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Lawrence W. Kessler
Maurice A. Deane School of Law at Hofstra University

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THE TREATMENT OF PRELIMINARY ISSUES OF FACT IN CONSPIRACY LITIGATIONS: PUTTING THE CONSPIRACY BACK INTO THE COCONSPIRATOR RULE

Lawrence W. Kessler*

Statements of one member of a conspiracy are frequently admitted as evidence of the guilt of the other participants. Ordinary barriers to the submission of such unsworn, out-of-court utterances are circumvented by classifying the statements as vicarious admissions. This classification is authorized by an evidentiary rule which parallels the substantive law of conspiracy. The evidentiary doctrine detailing the admissibility of this evidence is the coconspirator rule. For purposes of the admission of evidence, as well as for purposes of ultimate criminal responsibility, the acts and declarations of one are the acts and declarations of all.

The coconspirator exception is not a recent addition to the law. Categorization of admissions as nonhearsay seems to have arisen from the fact that they were not encompassed by the original hearsay rule. In 1827 the Supreme Court of the United States, in an agency case, adopted this categorization. The vicarious admission—the coconspirator rule—has developed from this agency law.

* Associate Professor of Law, Hofstra Law School; B.A., 1964, J.D., 1967, Columbia University. The author wishes to express his appreciation to Edward M. Schoenman for his invaluable research assistance.


2. See Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1162 (1954); 4 J. Wigmore, Evidence §§ 1076-87, at 152 (Chadbourn rev. 1972); Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355 (1921).

   So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all.
   The "acts" there in question were declarations which were admitted as evidence against the nondeclarant.


77
The present rule authorizes the admission of the statements of one conspirator as evidence of the guilt of his alleged confederates if four preliminary facts can be proven. The facts must show that the statement was made (1) during and (2) in furtherance of the conspiracy, (3) that the conspiracy existed, and (4) that the nondeclarant coconspirator was a member thereof. Although the courts do not talk of the reliability problem, the complexity of this coconspirator rule must be attributed to a silent realization that the statements must be screened. Thus, the plethora of preliminary facts are designed to achieve this goal.

The coconspirator rule parallels the traditional agency exception to the hearsay rules. Initially the preliminary factors were identical. It is no coincidence that the logical basis for the substantive conspiracy rules rests in agency. Joinder in crime forms the agency relationship which justifies the attribution of the statement to the nondeclarant.

It is not the substance but the implementation of this concept that created the issues which will be the focus of this article. The source of the difficulties is the tension between the pragmatic policy underlying admission of this type of statement and the traditional evidentiary policy prohibiting jury reliance on untrustworthy testimony. Traditional evidentiary policy prevents the introduction into evidence of potentially unreliable out-of-court statements. The pragmatic policy of admissions permits introduction into evidence of essential testimony despite its potential unreliability. These tensions surface in the determination of issues of preliminary fact.

5. These four factors may be collapsed into three—duration, furtherance, and foundation. Foundation means proof by independent evidence of the conspiracy and of the defendant's connection thereto. See, e.g., Carbo v. United States, 314 F.2d 718, 735 & n.21 (9th Cir. 1963).


7. The preliminary factors of the traditional agency rule are independent proof of the authorization, the identity of the declarant, and proof that the declaration was made during and within the scope of the agency. C. McCormick, Evidence § 267, at 640 (2d ed. Cleary 1972). The last requirement has now been modified. Fed. R. Evid. 801(d)(2)(D) (1975).

Although the resolution of such problems raises technical issues, the result of the litigation often depends on these very issues. In fact, the exploration of this area will reveal how the implementation of a solution based purely on an analysis of the evidentiary rules has disrupted the traditional balance between the conflicting policies to the detriment of the rights of the defendant.

It is the thesis of this article that the admissibility of coconspirators’ statements is a matter that must be decided by the jury. This approach, which is the traditional mode, presently competes for judicial favor with a revisionary rule. The revisionary rule places responsibility for deciding the preliminary issue with the judge, and, in at least the Second Circuit, permits admission without proof sufficient to create a prima facie case. The traditional approach better resolves the policy question. It is also a procedure that is mandated by the Federal Rules of Evidence.9

The pertinent Rules are 104(b) and 801(d)(2)(E). Rule 801 contains the coconspirator rule10 exception to the hearsay rule. Rule 104 structures the division of responsibility between judge and jury.11 The traditional bifurcated procedure is mandated by the meshing of these rules.

These apparently technical problems are of enormous significance in the conspiracy trial. Conspirator statements are often the central evidence in the case.12 The vitality of the conspiracy charge stems primarily from permissive evidentiary rules in conspiracy cases which have been deemed responsible for creating an


10. Under the Rules, an admission by a party opponent, which is defined to include a statement by a party opponent’s coconspirator made during the course and in furtherance of the conspiracy, is deemed to be nonhearsay and not an exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E). The assumption that such statements are not hearsay in nature has been termed “naive.” See Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1163-66 (1954). Indeed, courts have repeatedly and consistently discussed these declarations as hearsay. Glasser v. United States, 315 U.S. 60, 74-75 (1942); United States v. Zane, 485 F.2d 683, 692 (2d Cir. 1974); United States v. Lucido, 486 F.2d 868, 870 (6th Cir. 1973); United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973); Carbo v. United States, 314 F.2d 718, 735 (9th Cir. 1963).

