a judicial proceeding.[142] For example, one of the more lenient standards of proof is the substantial evidence test. Substantial evidence has been defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[143]

As a general rule, a "preponderance of the evidence" standard is relied upon in civil suits in which the law is indifferent as between plaintiffs and defendants but seeks to minimize the probability of error. Quantified, the preponderance standard would be more than fifty percent probable.[144] The preponderance of the evidence test has also been used to determine the admissibility of evidence under the constitutional exclusionary rules.[145] In *Lego v.*

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139. 357 U.S. 513 (1958).

140. *Id.* at 520-21 (emphasis added).

141. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 284 (1966).

142. *See In re* Winship, 397 U.S. 358, 370 (1970).

143. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

144. United States v. Schipani, 289 F. Supp. 43, 55-56 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).

145. *See* United States v. Matlock, 415 U.S. 164, 178 n. 14 (1974) (fourth amendment suppression); Lego v. Twomey, 404 U.S. 477, 488 (1972) (plurality opinion) (voluntariness of confession); *cf.* Franks v. Delaware, ___ U.S. ___, ___, 98 S. Ct. 2674, 2677, 57 L. Ed. 2d

Twomey[146] the Supreme Court explained that the procedural guidelines to determine the validity of a confession are "designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances."[147] The jury must still determine the "accuracy or weight of confessions admitted into evidence."[148] The Supreme Court thus concluded: "Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship* . . . ."[149]

In some civil proceedings when moral turpitude is implied, the courts have used the standard of "clear and convincing evidence," which is a test somewhat stricter than preponderance of the evidence.[150] When proof of another crime is being used as relevant evidence pursuant to rules 401 to 404 of the Federal Rules of Evidence, the most common test articulated is some form of the "clear and convincing" standard.[151] This standard is designed to give the defendant added protection not fully afforded by rules 403 and 404. Since the crimes are merely evidence of intermediate propositions, not material elements of a crime being tried or of a sentence, there is theoretically no reason why any burden must be met as long as rule 401's test of relevancy is satisfied—that is, the evidence has any tendency to make the material proposition more probable or less probable than it would be without the evidence.[152] Quantified, the

667, 672 (1978) (preponderance standard used to challenge affidavit supporting search warrant).

146. 404 U.S. 477 (1972).

147. *Id.* at 485.

148. *Id.* at 485.

149. *Id.* at 486. *See generally* Saltzburg, *Standard of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 305 (1975) (suggesting that the Court's *Lego* rule be altered to provide that the beyond a reasonable doubt standard be substituted for preponderance standard "whenever the defendant can demonstrate a need for protection that overrides any countervailing concerns of the criminal justice system").

150. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 331-32 (1974) (libel); Collins Sec. Corp. v. SEC, 562 F.2d 820, 824-26 (D.C. Cir. 1977) (securities fraud).

151. *See* United States v. Trevino, 565 F.2d 1317, 1319 (5th Cir.), *cert. denied*, 435 U.S. 971 (1978); United States v. Maestas, 554 F.2d 834, 837 (8th Cir.), *cert. denied*, 97 S. Ct. 2936 (1977). *But see* United States v. Kahan, 572 F.2d 923, 932 (2d Cir. 1978) (preponderance of the evidence test); United States v. Testa, 548 F.2d 847, 851 n.1 (9th Cir. 1977) (beyond a reasonable doubt test).

152. United States v. Schipani, 289 F. Supp. 43, 56 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).

probabilities might be on the order of above seventy percent under a clear and convincing standard of proof.

On the other hand, "in situations where the various interests of society are pitted against restrictions on the liberty of the individual, a more demanding standard is frequently imposed, such as proof by clear, unequivocal and convincing evidence."[153] The Supreme Court has applied this stricter standard to deportation proceedings,[154] denaturalization cases[155] and expatriation cases.[156] The probabilities for clear, unequivocal and convincing evidence might be in the range of above eighty percent under this standard.

