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# THE COCONSPIRATORS' EXCEPTION: DEFINING THE STANDARD OF THE INDEPENDENT EVIDENCE TEST UNDER THE NEW FEDERAL RULES OF EVIDENCE

*Paul B. Bergman\**

## INTRODUCTION

Every circuit in the federal system permits the reception in evidence of hearsay declarations by persons alleged to be coconspirators of the defendant on trial.<sup>1</sup> The so-called coconspirators' exception to the hearsay rule applies, as the Supreme Court has stated in *Anderson v. United States*, "if the declaration was [1] made during the course of and [2] in furtherance of the conspiracy charged . . . ."<sup>2</sup> As a practical matter, though, the admissibility of the hearsay evidence does not rest so much upon fulfilling the conditions enunciated in *Anderson* as it does upon satisfying a third: a determination that there is sufficient evidence exclusive of the hearsay to connect the defendant with the conspiracy.<sup>3</sup>

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1. See cases cited in note 3 *infra*.

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

3. That sufficient evidence "independent" of the hearsay is required has been acknowledged by the Supreme Court. In *Glasser v. United States*, 315 U.S. 60 (1942), the Court stated:

[D]eclarations [of co-conspirators] are admissible . . . only if there is proof *aliunde* that he [the defendant] is connected with the conspiracy. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.

*Id.* at 74-75 (dictum) (citations omitted). Moreover, a showing of independent evidence is uniformly required throughout the circuits. *First Circuit*: "The declaration of one co-conspirator is inadmissible against a second alleged co-conspirator . . . absent independent proof that the second co-conspirator is connected with the conspiracy." *United States v. Johnson*, 467 F.2d 804, 807 (1st Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *Second Circuit*: "[T]he judge must determine . . . whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *Third Circuit*: "Hearsay statements are inadmissible when no independent evidence links the declarant to the defendant." *United States v. Bey*, 437 F.2d 188, 190 (3d Cir. 1971) (citation omitted); *Fifth Circuit*: "[T]he government must introduce sufficient independent evidence of the existence of a conspiracy and of appellant's participation therein . . . ." *United States v. Rodriguez*, 509 F.2d 1342, 1346 (5th Cir. 1975); *Sixth Circuit*: "To permit consideration of hearsay, there must be sufficient independent evidence apart from the hearsay to establish a conspiracy or joint criminal venture between

The federal courts have not formulated a uniform test to determine the quantum of independent evidence necessary to satisfy this third precondition to the admission of a coconspirator's declaration. It is the thesis of this article that while the Federal Rules of Evidence do not mandate any fixed standard for reception of hearsay statements of coconspirators in the context of the independent evidence test, they do afford the courts an opportunity to reexamine their previous decisions with regard to the standard by which independent evidence is gauged. In addition, the new Rules offer courts the option of discarding the independent evidence test altogether and considering the hearsay itself in determining whether the hearsay should come before the jury. This option should be exercised so that hearsay declarations of a coconspirator will not be admitted unless the court is satisfied that there is proof beyond a reasonable doubt that the defendant against whom the declaration is offered was a member of the conspiracy at issue. The trial judge should be free as a matter of discretion to rely upon the disputed hearsay in making that determination.

#### CURRENT FORMULATION OF THE TEST

Uniformly, the federal courts of appeals have instructed trial judges in the district courts<sup>4</sup> that they must ignore the hearsay