11. Although the language of the Rule does not clearly indicate that a separation of function is intended, where relevancy is conditioned on preliminary questions of fact, this intent is vividly expressed in the commentary. Fed. R. Evid. 104(b) (commentary); 1 J. Weinstein & M. Berger, Weinstein’s Evidence ¶ 104[01] (1975) [hereinafter cited as Weinstein & Berger]. J. Crockett & A. Elkind, Federal Courtroom Evidence at 19 (1976).

12. See, e.g., United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), where the principal evidence against the defendant (Geaney) was testimony by a girlfriend of one coconspirator concerning incriminating statements made to her.
excessive use of the conspiracy charge. Thus, the amount of preliminary proof that the prosecution is required to submit before the court will admit the statements into evidence against the nondeclarant coconspirators may control the verdict. A high standard of proof may prevent the prosecution from proving its case. On the other hand, if the standard is low, the defendant may be convicted on unreliable evidence.

The major procedural change caused by the revision has been the substitution of the judge for the jury as the decider of the preliminary facts. The primary impact of the change is upon the jury decision on the ultimate issues in the case. If the court decides the preliminary issues, passively submitting the coconspirator statements to the jury with other evidence, the jury may not be alerted to the potential unreliability of this evidence. Without a charge requiring them to find independent evidence before relying on the coconspirator statement, the jury is not deterred from convicting solely upon that testimony. They may reject the independent proof and still convict. Even though the sanctity of the jury room cannot be pierced, the decision that, as a matter of law, it is unnecessary to command the jurors to guard themselves against such evidence is significant.

Despite the long history of sanctioning the use of this type of evidence, there is little basis for believing that such an utterance is inherently reliable. The declarant makes the statement

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14. See 1 WEINSTEIN & BERGER, supra note 11, ¶ 104[05].

15. The trial judge may charge the jury that the testimony is suspect—using language akin to that of a charge on the credibility of accomplice testimony. Cf. United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973). But by casting its warning as a mere caution against the poor character of the declarant, the court does not communicate to the jury the extent to which the law holds this type of testimony suspect. Such a palliative will not suffice in the face of each potentially devastating vicarious admission. Even more importantly, whether such a palliative is required is not at all clear from the cases. Unless the reviewing court finds prejudice, the trial court may be able to refuse to give any charge. Cf. United States v. Buschman, 527 F.2d 1082 (7th Cir. 1976); United States v. Beasley, 513 F.2d 309 (5th Cir. 1975); United States v. Moore, 505 F.2d 620 (5th Cir. 1974).


To admit the hearsay statements of a co-conspirator merely because of a highly
to further an avowedly criminal undertaking. When he refers to a group of supporters who back him in the venture, or upon whom his actions can be blamed, there is no compulsion for him to be accurate.

In justifying this rule, the courts do not discuss directly the probable reliability of such declarations. Instead, they resort to the most technical agency arguments. Indeed, the true basis for the rule is not a belief in the reliability of the statements, but the doctrine of necessity.17

In addition to these direct impacts upon the protection offered the defendant, his rights have been eroded by rules indirectly stemming from the revisionary procedure. These rules sanction practices wholly conflicting with the policy authorizing the evidentiary use of vicarious admissions. As will be discussed later, the need to reverse the progeny of the revisionary procedure is, in itself, a sufficient reason to return to the traditional practice.

**THE COCONSPIRATOR RULE**

In any discussion of the coconspirator rule it is appropriate to consider the importance of evidentiary law to the vitality of the substantive conspiracy law. The popularity of these laws in no small part derives from the elimination of the burden of proving an action by each member of the conspiracy, enabling prosecutors to convict those criminals who act through others.18

This socially desirable policy has been deemed to be of such importance that the legal system has willingly sacrificed some protection of the individual defendants. One aspect of the loss of

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controversial belief that they are more likely to be true than not is insufficient. Many of those who have closely studied the problem of conspiracy evidence are in agreement that such evidence is highly unreliable. The hearsay statements of alleged co-conspirators are perhaps the most suspect of all.

*See also* O'Dougherty, *Prosecution and Defense Under Conspiracy Indictments*, 9 Brooklyn L. Rev. 263, 275 (1940), where it is noted that declarations of coconspirators should be admissible "if they spring from [the conspiracy] and are made under circumstances which preclude the opportunity or idea of fictitious device or afterthought." [Emphasis added.] *But see* Model Code of Evidence Rule 508(b) Comment (1942); 4 J. Wigmore, Evidence § 1080(a), at 195 (Chadbourn rev. 1972); Morgan, *The Rationale of Vicarious Admissions*, 42 Harv. L. Rev. 461 (1929). *See also* United States v. Renda, 56 F.2d 601 (2d Cir. 1932).


protection is the mere joining of all conspirators in one trial.19 Defendants against whom there is little evidence may be stigmatized by being associated with those against whom there is substantial evidence.20

The power to transmute the statements and actions of one into the crimes of all is the unique potency of the law of conspiracy. The proof of the guilt of those never even seen during an investigation will come from the mouths of those who could be thought of as knowing them best—their accomplices in crime.