The standard of "proof beyond a reasonable doubt" is constitutionally mandated for elements of a criminal offense.[157] Writing for the majority in *In re Winship,*[158] Justice Brennan enumerated the "cogent reasons" why the 'reasonable-doubt' standard plays a vital role in the American scheme of criminal procedure and "is a prime instrument for reducing the risk of conviction resting on factual error."[159]

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . .
>
> Moreover, use of the reasonable-doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.[160]

Prior to the adoption of the Federal Rules of Evidence, the judge and the jury shared the responsibility for determining whether or

153. *In re* Ballay, 482 F.2d 648, 662 (D.C. Cir. 1973); *see* Chaunt v. United States, 364 U.S. 350, 353 (1960).

154. *See* Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285-86 (1966).

155. *See* Baumgartner v. United States, 322 U.S. 665, 671 (1944).

156. *See* Nishikawa v. Dulles, 356 U.S. 129, 138 (1958).

157. Mullaney v. Wilbur, 421 U.S. 684, 704 (1975); *cf.* Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973) (because probationer or parolee is "already convicted," proof beyond a reasonable doubt standard not needed in revocation hearing).

158. 397 U.S. 358 (1970).

159. *Id.* at 363.

160. *Id.* at 363-64. *See generally* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 YALE L.J. 1299 (1977).

not a statement made by one member of a conspiracy during the course of and in furtherance of the conspiracy could be used against other members of the conspiracy if certain conditions were met. The judge's role was to make a preliminary determination whether the government had presented sufficient evidence, independent of the hearsay itself, to support a finding by the jury that the alleged conspiracy existed and that the declarant and the defendant against whom the statement was offered were members of that conspiracy. This standard was the "prima facie case" standard, and was employed by virtually every circuit.[161] With the adoption of the Federal Rules of Evidence, most courts have shifted to a judicial determination of admissibility and have recognized that a higher standard of proof will be necessary because the jury no longer has the final word; nonetheless, no circuit had adopted a "beyond the reasonable-doubt" test.[162]

The United States Court of Appeals for the First Circuit had no trouble in casting aside the "prima facie test" in *United States v. Petrozziello.*[163] As the court noted, the requirement that a judge could admit hearsay against a defendant only if the judge found enough independent non-hearsay evidence to make a prima facie case of conspiracy sufficed when the jury had the last word, but since rule 104(a) requires that questions of admissibility be "determined" by the judge alone, a higher standard is necessary.[164] Furthermore, the First Circuit expressed no qualms in holding that rule 104(a) permits the trial judge to base his findings on hearsay

161. *See, e.g.*, United States v. Weiner, 578 F.2d 757, 768 (9th Cir. 1978); United States v. McManus, 560 F.2d 747, 750 (6th Cir. 1977), *cert. denied*, 98 S. Ct. 894 (1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); United States v. Oliva, 497 F.2d 130, 132-33 (5th Cir. 1974).

162. *See* 1 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶ 104(05), at 104-41 to -42 (1978).

> It is the contention of this treatise that the fair and practicable method of providing protection to the defendant without violating the letter or spirit of the Rules lies in insisting on a stringent standard of proof before the court admits a coconspirator's statement in a criminal case. Only the court is itself convinced to a high degree of probability—considering hearsay as well as nonhearsay evidence—of the conspiracy, defendant's membership, and that the statement was made during the course of, and in furtherance thereof, should it admit [the statement] . . . . We would prefer a standard as high as beyond a reasonable doubt, though a 'clear, unequivocal and convincing' standard or the equivalent would be suitable so long as the court was aware of the need to protect against abuse of coconspirator's declarations.

Id. ¶ 104(05), at 104-42 (footnotes omitted).

163. 548 F.2d 20, 23 (1st Cir. 1977).

164. *Id.* at 23. *See also* United States v. Martorano, 561 F.2d 406, 407 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978).

and other inadmissible evidence.[165] Accordingly, "[c]ontinued reliance on a prima facie standard will either broaden the co-conspirator exception unconscionably or plunge the courts into metaphysical speculation about how a prima facie case can be built on inadmissible evidence."[166] Because the judge is ruling on admissibility, not guilt or innocence, the court concluded that the government's burden need not be as great as the beyond a reasonable doubt standard.[167] Rather, the court decided that the ordinary civil standard of preponderance of the evidence is sufficient—that it appears more likely than not that the declarant and the defendant were members of the conspiracy when the declaration was made, and that the statement was made during the course and in furtherance of the conspiracy.[168]