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the declarant and the defendant." *United States v. Craig*, 522 F.2d 29, 31 (6th Cir. 1975) (citations and footnotes omitted); *Seventh Circuit*: "[T]here must be sufficient evidence aliunde extra-judicial declarations of co-conspirators establishing the existence of the conspiracy and connecting the appellant with it." *United States v. Santos*, 385 F.2d 43, 44 (7th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968); *Eighth Circuit*: "[I]n order that the declarations of an alleged co-conspirator be admissible against a defendant there must be proof aliunde of the alleged declarations of the existence of a conspiracy. . . ." *Rizzo v. United States*, 304 F.2d 810, 826 (8th Cir.), *cert. denied*, 371 U.S. 890 (1962); *Ninth Circuit*: "[S]uch declarations are admissible . . . only if there is proof independent of the declaration that he [defendant] is connected with the conspiracy." *Carbo v. United States*, 314 F.2d 718, 735 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); *Tenth Circuit*: "[T]he existence of the conspiracy must be shown and the connection of the [defendant] therewith established by independent evidence." *Glover v. United States*, 306 F.2d 594, 595 (10th Cir. 1962); *D.C. Circuit*: "[T]he statements of a coconspirator are inadmissible . . . unless there is substantial independent evidence tending to establish the existence of the conspiracy . . ." *Laughlin v. United States*, 385 F.2d 287, 292 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

While the Fourth Circuit has not explicitly remarked that the evidence of the conspiracy's existence and the defendant's connection with it be independently demonstrated, the requirement is implicit in its decisions. See *United States v. Vaught*, 485 F.2d 320, 323 (4th Cir. 1973); *United States v. Sapperstein*, 312 F.2d 694, 698 (4th Cir. 1963).

4. The question of whether there is "sufficient" independent evidence is properly determined by the court and should not be left to the jury as a preliminary matter. See Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of*

itself, and concentrate solely upon the so-called independent evidence in the case, before determining whether there is sufficient foundation to admit the hearsay.<sup>5</sup> In effect, trial judges have been asked to perform a kind of mental gymnastic<sup>6</sup> which, at times, has resulted in confusion, even among seasoned jurists.<sup>7</sup>

While the circuit courts have been firm in their requirement that the independence of the evidence be demonstrated, they have been neither uniform nor clear in their application of the standard by which the sufficiency of the independent evidence is to be gauged. At one pole is the test currently employed by the Second Circuit, first enunciated by Judge Friendly in *United*

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*Fact*, 43 HARV. L. REV. 165, 186-87 (1929). As to whether the jury should also be allowed the opportunity to exclude the hearsay on the same theory, compare *United States v. Bermudez*, 526 F.2d 89, 98-99 (2d Cir. 1975), with *United States v. Rosenstein*, 474 F.2d 705, 712-13 (2d Cir. 1973). See generally 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[5] (1975). Surely, unless we wish to confuse jurors hopelessly, they should not be given instructions in conspiracy cases much beyond what is necessary. In addition, there seems to be no sound reason to permit a double screening on questions of admissibility. Cf. 18 U.S.C. § 3501(a) (1971); *United States v. Barry*, 518 F.2d 342, 346 (2d Cir. 1975). In *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950) (dictum), *aff'd*, 341 U.S. 494 (1951), Judge Learned Hand questioned the utility of having the jury first determine that the defendant's participation in the conspiracy was shown beyond a reasonable doubt before the hearsay declarations. He remarked: "[U]pon that hypothesis, the declarations would merely serve to confirm what the jury had already decided." *Id.* at 231. Of course, having the court determine that the evidence meets a certain standard before allowing the jury to consider the question is an entirely different matter. But see Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1390 n.57 (1972).

5. The premise most consistently used for the reception of a coconspirator's statement has been the agency theory. See *Lutwak v. United States*, 344 U.S. 604, 617 (1953); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917); *Logan v. United States*, 144 U.S. 263, 308-09 (1892); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469 (1827). Because the existence of an agency cannot be shown by the agent's own declaration, however, the fact of the agency must be "shown independently." *United States v. Renda*, 56 F.2d 601, 602 (2d Cir. 1932).

6. In *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970), Judge Friendly remarked:

It is difficult, of course, for the trial judge or a reviewing court to perform the intellectual feat of assessing the independent evidence free from the color shed upon it by the hearsay.

*Id.* at 1120.