If there is any doubt, the potency of coconspirator evidence can best be demonstrated by an example. Assume the charge is conspiracy to distribute a controlled substance.21 One typical coconspirator statement would be: "A said I had to charge you $1,200 for the cocaine, so that we all could make something out of the deal." The declarant and A are codefendants and the former will not testify. The witness is an informer or an undercover law officer. The statement is logically sufficient to prove every element of the offense charged. Without the coconspirator rule, the statement would not be admissible as evidence of any crime by A—as to him, it would be hearsay. But if admitted against A, the jury will have little choice but to treat A and the declarant as one. Unless the declarant is acquitted, this statement virtually compels A's conviction.

The sole restriction upon the use of such devastating testimony is the preliminary fact requirement.

THE THEORETICAL BASE

Preliminary fact questions pose significant theoretical problems for our legal system. In theory, the jury decides issues of fact. But most preliminary facts cannot practically be left to a jury determination. The confusion created and the time consumed by a nonjudicial resolution would prolong the litigation interminably.22 A matter might never proceed to final verdict if the court did not decide issues such as whether a document was kept in the

20. Id.
22. 9 J. Wigmore, EVIDENCE § 2550, at 501 (3d ed. 1940); 1 C. CHAMBERLAYNE, EVIDENCE § 81, at 132 (1911); MAGUIRE & EPSTEIN, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392, 394 (1927) [hereinafter cited as MAGUIRE & EPSTEIN]. See also Gorton v. Hadsell, 9 Cush. 508, 511 (Mass. 1852); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898).
normal course of business, or whether an assertion was intended by an action. Indeed, at one point in the law’s development, the determination of preliminary issues was so rigidly controlled by the court that the substance of the litigation was frequently decided by the court on these preliminary matters.\(^\text{23}\)

To balance the interest of expedition against that of jury determination of the litigated fact, it was necessary to create a theoretical model which would permit the allocation of some preliminary determinations to the judge and others to the jury. The most successful construct is the doctrine of conditional relevancy.\(^\text{24}\)

Issues purely raising questions of competency or reliability will be conclusively resolved by the judge. These issues encompass such technical matters as the qualifications or competence of a witness, which are tested by any of the scores of factors which have been held to necessitate the exclusion of evidence.\(^\text{25}\) Preliminary issues which raise questions of the probative force of evidence must, however, be left to the jury. To remove such relevancy questions from the jury’s determinations would be to restrict or destroy the jury’s function as trier of fact.\(^\text{26}\)

The crucial factor is whether the relevance of evidence depends upon the existence of the preliminary fact. If it does, the preliminary issue must be decided by the jury. An example of such a preliminary fact is:\(^\text{27}\)

> [W]hen a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it.

Application of this theoretical model to the admissibility of coconspirator statements produced a two-step procedure which is still followed by many courts. The existence of a conspiracy and the nondeclarant’s membership are perceived to be questions of conditional relevancy. As such the court preliminarily tests them for sufficiency\(^\text{28}\) and then submits the matter to the jury for an

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25. 1 Weinstein & Berger, supra note 11, ¶ 104[01].

26. Fed. R. Evid. 104(b) (Advisory Committee Note).

27. Id.

28. The standard by which the court must test the sufficiency of the evidence is the prima facie case. United States v. Nixon, 418 U.S. 683, 701 n.14 (1974): "As a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least
ultimate determination.\textsuperscript{29}

The uniformity created by adherence to this approach, however, has not been maintained. Further development of a general model of judge and jury functions leads to the recognition of a unique type of fact situation. In this situation the preliminary fact and the ultimate fact of the litigation are the same. Their merger distorts the significance of the bifurcated screening process. Their unity means that the jurors are given the task of deciding the preliminary issue, and are then told that, if they resolve the issue favorably to the prosecutor, they must redefine the identical issue using additional evidence. This was perceived to be confusing and futile.\textsuperscript{30} It was futile because the jurors were not believed to have the capacity to receive the evidence, and then erase it from their minds while considering the preliminary issues.\textsuperscript{31} Permitting the jurors to hear the questionable evidence

\textsuperscript{29} See United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975); United States v. Mayes, 512 F.2d 637, 651 (6th Cir. 1975); United States v. Oliva, 497 F.2d 130, 132-33 (6th Cir. 1974); United States v. Rodrigues, 491 F.2d 633, 666 (3d Cir. 1974); 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. Johnson, 467 F.2d 804, 807 (1st Cir. 1972); United States v. Santos, 385 F.2d 43, 44 (7th Cir. 1967).

\textsuperscript{30} For the proposition that only slight evidence is required to connect defendant with the conspiracy (i.e., slight evidence is enough to establish, prima facie, defendant's connection) see United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975); United States v. Prince, 515 F.2d 564, 567 (5th Cir. 1975); United States v. De Lazo, 497 F.2d 1168, 1170 (3d Cir. 1974); United States v. Overshon, 494 F.2d 894, 896 (8th Cir. 1974).

\textsuperscript{31} Only the Second Circuit permits admission on less proof where preponderance is the standard. United States v. Wiley, 519 F.2d 1348, 1350-51 (2d Cir. 1975); United States v. Cohen, 489 F.2d 945, 950 (2d Cir. 1973); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).

29. The traditional conspiracy charge commands the jury to consider the coconspirator statements after determining the existence of a conspiracy:

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was sure of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member, may be considered by the jury as evidence in the case . . . .