Other courts have not found the reasoning to be so easy, however, although many have blanketly adopted the *Petrozziello* position.[169] The next consideration of this issue occurred in *United States v. Enright*[170] in which a police chief was convicted of conspiracy. During the trial, statements of a gambling operator that he paid the defendant police chief for protection were introduced against the defendant's objection. The Court of Appeals for the Sixth Circuit noted that its prior decisions had followed the prima facie test that had been rejected by the First Circuit in *Petrozziello*.[171] The Sixth Circuit pointed out, however, that a bare citation to rule 104 of the Federal Rules of Evidence would not be sufficient since the existence of the conspiracy could as easily be classified as a condition to the relevancy of the evidence under rule 104(b) as it could to the question of admissibility under rule 104(a).[172] The reasoning by which the court reached its conclusion left much to be desired, however: "The issue, as we see it, is more naturally that of admissibility of hearsay evidence than it is of the relevancy of the evidence . . . . [T]he question seems to be more one of the basic reliability and fairness of admitting the evidence rather than a relevancy question . . . ."[173] In discussing the burden of proof, the Sixth Circuit

165. United States v. Petrozziello, 548 F.2d 20, 23 n.2 (1st Cir. 1977).
166. *Id.* at 23.
167. *Id.* at 23.
168. *Id.* at 23.
169. *See* United States v. Andrews, 585 F.2d 961, 965-66 (10th Cir. 1978).
170. 579 F.2d 980 (6th Cir. 1978).
171. *Id.* at 985, *see* United States v. Mayes, 512 F.2d 637, 651 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975).
172. United States v. Enright, 579 F.2d 980, 984 (6th Cir. 1978).
173. *Id.* at 984.

reasoned backwards from its initial decisions. Since rule 104(b) constitutes a "classic restatement of the prima facie test" and does not apply, then a more demanding standard is needed.[174] The court rejected Weinstein's advocacy of the reasonable doubt standard, opting instead for the lesser standard of preponderance of the evidence.[175]

In a thoughtful and well-reasoned opinion, the United States Court of Appeals for the Seventh Circuit adopted the *Petrozziello* position of adhering to the preponderance of the evidence test in determining admissibility in *United States v. Santiago.*[176] Prior to the adoption of the Federal Rules of Evidence, in the Seventh Circuit a defendant who failed to prevent the admission of coconspirator statements by convincing the trial judge that a prima facie showing of the alleged conspiracy had not been established by independent evidence was given a second chance before the jury.[177] Under this theory, the jury was instructed that the acts and declarations of a coconspirator made during and in furtherance of the conspiracy could not be considered against another alleged coconspirator until the government had established by independent evidence beyond a reasonable doubt that a conspiracy existed and that the other alleged coconspirator was a member of the conspiracy.[178] This solution was impractical, as the court in *Santiago* cogently noted:

> Merely to state that rule raises doubts about its efficacy. Even though the jury was cautioned when a hearsay declaration was admitted, the jury was expected during its deliberations to sort through the evidence and to lay aside the often very prejudicial co-conspirator's hearsay statements and to immunize itself from its influence until it first found by other independent evidence that the conspiracy and the defendant's membership in it had been established beyond a reasonable doubt. The jury then free to consider the co-conspirator's hearsay declarations. At that point conspiratorial guilt had in theory already been established. The co-conspirator's declarations could only confirm the judgment previously reached. To expect such a precise untainted jury performance must strain the confidence of even the most ardent admirers of the jury system, and is unnecessary.[179]

174. *Id.* at 984-85.

175. *Id.* at 985. The court pointed out that the Supreme Court has yet to apply the reasonable doubt standard in determining the admissibility of a coconspirator's statement, citing United States v. Nixon, 418 U.S. 683, 701 n.14 (1970).

176. 582 F.2d 1128, 1133 (7th Cir. 1978).

177. United States v. Santos, 385 F.2d 43, 44 (7th Cir.), *cert. denied,* 390 U.S. 954 (1967).

178. *Id.* at 44.