7. In *United States v. Fantuzzi*, 463 F.2d 683 (2d Cir. 1972), a case involving a narcotics conspiracy, the court gave the governing standard an unintended dual aspect that had the momentary and accidental and, in the author's view, correct effect of partially merging the evidentiary issue with the issue of whether the evidence was sufficient to prove guilt beyond a reasonable doubt:

He [the defendant Bruno] argues first, that the Government failed to establish by independent non-hearsay evidence that he had knowledge of the illegal im-

*States v. Geaney*,<sup>8</sup> where he stated:<sup>9</sup>

[T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances.

In direct contrast to the Second Circuit's view is the more recent holding of the Fifth Circuit in *United States v. Oliva*.<sup>10</sup> In *Oliva* the court explicitly adopted a standard which requires that the prosecution establish "a prima facie case of the existence of a conspiracy and of the defendant's participation therein," and that the independent evidence "be sufficient to support a finding by the jury that the defendant was himself a conspirator."<sup>11</sup>

While none of the remaining circuits have made their positions entirely clear on this issue, it appears that the Second Circuit's standard is the minimum which must be met. While other circuits may demand a greater showing of independence than is required by the Second Circuit, no circuit, despite the assertions of the court in *Oliva*, has gone as far as the Fifth Circuit and required that the proof be beyond a reasonable doubt.<sup>12</sup>

portation of the cocaine, and second, that the evidence pertaining to his words or his acts was insufficient to prove that he was a member of the conspiracy. As we find reversible error on the latter ground we shall have no occasion to discuss the former contention.

*Id.* at 689. Curiously, the court in *Fantuzzi* then proceeded to discuss the Government's failure to show by independent evidence that the defendant Bruno was connected with the conspiracy and based its decision on that ground, not on the ground that the evidence was insufficient to prove guilt beyond a reasonable doubt. *Query*: given its admissibility, why would hearsay evidence not have been probative of the defendant's state of mind?

8. 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

9. *Id.* at 1120.

10. 497 F.2d 130 (5th Cir. 1974).

11. *Id.* at 132-33.

12. There are a number of circuits which, like the Fifth Circuit, speak of a "prima facie" case of conspiracy as the test to be used in determining whether there is independent evidence to establish the defendant's connection with the conspiracy. *See, e.g.*, *United States v. Morton*, 483 F.2d 573, 576 (8th Cir. 1973); *United States v. Spanos*, 462 F.2d 1012, 1014 (9th Cir. 1972); *United States v. Hoffa*, 349 F.2d 20, 41 (6th Cir. 1965), *aff'd on other grounds*, 385 U.S. 293 (1966). Nevertheless, none has stated that the standard to be employed involves proof beyond a reasonable doubt. In these cases, the expression "prima facie" simply begs the question.

It is difficult to determine the First Circuit's position on this issue. In *United States v. Johnson*, 467 F.2d 804 (1st Cir. 1972), *cert. denied*, 410 U.S. 909 (1973), the court stated that the "independent evidence need not establish the alleged co-conspirator's participation beyond a reasonable doubt." *Id.* at 807. *See also* *United States v. Bickford*, 445 F.2d 829, 830 (1st Cir.), *cert. denied*, 404 U.S. 946 (1971). Nevertheless, in *Oliva*, the Fifth Circuit—inexplicably, it would seem—erroneously lumped the First Circuit, citing *Johnson*, as one of three other circuits (erroneously including, as well, the Eighth and the

The Supreme Court has not offered any definitive guidance in the area, and it has not adopted a standard supported by adherents of either position. Thus, in *United States v. Nixon*<sup>13</sup> the Court stated:

Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy.

In a footnote to that statement, the Court elaborated on its expression "independent evidence" and suggested that "as a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury."<sup>14</sup> Plainly, if the Court meant to equate "substantial" with the reasonable doubt standard, it could have done so explicitly. Conversely, if "substantial" means less than a reasonable doubt, then it is difficult to understand why the Court would speak of enough "independent evidence" to "take the question to the jury." Given this ambiguity, it seems entirely appropriate, then, to dismiss as dicta the Court's statements concerning the degree of evidence necessary to admit the hearsay evidence.<sup>15</sup>

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Ninth) which had cast the prima facie test in terms of proof beyond a reasonable doubt. *Id.* at 833. One could easily dismiss such reliance were it not for the fact that when the First Circuit was given the opportunity to correct the false impression in *United States v. Klein*, 522 F.2d 296 (1st Cir. 1975), it remained ambiguously silent.