1 E. Devitt & C. Blackman, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 29.06 (2d ed. 1970). Those circuits presently following this procedure include the Fourth, Fifth, Seventh and Tenth. See United States v. Wilkinson, 513 F.2d 227 (7th Cir. 1975); United States v. Pennett, 496 F.2d 293, 296-97 (10th Cir. 1974); United States v. Fontenot, 483 F.2d 315, 324-25 (5th Cir. 1973); United States v. Lawler, 413 F.2d 622, 627-28 (7th Cir. 1969); United States v. Grow, 394 F.2d 182, 203 (4th Cir. 1968).

30. Maguire & Epstein, supra note 22, at 407 n.47.

31. See Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963); United States v. Dennis, 183 F.2d 201, 230-31 (2d Cir. 1950); Morgan, Functions of Judge and Jury in Determination of Preliminary Questions of Fact, 43 HARV. L. REV. 165, 168-69 (1929); Maguire & Epstein, supra note 22, at 407 n.47; 9 J. Wigmore, EVIDENCE § 2560, at 501 (3d ed. 1940). But cf. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969): "Al-
was thought to violate the concept of jury protection. Once the jurors heard the evidence, they would use it even if they decided it should be rejected. Juries had to be protected from hearing potentially inadmissible testimony. From such a policy base it appeared foolish to let the jury decide any admissibility issue. Of course, to effectuate this policy the judicial determination of the preliminary issues was to be made in a hearing held out of the jury's presence.

The proposition is compelling. It cannot be denied that optimism motivates the decision to ask the jury to twice decide an issue such as whether the existence of a conspiracy has been proven. But the minimal denial of reality affected by such an act seems worthwhile when the alternative apparently leads to far greater conflicts with reality.

Application of the revisionary rule has revealed its flaw. To protect the jury and to avoid redundancy some courts changed their procedure for deciding preliminary issues of fact in coconspirator statements. The revision was the adoption of a procedure by which the judge decided the admissibility of coconspirator statements. Over time, that decision led to another revision.


29. Maguire & Erstein, supra note 22, at 394, 416.

30. "The orthodox rule [referring to the judicial determination of preliminary questions], then, possesses the merit of protection." Maguire & Erstein, supra note 22, at 394. But this merit is not always maintained. Judges sometimes admit evidence conditionally or de bene subject to a motion to strike out." Id. at 394 n.9.

31. This procedure was first adopted by the Second Circuit. United States v. Dennis 183 F.2d 201, 231 (2d Cir. 1950). The trend appears to be towards adoption of this revisionary procedure. A decade later a number of circuits followed suit. United States v. Rodriguez, 491 F.2d 663, 666 (3d Cir. 1974); United States v. Johnson, 487 F.2d 804, 807 (1st Cir. 1972); United States v. Hoffs, 449 F.2d 20, 41-42 (6th Cir. 1965); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963).

The exact state of the law in the Ninth Circuit is somewhat unclear because of the language in United States v. Griffin, 434 F.2d 978, 984-85 (9th Cir. 1970): [A]lthough we are mindful of the danger that a jury, in violation of its instructions, may consider the out-of-court statements as well as the independent evidence in determining the preliminary fact of the existence of a common scheme or plan, we believe that any change in the allocation of existing functions between judge and jury must await direction from the Supreme Court. See also United States v. Smith, 519 F.2d 516, 519-20 (9th Cir. 1975).
Since the judge was to decide the issue, the standard of proof he applied was adjusted in at least one circuit so that it more closely paralleled other preliminary facts. The proof requirement was thereby lowered to something less than a prima facie case. Its exact standard is both vague and varied.

Once the level of proof was reduced, the ultimate revision, induced by this adherence to a purely evidentiary theory, was adopted in some circuits. These circuits admit coconspirator statements even if the jury has found that there was no conspiracy. One circuit has even permitted admission of coconspirator statements on a substantive count despite the fact that the trial court had dismissed the conspiracy for insufficiency. The irony of the result is disregarded. The analysis follows logically from the initial construct:

The determination of whether hearsay declarations are admissible under the "co-conspirator" exception to the hearsay rule does not rest on finding sufficient evidence to submit a charge of conspiracy to the jury.

The result, however, is absurd. A necessary precondition to the relevancy of the declarant's statements to his codefendant A is the existence of another fact. That fact is the existence of a conspiracy. Conspiracy creates the quasi-agency relationship that justifies using the statement against A. If no conspiracy exists, A was not in an agency relationship with the declarant. Without the relationship there can be no vicarious liability for acts or statements.

35. See, e.g., United States v. Nuccio, 373 F.2d 168, 173 (2d Cir. 1967); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963); United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950).
37. United States v. Zane, 495 F.2d 683, 692 (2d Cir. 1974); Ottoman v. United States, 468 F.2d 269, 273 (1st Cir. 1972).
39. Id. at 326.
40. The technical argument that a lesser standard of proof is sufficient because the matter is only one of competency, and that a jury verdict of no conspiracy is therefore not inconsistent with admission of the evidence based on the judge's finding of a lower standard cannot be supported. The imputation of the declarant's statement is lawful only if there is a conspiracy—an agency relationship. As a fact of conditional relevancy this has long been a jury determination. For the purpose of criminal trials, the fact that such a relationship exists cannot be decided by a standard less than proof beyond a reasonable
If the statement were, "I have the cocaine," and if the charge is conspiracy and sale of a controlled substance, a finding that the conspiracy does not exist renders declarant's possession of cocaine totally irrelevant to A.41 Permitting admission in this circumstance mocks the principles upon which the coconspirator rule is founded.42

Similar problems exist in the application of the rule to joint ventures. Although most circuits have not considered the issue, one circuit has affirmed a conviction in which the adequacy of the proof of the preliminary facts of the joint venture was not adjudicated by the jury.43 But joint venture is a theory of admissibility identical to the coconspirator rule. The only difference is that there is no conspiracy charge in the indictment.44 The preliminary doubt. A finding of a prima facie case on the issue—the procedure the judge follows in the First, Third, Sixth, and Ninth Circuits—does not even purport, on its face, to decide that the agency relationship exists. Yet if there is no B, there can be no reliance on A.

