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THE CO-CONSPIRATORS EXCEPTION TO THE HEARSAY RULE: PROCEDURAL IMPLEMENTATION AND CONFRONTATION CLAUSE REQUIREMENTS

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INTRODUCTION

Publicity surrounding the recent political conspiracy trials[1] has made laymen aware that the conspiracy charge is a powerful, if somewhat ill-defined, prosecutorial tool.[2] Both bench and bar, however, recognized long ago the importance of conspiracy indictments to prosecutors and the need to protect defendants from special dangers inherent in conspiracy prosecutions.[3] Despite such recognition and the plethora of law review articles on the subject,[4] conspiracy remains one of the least understood of all criminal offenses.[5]

One of the most confusing aspects of the conspiracy crime is the evidentiary principle known as the co-conspirator's exception to the hearsay rule. Simply formulated, the co-conspirators exception allows a conspirator to testify against his fellows regarding words spoken or acts performed in furtherance of the conspiracy and during its pendency, provided there exists independent proof to establish the conspiracy. This article will first focus on the issues related to the independent proof requirement, including the critical issue of whether the judge or the jury shall make the finding of independent proof. Second, the validity and prospective vitality of the co-conspirators exception, and the admission of hearsay generally, will be considered in light of recent decisions involving the hearsay rule and the sixth amendment right of confrontation. Before turning to these two areas, it may be helpful to lay a foundation by briefly reviewing the crime of conspiracy, the hearsay rule, and the co-conspirator's exception.

CRIMINAL CONSPIRACY

A criminal conspiracy is said to be a "partnership in crime." [6] More specifically, a criminal conspiracy is "an agreement between two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means." [7] While many

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[1] *See, e.g.*, United States v. Spock, 416 F.2d 165 (1st Cir. 1969); United States v. Dellinger, 69 CR 180 (N.D. Ill. 1969).

[2] Under the Sherman Antitrust Act, 15 U.S.C.§§ 1–7 (1964), the conspiracy prosecution was used frequently to thwart the organization and growth of labor unions. The enactment of the Norris-La Guardia (Anti-Injunction) Act, 29 U.S.C. §§ 101–15 (1964), in 1932 finally discouraged this practice.

[3] In 1925, Chief Justice Taft condemned the prevalent use of conspiracy charges brought "for the purpose —or at least with the effect—of bringing in much improper evidence," and emphasized that "the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." *Report of the Attorney General for 1925* 5–6. *See also* Judge Hand speaking for the court in United States v. Falcone, 100 F.2d 579, 581 (2d Cir. 1940):

> [Today] many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.

See Hudspeth v. McDonald, 130 F.2d 962 (10th Cir. 1941); *see generally*, O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 599 (1948). Perhaps one of the best statements of the fear of misuse of conspiracy prosecutions appears in Justice Jackson's concurring opinion in Krulewitch v. United States, 336 U.S. 440, 446–47 (1946), quoted *infra* note 5.

[4] *See, e.g.*, Arens, *Conspiracy Revisited*, 3 BUFFALO L. REV. 242 (1954); Goldstein, *The Krulewitch Warning: Guilt by Association*, 54 GEO. L.J. 133 (1965); Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941); Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957); Wechsler, Jones, & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957 (1961); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948).

[5] "The modern crime of conspiracy is so vague that it almost defies definition. . . . [C]hameleon-like, it takes on a special coloration from each of the many independent offenses on which it may be overlaid." Krulewitch v. United States, 336 U.S. 440–47 (1946) (Jackson, J., concurring).

"In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy." Harno, *supra* note 4, at 625.

[6] United States v. Kissel, 218 U.S. 601, 608 (1910); Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926).

[7] *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959) [hereinafter cited as *Developments*]; *see* Pettibone v. United States, 148 U.S. 197, 203 (1893).

jurisdictions require an overt act[8] as an element of the offense,[9] agreement is the gist of a conspiracy.[10] The requisite agreement need not even be express; it may be only a tacit, mutual understanding.[11] Moreover, criminal conspiracy is an independent crime, a distinct offense, separate from its object and from any substantive offenses committed in pursuance of the conspiratorial agreement.[12]

Because it often punishes conspirators for their uncompleted acts, conspiracy finds justification as a criminal offense in the assumption that group action toward an unlawful end presents a special danger to the general public.[13] Under this assumption, not only does concerted action increase the chances of success, it also increases the extent of potential harm.[14] Group action can expand both the scope and the complexity of the criminal undertaking. Group pressure also tends to prevent withdrawal and to inhibit disclosure.[15] Although the more participants in an activity, the greater the chance for infiltration by informers, or "leaks," the secret nature of a conspiracy[16] is thought to minimize possible detection by such "leaks." It is precisely this difficulty of detection and proof which has given rise to the flexibility and latitude accorded the judge in admitting evidence in a conspiracy trial.[17]

A second justification for conspiracy is derived

[8] *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 29.07 (2d ed. 1970):

> An 'overt act' is any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

See, e.g., Jordan v. United States, 370 F.2d 126 (10th Cir.), *cert. denied*, 386 U.S. 1033 (1967); Hansen v. United States, 326 F.2d 152 (9th Cir. 1963). Very little is needed to constitute an overt act. *See, e.g.*, Bartoli v. United States, 192 F. 2d 130 (4th Cir. 1951) (telephone conversation).