13. 418 U.S. 683, 701 (1974) (footnote omitted).

14. *Id.* at 701 n.14. It is difficult to understand what "question" the Court speaks of when it contemplates taking "the question to the jury." It appears, though, that the Court is concerned with the question of guilt or innocence because the footnote concludes with the correct observation that the admissibility of the hearsay is a question to be decided by the trial judge, unless the Court means to have the question passed upon twice.

15. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall, speaking of dicta in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), observed:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

*Cohens v. Virginia*, *supra* at 398.

### THE NEW FEDERAL RULES

With the advent of the Federal Rules of Evidence, an entirely new framework has been given to federal trial judges for determining the admissibility of coconspirators' statements. That framework is not explicitly provided for in the Rules; instead, it emerges from what can best be termed an interplay between the "admission by a party-opponent" of Rule 801(d)(2)(E),<sup>16</sup> and the provisions of Rule 104(a)<sup>17</sup> which deal with preliminary questions concerning the admissibility of all evidence, including coconspirators' statements.

Rule 801(d)(2)(E), which takes admissions by a party-opponent out of the operation of the hearsay rule,<sup>18</sup> includes within its ambit statements by coconspirators which are made, in the language of *Anderson v. United States*, "during the course of and in furtherance of the conspiracy."<sup>19</sup> It can be seen, then, that while the Rule explicitly continues the first two preconditions to admissibility of a coconspirator's declaration, no provision is made respecting the quantum of evidence necessary to establish the "party-opponent's" participation in the conspiracy. On that issue, the Federal Rules of Evidence are silent. More significantly, there is no requirement in the Rules that there be evidence independent of the hearsay "statement by a co-conspirator of a party . . . ."<sup>20</sup> The Rules do not carry forward the

16. FED. R. EVID. 801(d)(2) provides that a statement is not hearsay if:

. . . .

The statement is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

17. FED. R. EVID. 104(a) provides:

(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.

18. The FEDERAL RULES OF EVIDENCE no longer classify the coconspirators' exception to the hearsay rule as a hearsay exception. Instead, subdivision (d)(2)(E) of Rule 801 expressly provides that an "admission by [a] party opponent," which includes in subdivision (d)(1)(E) of Rule 801, "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy," is "a statement [which] is not hearsay."

19. 417 U.S. 211, 218 (1974).

20. FED. R. EVID. 801(d)(2). For the text of this Rule see note 16 *supra*.

requirement, set forth in cases decided before the Rules were adopted,<sup>21</sup> that there be evidence independent of the contents of the declaration to connect a defendant to the conspiracy. Thus, if the courts choose to reevaluate the so-called independent evidence test, they can properly assess their prior holdings on the pretext that Rule 801(d)(2)(E) reopens the inquiry. The key to the reevaluation, however, rests with Rule 104(a).

Rule 104(a) provides judges with the flexibility needed to deal profitably with the lacuna in Rule 801(d)(2)(E) inasmuch as it gives trial judges the discretion to consider otherwise inadmissible evidence in determining threshold questions of admissibility. Rule 104(a) provides, in pertinent part, that a court, in determining a preliminary question of the admissibility of evidence, "is not bound by the rules of evidence except those with respect to privileges." Thus, even though the courts, undoubtedly, will not completely shed the independent evidence test (as they should not), Rule 104(a) specifically allows judges to have a "look-see" at the hearsay in order to determine whether the jury should be permitted to consider the declaration during its deliberations.