41. This relevancy issue could also be analyzed under general principles of relevancy. A statement may be rendered admissible without the bar of the hearsay rule by the operation of the coconspirator exception. It is not, however, made relevant to the nondeclarant by the exception. Relevancy comes from proof of a condition of fact. Proof of this fact is a requirement of relevancy (FED. R. EVID. 401) and competency (FED. R. EVID. 801). In the above example, the requirement of FED. R. EVID. 401 cannot possibly be met. Therefore, the evidence may not be used even if it meets the terms of the coconspirator exception.

42. To permit hearsay evidence to support a substantive charge on the theory of the "conspiracy" exception where the charge of a conspiracy has been specifically rejected by the jury would not only undercut the very foundation of the exception, but would magnify the dangers to the liberty of the individual and the integrity of the judicial process . . .


43. See United States v. Alsondo, 486 F.2d 1393 (2d Cir. 1973), rev'd on other grounds sub nom. United States v. Feola, 429 U.S. 671 (1976). Though the issue was not discussed therein, a jury finding was sustained despite the fact the jury was never asked to decide the preliminary issues. For the peculiar facts of Alsondo they were not so charged because a conspiracy charge was included in the indictment. When conviction on the conspiracy was reversed by the court of appeals for insufficiency, the only means in the entire record by which the introduction of the coconspirator statements could be justified was the joint venture theory.

The Ninth Circuit has specifically ruled that the jury must decide the preliminary fact question in joint venture cases. United States v. Ushakow, 474 F.2d 1244 (9th Cir. 1973).

44. "Joint participants in crime may be denominated conspirators. Proof of joint action to defraud is tantamount to proof of a conspiracy . . . ." United States v. Snyder, 505 F.2d 595, 599 (5th Cir. 1974). See United States v. Ushakow, 474 F.2d 1244, 1245 (9th Cir. 1973) (joint venture and conspiracy considered twin brothers); United States v. Hoffa, 349 F.2d 20, 41 (6th Cir. 1965). "The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis." United States v. Olweiss, 138 F.2d 798, 800 (2d Cir. 1943).

[II]t is this committee's understanding that the rule is meant to carry forward
facts necessary for admission are the same.45 Since there is no conspiracy charge, however, the jury will never have the opportunity to determine whether or not there was a conspiracy; the ultimate issue and these preliminary issues do not merge. Therefore, the decision by a judge that a conspiracy exists means that the conditional relevancy of the statement will have been decided by the judge. None of the policy bases which theoretically justified removing this issue from the jury applies since the issues do not merge. The relevancy issue is removed from the jury: the defendant is deprived of a jury trial on a crucial fact issue for no other reason than that the procedure conforms to the practice in conspiracy cases.46 Logical consistency has become a higher value than the right to a jury trial.

The effect of removing the preliminary issue from the jury has been to permit hearsay to "lift itself by its own bootstraps."47 Adherence to a superficially logical theory has permitted the courts to distort reality, while simultaneously providing a rationale through which they can avoid confrontation with their fundamental corruption of the coconspirator rule.

**The Impact Of Rules 801, 104 and 401**

The drafters of the Federal Rules of Evidence did not focus upon the preliminary fact problems created by the coconspirator rule. Neither the text nor the commentaries indicate the slightest recognition of the issue.

The coconspirator exception to the hearsay rule is perpetuated in Rule 801(d)(2)(E).48 It appears as a basis of admission equal to and independent from the traditional agency exception.49

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45. The universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged.

46. The United States, supra note 11, ¶ 801(d)(2)(E)(01).

47. [Although it is possible to draw narrow technical distinctions between cases involving conspiracy or joint-venture theories, the legal analysis applicable to evidentiary rules must, by its very nature, be the same.]

48. Fed. R. Evid. 801 provides in pertinent part:

(d) Statements which are not hearsay. A statement is not hearsay if—

. . .

(2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Independent proof of the existence of the conspiracy and of the nondeclarant’s membership is compelled. Rule 401 imposes the same proof requirements. As Rule 401 requirements, however, they are foundation elements for any finding of relevancy. To be introduced, an assertion must comply with the requirements of both Rules. Neither Rule 401 nor Rule 801, however, directly addresses the preliminary fact issues. Preliminary facts requisite to admission are identified, but the instructions controlling their application are contained in Rule 104.

Rule 104 adopts a uniform structure to control the decision of preliminary questions. In the first two paragraphs, the Rule allocates certain preliminary questions to the jury, while continuing the traditional practice of placing the responsibility for the resolution of the others on the judge.50

Rule 104(b) mandates a jury resolution of questions of conditional relevancy.61 The grant of authority to the judge to resolve preliminary questions concerning “the admissibility of evidence” is “subject to the provisions of subdivision (b).”