179. United States v. Santiago, 582 F.2d 1128, 1132 (7th Cir. 1978).

The Seventh Circuit acknowledged that rule 104 does not eliminate all of the ambiguities concerning who is to determine the preliminary questions regarding coconspirators statements or by what standard.[180] The court adopted the *Petrozziello* position, holding that admission is to be determined solely by the trial judge under rule 104(a), and that the jury is to have no part in the determination of admissibility.[181] The jury nonetheless retains total responsibility to "determine the related matters of credibility and weight as it considers all the evidence in determinng whether guilt has been established beyond a reasonable doubt."[182] Furthermore, the court decided that whether or not the conspiracy has been established by sufficient, independent evidence to permit admission of the coconspirator statement is an issue of competency under rule 104(a) rather than of a conditional relevancy under rule 104(b).[183] Since admissibility as well as competency is the trial judge's responsibility, the court concluded that a different standard of proof should be applied. After discussing the various standards that could be adopted, the court determined that its own reasoning was similar to that espoused by the First Circuit in *Petrozziello,* and accordingly, adopted the view that the trial judge is to use a preponderance of the evidence standard.[184]

To date, the United States Court of Appeals for the Fifth Circuit stands alone in adopting a two-pronged test for the trial judge to employ in determining admissibility of a coconspirator's statement. In *United States v. James*[185] that appellate court concluded that in determining admissibility of a coconspirator's statement during the government's case-in-chief, the judge should decide whether "substantial, independent evidence" of the predicate facts exists.[186] When all the evidence is closed and defense counsel makes the appropriate motion, however, the judge is then required to deter-

180. *Id.* at 1133.

181. *Id.* at 1132; *accord,* United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); *see* United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978); United States v. Stanchich, 550 F.2d 1294, 1298 (2d Cir. 1977); United States v. Trowery, 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977); United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976).

182. United States v. Santiago, 582 F.2d 1128, 1133 (7th Cir. 1978) "The competence of the evidence is determined by whether or not the probability of its reliability is sufficiently great to permit its admissibility." *Id.* at 1133.

183. *Id.* at 1133.

184. *Id.* at 1134.

185. 590 F.2d 575 (5th Cir. 1979) (en banc).

186. *Id.* at 581.

mine by a "preponderance of the evidence" whether the predicate facts have been established.[187] If not, the statement erroneously admitted must be stricken and the jury instructed to disregard it, or, if a cautionary instruction is deemed insufficient to cure the potential prejudice, a mistrial must be declared.[188] Because the trial court has the sole responsibility for determining those questions of fact relating to the admissibility of a coconspirator's statement, the court must use a standard of proof high enough to afford adequate protection to the defendant against whom the evidence is to be offered.[189] Nonetheless, the standard must not be so high that it excludes trustworthy, relevant evidence.[190] The rational conclusion is that "the standard must be one that requires the trial judge to find at least enough evidence touching on the critical issues to support a jury verdict."[191] Relying upon dictum set out by the Supreme Court in *United States v. Nixon,*[192] the Fifth Circuit concluded that the trial court's threshhold determination of admissibility is to be based upon the substantial, independent evidence test.[193] Additionally, this initial determination should be made during the presentation of the government's case-in-chief and before the evidence is heard by the jury.[194] Furthermore, because of the possible prejudice to a defendant when a statement is admitted and then not connected up by sufficient, independent evidence of the conspiracy, and "because of the inevitable serious waste of time, energy and efficiency when a mistrial is required in order to obviate such danger," the court dictated that the trial court should whenever reasonably practicable require the government to prove the conspiracy and the defendant's connection to it prior to the admission of statements from a coconspirator.[195]

CONCLUSION

The Federal Rules of Evidence were praised for establishing uniformity and criticized for imposing rigidity. They have done neither,

187. *Id.* at 582.
188. *Id.* at 582-83.
189. *Id.* at 580.
190. *Id.* at 580.
191. *Id.* at 580.
192. 418 U.S. 683, 701 (1974).
193. United States v. James, 590 F.2d 575, 581 (5th Cir. 1979) (en banc).
194. *Id.* at 581. Although the court did not expressly state it, such a determination would necessitate a hearing outside the jury's presence under rule 104(c).
195. *Id.* at 582.