For example, suppose the following: *A*, who sells counterfeit 20-dollar bills, begins to deal (to his ultimate detriment) with an undercover agent of the Secret Service. They have several meetings during which *A* repeatedly mentions his "connection," *i.e.*, the person who supplies him with the counterfeit money. Prior to some of these meetings, surveillance agents observe an unknown person arriving at *A*'s apartment house, driving a yellow sports car. One day, in passing, *A* casually mentions to the agent that his "connection" drives a yellow sports car. Eventually, after the agent has won his full confidence, *A* tells him that his supplier is *B*. Investigation by agents shows conclusively that *B* is the owner and driver of the yellow sports car which had been seen at *A*'s apartment just before several of the counterfeit sales.

On these facts, there is no sound reason why both of *A*'s statements, if related by the agent as a witness at *B*'s trial, should not be admitted in evidence. Each was made under circumstances which were reliable. The first statement was, by itself, innocuous, and the second was made at an unguarded moment. Taken together, the statements buttress themselves. Nevertheless, these two highly probative items of evidence would not be admissible under the current formulations of the coconspirators' exception,

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21. See note 3 *supra*.

because without *A*'s statements, *B*'s visits to the apartment are hardly sufficient to connect him with the conspiracy. If we were to deny admission of *A*'s statements about his supplier's sports car, the agent's testimony might be considered too weak to support a finding that there was sufficient evidence to allow reception of *A*'s direct statement that *B* was his supplier. Admissibility of *A*'s statement, therefore, should be a matter of discretion for the trial court.

In effect, Rules 801(d)(2)(E) and 104(a) allow judges to give full credit to the disputed hearsay if they choose to do so. At the same time, the Rules arguably give some assistance to the accused by requiring that his or her participation in the charged crime be shown beyond a reasonable doubt before the hearsay is admitted. Because such an approach will necessarily involve a preview by the court of evidence yet to be introduced,<sup>22</sup> the confusion and time wasting which often accompanies the reception of such evidence is eliminated. In addition, this approach will permit an across-the-board application by trial judges of the same standard that they currently employ in sending the case to the jury.<sup>23</sup> It will also provide a needed uniformity among the circuits regarding the standard to be followed.

At least one notable authority has suggested the above approach.<sup>24</sup> On the other hand, the notion that the hearsay itself can

22. Hearsay evidence under the coconspirator's exception can be admitted subject to connection. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

23. With the Second Circuit's long-awaited decision in *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972), it is now firmly established that before a criminal case may properly be submitted to a jury for its consideration, there must be enough evidence for a reasonable mind to find guilt beyond a reasonable doubt. See *Curley v. United States*, 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947) for Judge Prettyman's oft-quoted statement of the standard:

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

*Id.* at 232-33 (footnote omitted).

24. District Judge Jack B. Weinstein, a member of the Advisory Committee on the Federal Rules of Evidence, suggests:

The better practice would be to require a very high degree of proof before admit-

be considered at all has elsewhere been dismissed out of hand.<sup>25</sup> The point is, however, that whatever rule is adopted, reality must be confronted: like it or not, courts do consider the hearsay even when they say they do not consider it; and when courts recognize what they are doing, they look to the contents of the hearsay to justify the admission of the declaration into evidence.

In *United States v. Calarco*<sup>26</sup> for instance, eight men were indicted for conspiring to hijack a truck. The main witness for the government was Warren, one of the alleged conspirators. Riviello, another defendant, was convicted on the basis of Warren's testimony. The conspiracy was hatched by Warren and three other men, including one John Calarco, at a meeting in a bar. Warren testified that during the meeting Calarco suggested that the others accompany him across town where he would talk with the people who were going to purchase the goods after the truck was hijacked. The men accompanied Calarco and waited for him outside another bar while Calarco presumably spoke with the ultimate purchasers. Calarco eventually emerged from the bar and, according to Warren, told the others that they were to follow the two people who were then just coming out of the bar. These two men were to show Calarco's men where to bring the hijacked truck. One of the two people emerging from the bar was Riviello. Up to this point, Warren had not had, nor would he ever have, a conversation with Riviello.