This rule deprives the court of the authority to decide the conditional relevancy questions. Any more liberal interpretation would be inconsistent with the Rules’ policy of preserving the parties’ right to a jury determination on the fundamental issues of the litigation:62

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries.

The sole purpose of Rule 104(b) is to mandate jury determinations of relevancy questions. Relevancy, as defined in Rule

50. Fed. R. Evid. 104 provides in part:
   (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.
   (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.

401,\textsuperscript{53} encompasses both logical and conditional relevancy.\textsuperscript{54} If the relevancy of evidence depends upon "the existence of some matter of fact,"\textsuperscript{55} it may only be admitted pursuant to Rules 401 and 402\textsuperscript{56} if Rule 104(b) is followed.\textsuperscript{57} The language of Rule 104(b) permits no exceptions.\textsuperscript{58}

Rule 104 does not authorize the indiscriminate submission of evidence to the jury. Evidence must first be screened by the judge. The issue goes to the jury only after the judge weighs the evidence and decides that it is "sufficient to support a finding of the fulfillment of the condition."\textsuperscript{59} The standard by which the court is to weigh the adequacy of the evidence is that of the prima facie case.\textsuperscript{60}

This division between the functions of the judge and the jury applies to the determination of all preliminary issues. One such issue is the preliminary fact questions of the coconspirator rule. Rule 104 must be applied to their admission. Since the preliminary facts in the coconspirator exception undeniably contain problems of conditional relevancy (proof of the existence of the conspiracy is required by Rule 401 as well as by Rule 801), Rule

\textsuperscript{53} Fed. R. Evid. 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

It is apparent from the Advisory Committee Note that this section applies to evidence that is conditionally relevant subject to the provisions of Fed. R. Evid. 104(b).

The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901.


\textsuperscript{54} See note 41 supra.

\textsuperscript{55} Fed. R. Evid. 401, Advisory Comm. Notes at 84.

\textsuperscript{56} Fed. R. Evid. 402 provides in part:

Relevant Evidence Generally Admissible . . .

All relevant evidence is admissible . . .

\textsuperscript{57} Fed. R. Evid. 401, Advisory Comm. Notes at 84.

\textsuperscript{58} The only exception appears in the general exception set forth in Public Law 93-595 (Jan. 2, 1975): "These rules apply to further procedure in actions, cases, and proceedings . . . except to the extent that application of the rules would not be feasible, or would work injustice . . . ." There should be no exception in this area. The majority rule requires submission of the conditional relevance issue in coconspiracy to the jury. Thus, it cannot be infeasible.

\textsuperscript{59} Fed. R. Evid. 104(b).

\textsuperscript{60} If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them.

the jury for a finding on the preliminary fact.

Application of this Rule would extinguish the revisionary practice. By returning to the traditional procedure, the above detailed provisions would become impossible. Once the jurors are given the task of finding the existence of a conspiracy by the reasonable doubt standard, as a condition precedent to their use of the vicarious admissions, an acquittal on the conspiracy would simultaneously resolve the admissibility question. A finding of no conspiracy on the substantive count would be a binding decision on the preliminary issue. The standard is the same. The illogical and prejudicial inconsistencies of the new rule would vanish. If there is no conspiracy, there will be no vicarious liability for a coconspirator's statements.61

The only possible barrier to the application of Rule 104(b) to the resolution of these issues would be a viable analysis of the coconspirator preliminary fact issues which negated all issues of conditional relevancy. Rule 104(b) is applicable only to issues of conditional relevancy. Without such an issue, Rule 104(a) would control and the decision would be made by the judge. But, such an analysis is not possible.

The first argument against the theory that no conditional relevancy issue exists stems from the commentary to the Rules. It contains two examples of conditional relevance. Proof of an agency relationship is one of those examples:62

[If a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it.

The existence of authority issue is the agency equivalent of the existence of a conspiracy issue within the coconspirator exception. The parallel is particularly evident in such statements as "the cocaine is available at $1,200 an ounce," or "I'll have the stuff tomorrow." If these statements are to be vicariously attributed to the nondeclarant, a conditional relevancy issue is undeniably raised. They cannot relate to the nondeclarant unless the

61. Obtaining this result, while creating as little confusion as possible for the jury in reaching its ultimate decision, must be a task for the judge. He must reevaluate the sufficiency of the evidence on the counts in light of the jury's rejection of the conspiracy charge. To secure justice between the parties, he must also consider whether the fairness of the verdict may have been affected by the jury's knowledge of the now inadmissible statements. Cf. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

fact of conspiracy is proven. This type of statement is but one of many that are encompassed by the coconspirator rule. As to some statements, the competency issue may be more pronounced; however, both elements exist in all of these declarations.

In fact, no analyst has denied the existence of relevancy issues. Those favoring a judicial resolution have settled upon an analysis which accepts two interpretations. One interpretation is competency, the other relevancy. This analysis then confesses that choice is impossible. The Rule 104(b) problem is thus not to be solved with reference to the Rule. Instead, it is suggested that a policy analysis should take precedence over the language of the Rule. The policy referred to is the confusion and futility created by twice giving the jury the same issue. Its source is the merger between the ultimate and preliminary issues.

It is contended herein that the Rule does not permit such a resolution. Rule 104(b) was enacted to guarantee a jury determination of matters of conditional relevancy. Agency is specifically identified as a conditional relevancy issue. It is a requirement imposed by Rule 401. Its character does not change because it and the ultimate issue are the same. Nor does its importance diminish because Rule 801 imposes the same requirement. Once it has been demonstrated that there is a relevancy issue, Rule 104(b) mandates its submission to the jury. The Rule contains no exception for situations in which the ultimate and preliminary issues merge. Without a stated exception, the policy of leaving such issues with the jury cannot be disregarded. Indeed, the absence of any provision for a different procedure in a merger situation, even in the Advisory Committee Notes, suggests that the revisionary procedure was intentionally rejected. In any event, an analysis of Rule 104(b) indicates that it mandates submission of the preliminary issue to the jury.


64. Rule 104 does not clearly resolve the ambiguity with regard to who should decide the preliminary questions in this area [coconspirators' out-of-court declarations] . . . . [S]uch preliminary issues might well be couched in terms of relevancy and be for the jury under subdivision (b) of the rule. On the other hand, if they are considered as matters of competence the determination would clearly be for the judge under subdivision (a).

65. Id.
A Policy Analysis

No analysis of this problem would be complete, however, if restricted to the language of Rule 104. The conclusion that the preliminary facts should be decided by the jury must be tested with reference to the impact such a process would have on the fairness of the proceedings.

The first aspect to be discussed is the law of hearsay. Typically, the preliminary factors to be judged in a potential hearsay situation relate to the circumstances in which a statement was uttered. Categorization of the statement as hearsay, nonhearsay or an exception is determined by reference to these situational factors. For example, to introduce a statement into evidence as a dying declaration, the preliminary facts that must be proven refer exclusively to the circumstances in which the statement was made. The statement must concern the cause of death and be made under a belief that death was imminent. Similarly, to admit acts as nonhearsay, the court must find that the action was not intended as an assertion. This situational analysis permits the court to find that the statement was made in circumstances predetermined to be sufficiently reliable.

Only two of the factors comprising the coconspirator rule fit this mode. They are the requirements that the statements be made during and in furtherance of the conspiracy. Their focus is upon the situation in which the statement was made. They test the statement and limit admissibility of the extrajudicial declaration to those made in circumstances in which there is no obvious or overwhelming motive to lie.

The other two requirements—that the statements may not

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69. 5 J. WIGMORE, EVIDENCE § 1420-26, at 251 (Chadbourn rev. 1974).

[T]he trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability. . . . In most cases the determination that a declaration is in furtherance of the conspiracy . . . will decide whether sufficient indicia of reliability were present.

See 4 WEINSTEIN & BERGER, supra note 11, ¶ 801(d)(2)(B)(01), at 144-47. See also Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1173 (1954), where it is stated:

Declarations made after the conspiracy ends are particularly untrustworthy. Once the conspiracy terminates, the interest of every member is to avoid responsibility and shift the blame . . . . The case for admitting only declarations made during the pendency of the conspiracy resembles that for furtherance.
be admitted unless there is independent proof that the conspiracy exists and that the nondeclarant is a member—are, however, unique in the law of hearsay. Their requirement of independent proof tells us nothing about the reliability of the statement as a function of the situation in which it was made. Independent proof does, however, demonstrate the conditional relevancy of the statement. Thus, the requirements would be imposed by Rule 401, even if they were not simultaneously elements of Rule 801.

Only in one situation can independent proof assist in testing the reliability of the statement. When the statement contains proof of the conspiracy or of the nondeclarant’s membership, the independent proof requirement imposes a burden upon the prosecutor to corroborate the implicating statement.  

Federal law rejects any requirement of corroboration for accomplice testimony. Nonetheless, these vicarious admissions are too suspect to be permitted without some support for the accuracy of the assertion. In effect, by requiring corroboration of this type of coconspirator statement, reliability is proven through the enhancement of the declarant’s credibility. But the statement itself is not made more reliable if it is corroborated; rather, it is made more credible. Corroborated or not, the statement has the same inherent indicia of reliability. To the trier of fact, however, it becomes far more reasonable to accept the statement and to give it weight if it is supported by other evidence. Thus, when the assertion proves its own relevancy, the independent proof requirement is a guide to the person who will be deciding the credibility issue. It tells him how to structure his analysis of the evidence.

In demanding independent proof of the existence of a conspiracy, the courts have attempted to alleviate some of the prejudice that would otherwise affect the fairness of the nondeclarant’s trial. Logically sufficient evidence is not admissible unless its conditional relevancy is proven. If the statement tends to prove its own relevancy, it still will be barred unless the credibility of

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72. See, e.g., Caminetti v. United States, 242 U.S. 470, 495 (1917); United States v. Willis, 473 F.2d 450, 454 (6th Cir. 1973); United States v. Hibler, 463 F.2d 455, 458 (9th Cir. 1972); United States v. Adams, 454 F.2d 1367, 1360 (7th Cir. 1972); Patterson v. United States, 413 F.2d 1001, 1003 (5th Cir. 1969).

the declarant is corroborated. If these latter assertions were admitted without corroboration, the purpose of the exclusionary hearsay rule would be defeated. "[H]earsay would [be permitted to] lift itself by its own bootstraps."\textsuperscript{74}

The analysis of these preliminary factors as competency requirements was induced by the similarity in function between traditional competency standards and this unique conditional relevancy-corroboration requirement. In both cases the function is to prevent the introduction of evidence that may unfairly prejudice a party. But the independent-proof-of-preliminary-facts requirement of the coconspirator rule is not a competency requirement. The requirements are actually guides for the trier of fact. No matter what the verbiage of the declaration, the independent evidence requirement instructs the trier of fact how to treat the proof. If the statement does not prove the conspiracy, he is to eliminate it from his consideration until he finds that proof in the record. If the statement does prove the conspiracy, the trier of fact is instructed to perform the same intellectual analysis, but the policy reason is different. In this latter situation, the trier of fact performs the analysis to corroborate the credibility of the declarant.