Riviello and his companion got into a car and were followed by Warren, Calarco and the others to a third location. Calarco got out of his car and, for the next 15 minutes, spoke with Riviello in Riviello's car, out of Warren's earshot. When he returned to Warren and the others, Calarco said: "When you get the truck, this is where you are going to bring it, bring it here."<sup>27</sup> Thereafter, the Calarco-Warren group planned and attempted to execute the hijacking. The attempt was a fiasco and all the participants were arrested.

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ting the statement. Only if the court is itself convinced beyond a reasonable doubt—considering hearsay as well as non-hearsay evidence—of the conspiracy, defendant's membership, and that the statement was made in furtherance thereof, should it admit.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 104[05] (1975) (footnote omitted).

25. In the 1959 Symposium *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959), the authors remark, without extensive discussion, that the approach of considering the hearsay is logically inconsistent and that the requirement of independent evidence becomes "virtually meaningless." *Id.* at 987.

26. 424 F.2d 657 (2d Cir. 1970).

27. *Id.* at 658.

It is instructive to examine how the Second Circuit bootstrapped the insignificant incident of Riviello's meeting with Calarco to meet its test that there be a "fair preponderance of the evidence independent of the hearsay utterances."<sup>28</sup> The court reasoned that Warren's testimony that Calarco had said, "When you get the truck this is where you are going to bring it, bring it here" was "not hearsay as to Riviello" because it was, in the court's view, a relevant nonhearsay "verbal act" which was "not offered in this context to show the truth of either Calarco's suggestion that the particular location was a suitable one for delivery of the truck or of Warren's own assertion that Calarco's statement concerned delivery of a truck."<sup>29</sup> When *Calarco* is examined further,<sup>30</sup> we find that the court used Calarco's so-called nonhearsay verbal act for precisely the prohibited purpose that would have attended its use had Calarco spelled out that he had conversed with Riviello about the hijacking and received instructions from him. Thus the court concluded:<sup>31</sup>

The non-hearsay evidence linking Riviello to the conspiracy in this case included not just his "mere presence" at a certain site,

28. *Id.* at 660.

29. The expression "verbal act" in the context of the coconspirators' exception to the hearsay rule is vague and not altogether satisfactorily defined. See Symposium, 72 HARV. L. REV. 920, *supra* note 25, at 989. To the extent that it is used as a term to express what courts characterize as statements which they say are not hearsay, one might, as a cynic, be content. Nevertheless, the expression does connote something. It derives from the notion that declarations of conspirators are the very essence of the crime of conspiracy. As stated by Justice Learned Hand:

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.

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

Thus, nonnarrative statements of coconspirators are admitted as utterances to show the progress of the conspiracy. See *United States v. Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973); *United States v. Costello*, 352 F.2d 848, 853-54 (2d Cir. 1965), *rev'd on other grounds*, 390 U.S. 39 (1968). Cf. *United States v. Cirillo*, 499 F.2d 872, 885 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). They should not be admitted for one purpose, a lesser one, and then misused.

30. Before proceeding with this examination, it would be helpful to imagine what the court might have determined if Calarco had stated to Warren, "I just spoke with Riviello who said that this is where you are going to bring the truck after it is hijacked." Obviously, such a statement would clearly be hearsay as to Riviello and could not, in any sense, be considered as having been offered for anything less than to show that Calarco had a conversation with Riviello about the hijacking during which he had received instructions.

31. *United States v. Calarco*, 424 F.2d 657, 660 (1970) (footnote omitted) (emphasis added).

but also his acts of leading the others from the Democratic Club to that location and *there relaying instructions to them through Calarco*. This was sufficient for the trial judge to conclude that Riviello was a participant in the conspiracy and that hearsay statements of his co-conspirators in furtherance of the conspiracy were admissible against him.