It is the fact assessment attribute of this unique requirement that makes any judicial decision of the preliminary issue inappropriate. The policy behind the rule is to balance the need for the testimony against its suspect character. The method is the imposition of a procedure through which relevance and credibility are tested. Since the jury decides both of these issues, it must decide the preliminary fact question as well. To take the issue from the jury is to diminish the protection of the preliminary requirement. The bizarre results caused by giving the decision to the judge have already been discussed.

The second policy that pertains to the solution of this problem centers upon the fairness of the proceeding. Removal of such issues from the jury when the ultimate and preliminary questions merged was motivated by the fear that the jury could not separate its function on the twin issues. Submission constituted an abandonment of the effort to restrict use of the evidence.\textsuperscript{75} The defendant was perceived as the prejudiced party. If the evidence was not admissible the jury should not hear it. Through a similar

\textsuperscript{74} Glasser v. United States, 315 U.S. 60, 75 (1942).

\textsuperscript{75} See note 32 supra.
analysis the Supreme Court refused to allow juries to decide questions of the voluntariness of confessions.\textsuperscript{76}

But experience with the revisionary rule has shown that less prejudice would inure to the defendant by giving the issue to the jury. The reasons are varied.

One of the strongest reasons stems from courts increasingly admitting hearsay statements subject to connection.\textsuperscript{77} Juries are no longer protected by an evidentiary hearing conducted out of their presence. The interest of jury protection is abandoned. Jurors will be burdened with the task of ignoring what they have already heard, whether they or the judge decide admissibility. In the modern procedural setting, submission of the admissibility issue to the jury creates no prejudice to the defendant. As previously discussed, the standard of proof applied by some of the courts which follow the revisionary procedure is lower than the precharge screening standard which would be imposed pursuant to Rule 104(b). Giving the task to the jury, rather than prejudicing the defendant, would further protect him in those circuits.

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

\textsuperscript{76} Cf. Jackson v. Denno, 378 U.S. 368, 390-91 (1964); Delli Paoli v. United States, 352 U.S. 232 (1957). "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." Delli Paoli v. United States, supra at 248.

\textsuperscript{77} See, e.g., Fed. R. Evid. 104(b).

Where the exclusion is based on a policy of protections of an interest, nothing could be more absurd than to violate the interest and then instruct the jury to repair the damage by disregarding the wrongly extracted evidence.

Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165, 169 (1929).
Even if the direction to twice decide the conspiracy issue does not reflect the reality of the human decisionmaking process, the charge will achieve its purpose. Letting the judge decide the preliminary issue is not an adequate substitute. He has no greater capacity to ignore what he has heard than do the jurors.78 If the task is truly impossible, there is slight reason to believe the judge will perform it better.

The potent element of the traditional coconspirator charge is that it directs the jury to follow a procedure. Since it is fair to assume that the jurors try to follow the law, it imposes upon them a duty to try to segregate this type of evidence from the rest. Merely by making that effort, they effectuate all of the policies that lead to the formulation of the rule.

The final argument of those supporting the revisionary practice is that judicial decision makes no difference because the jury will decide the issue in any event.79 They will get it as the ultimate fact. This argument, too, must fail. “To decide B on evidence exclusive of A is quite a different thing from deciding B with the helpful or harmful influence of A.”80 The direction to the jury to attempt the former creates the possibility that the law’s distinction will be one without a difference. Any risk of prejudice is removed since the judge decides the screening issue—whether there is a prima facie case without the statements—by the same standard that he would follow if he were to be given the ultimate decision. Submission to the jury cannot injure either party. At worst it is a “second bite at the apple” for the defendant.81

Pursuit of the traditional procedure better alerts the jury to the inherent unreliability of this type of evidence. Since it is the jurors who will make the ultimate decision, these coconspirator guidelines that were created to protect against improvident fact decisions should be given to them. The jurors should be given this guidance. When they fail to apply it literally, the judge’s prescreening prevents any harm to the parties. When they succeed, the optimism behind our legal system that expects complex problems to be solved by lay jurors will triumph.

79. Maguire & Epstein, supra note 22, at 416.
80. Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165, 169 (1929). Morgan uses this proposition to reject introduction of evidence in a jury determination without significant prescreening by the court.
81. 1 Weinstein & Berger, supra note 11, ¶ 104[05].
In 1970 the Ninth Circuit sought guidance in structuring the consideration of preliminary facts:\textsuperscript{82}

\[\text{Although we are mindful of the danger that a jury, in violation of its instructions, may consider the out-of-court statements as well as the independent evidence in determining the preliminary fact of the existence of a common scheme or plan, we believe that any change in the allocation of existing functions between judge and jury must await direction from the Supreme Court.}\]

With Rule 104(b), the Supreme Court has provided that direction. The preliminary fact issues must be decided by the jury.

\textsuperscript{82} United States v. Griffin, 434 F.2d 978, 984-85 (9th Cir. 1970).