*Calarco* is usefully compared with another Second Circuit case in which the panel refused to consider the disputed statements as a "non-hearsay verbal act." In *United States v. Kaplan*<sup>32</sup> one Lange, a small-time narcotics peddler, had been dealing with Alleva, an undercover agent for the government. On January 5 Alleva spoke with Lange on the telephone and was told to come to Lange's home the following day where "his connection would be there with him."<sup>33</sup> Predictably, objection to the admission of this statement was made and, following extended argument in the trial court, the judge admitted the statement as a nonhearsay verbal act to explain Alleva's state of mind when, the following day, he came to Lange's home and found the defendant Kaplan "half sitting, half lying on the mattress on the floor."<sup>34</sup> The state of mind, obviously, was Alleva's belief that Kaplan was Lange's "connection." On that basis, the jury was instructed, in the words of the court of appeals, "with meticulous care"<sup>35</sup> that it was not to assume that Lange had had any prior conversations with Kaplan. On appeal, the court was unable consciously to perform the same alchemy on Lange's "verbal act" which the court had performed with Calarco's verbal act. "We conclude," the court stated, "that its potency lay not in the ostensible purpose of its technical use, as illuminating Alleva's 'state of mind,' but in its overwhelmingly probable misuse by the triers of fact—as evidence that appellant was in fact Lange's connection, as Alleva said Lange had said."<sup>36</sup>

One would think, then, that the court in the *Kaplan* case, apparently concerned with honing a close edge on the coconspirators' exception to the hearsay rule, would eschew any unauthorized use of the forbidden hearsay statement. Nevertheless, on

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32. 510 F.2d 606 (2d Cir. 1974).

33. *Id.* at 609 n.1.

34. *Id.* at 608.

35. *Id.*

36. *Id.* at 610. With refreshing candor the court in *Kaplan* remarked that "there are limits upon the powers of jurors—or judges or anyone—to keep connected thoughts separated from each other." *Id.* at 611. See note 6 *supra*.

further examination of the opinion in *Kaplan* it can be seen that the court would have permitted the hearsay use of the statement had it gone to the jury on that theory despite the absence of independent evidence to show that Lange's statement was uttered during the course of a conspiracy. Thus, while the evidence was entirely sufficient to show that Kaplan had joined the venture on January 6 at Lange's home, there was no independent evidence, apart from the hearsay, to show that Kaplan was part of the venture as of January 5. Clearly, if Kaplan were not found to have been part of the venture on January 5, Lange's statement could hardly have been made in the course of and in furtherance of a conspiracy which, as of January 5, included no one other than Lange.<sup>37</sup> It is, therefore, only by using the January 6th hearsay that the court could have concluded that Kaplan was part of the conspiracy on January 5.

### CONCLUSION

No standard for the admissibility of hearsay will be perfectly satisfactory for all occasions. Admittedly, a hearsay statement should not, without some additional support, usher itself into evidence. Thus, if the sole evidence in the case consists of a hearsay declaration such as "John Doe is my partner," additional corroborative evidence would be necessary. In a slightly different context, a requirement of corroboration has also worked perfectly well. New York, for instance, requires that before a defendant may be convicted on the testimony of an accomplice, there must be "corroborative evidence tending to connect the defendant with the commission of such offense."<sup>38</sup>

In conspiracy prosecutions where a major concern is the inability of a defendant to cross-examine a coconspirator regarding an out-of-court statement which comes before the jury, it seems reasonable to require that before a judge makes the determination that the statement is or is not to be admitted, the judge should be given the widest possible latitude in deciding whether there is enough for a reasonable juror to be convinced beyond a reasonable doubt that the defendant was a part of the conspiracy at issue. The proffered hearsay itself should be considered in making that determination.

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37. See, e.g., *Walker v. United States*, 104 F.2d 465 (4th Cir. 1939). A conspiracy must be made up of more than one person; one cannot conspire with himself.

38. N.Y. CRIM. PRO. L. § 60.22(1) (McKinney 1971).