[9] *See, e.g.*, 18 U.S.C. § 371 (1964); ARIZ. REV. STAT. ANN. § 13-332 (1956); CAL. PENAL CODE § 184 (West 1970); ILL. REV. STAT. ch. 38, § 8-2 (1969); N.Y. PENAL LAW § 105.20 (McKinney 1967). *See generally* Note, *Criminal Conspiracy: Bearing of Overt Acts upon the Nature of the Crime*, 37 HARV. L. REV. 1121 (1924); Comment, *The "Overt Act" in Conspiracy*, 18 BROOKLYN L. REV. 263 (1952) (discussion of overt act requirement under New York law).

[10] *See* Black v. United States, 252 F.2d 93, 94 (9th Cir. 1958), where the court stated: "While the law requires overt acts to complete criminal conspiracies, the essence of the offense of the conspiracy, that which is punished, is the 'agreement.'" The agreement represents the actualization of the intent. It is the act which expresses in concrete form the threat to society of an intent shared by two or more persons. Vicarious liability is imputed and hearsay evidence admitted, statute of limitations tolled and venue attained—all by virtue of the terms of that agreement.

[11] *See, e.g.*, Rizzo v. United States, 304 F.2d 810 (8th Cir. 1962); Isaacs v. United States, 301 F.2d 706 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962). *See generally* Comment, *Conspiracy—Character of Agreement—Tacit Consent*, 2 VILL. L. REV. 230 (1957).

[12] *See* Blumenthal v. United States, 158 F.2d 883 (9th Cir. 1946), *aff'd*, 332 U.S. 539 (1947). In United States v. Bazzell, 187 F.2d 878, 884 (7th Cir.), *cert. denied*, 342 U.S. 849 (1951), the Seventh Circuit stated:

> The conspiracy remains none the less a crime because by its success an additional crime has been committed. . . . Consequently, the substantive offense is not merged in the charge of conspiracy . . . and the parties may be punished for their agreement to commit a crime as well as for the completed crime.

[13] *See Developments*, *supra* note 7, at 923–25. As Judge Coffin summarized in his dissent to United States v. Spock, 416 F.2d at 184:

> [T]he core idea underlying the conspiracy theory is that disciplined, concerted action poses a greater threat to society than does individual or uncoordinated group effort in that larger numbers permit a division of labor, and discipline makes withdrawal from the enterprise less likely.

[14] *See* Woods v. United States, 240 F.2d 37 (D.C. Cir. 1957).

[15] On the difficulty of detection of conspiracies, the Supreme Court noted in United States v. Rabinowich, 238 U.S. 78, 88 (1915):

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

[16] "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime." Blumenthal v. United States, 332 U.S. at 557. *But see* United States v. Spock, 416 F.2d 165, where the First Circuit stated that secrecy is not an essential element of a conspiracy. The purpose may be to commit open violations of the law.

[17] For example, circumstantial evidence of conspiracies is said to be much favored by the courts:

> It should be borne in mind that in a conspiracy case wide latitute is allowed in presenting evidence and it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged.

Shine v. United States, 209 F.2d 67, 74 (9th Cir. 1954). *See also* Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1160 (1954); *see generally* Eastern States Retail Lumber Dealers v. United States, 234 U.S. 600 (1914).

from agency principles. In defining conspiracy as a "partnership in criminal purposes," [18] courts have held that each conspirator becomes the agent of his fellow conspirators upon joining the conspiracy.[19] The agency theory in conspiracy "partnerships" imposes a stricter vicarious liability upon the "partners" than the law of agency imposes upon legitimate partnerships. Thus, a defendant may be a co-conspirator of persons whom he does not know.[20] He need not know the full extent or the entire scope of the conspiracy in order to be guilty.[21] Furthermore, by joining the conspiracy, a defendant may be deemed responsible for an act which preceded his entry, even if he had no knowledge of the act.[22]

These, then, are the two theories—difficulty of proof of conspiracies and the application of stringent principles of partnership and agency law—which underlie the conspiracy crime and the co-conspirator's exception to the hearsay rule. Inherent in the exception is the assumption that when a conspiracy is established, everything said, written, or done by any of the conspirators in furtherance of the common design is deemed to have been said, done, or written by every one of them and may be proved against each.[23] It is through this door that much hearsay testimony is admitted into evidence in a conspiracy trial.

[18] *See* Pinkerton v. United States, 328 U.S. 640, 644 (1946); United States v. Kissel, 218 U.S. 601, 608 (1910).

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

[20] *See* Lefco v. United States, 74 F.2d 66, 68 (3d Cir. 1934).

[21] *See* United States v. Manton, 107 F.2d 834, 848–49 (2d Cir. 1938); Marino v. United States, 91 F.2d 691, 696 (9th Cir. 1937).

[22] *See* cases cited at note 23 *infra*.

[23] *See* Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926):

> Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of the 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.

See also Agnello v. United States, 269 U.S. 20 (1925); Wiborg v. United States, 163 U.S. 632 (1896).

FED. R. CRIM. P. 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

THE HEARSAY RULE

The hearsay rule as conventionally stated[24] excludes out-of-court assertions[25] offered as evidence to prove the truth of the matter asserted.[26] For example, suppose that in the trial of Jones for the murder of Smith, a witness testifies that the deceased, shortly before his death, stated that "Jones shot me, my time is up." If the issue is the identity of Smith's murderer, the witness' testimony is hearsay and inadmissible unless it belongs within one of the exceptions to the hearsay rule.

The hearsay rule reflects the belief that some evidence which might be of probative value should not be admitted unless the declarant has actually appeared in court and has been cross-examined under oath with regard to his sincerity, memory, perception and ability to communicate.[27] As McCormick points out, the exclusionary rule is predicated on the fear that hearsay evidence is untrustworthy because any one or more of three guarantees of trustworthiness may be lacking: 1) the administration of an oath; 2) the opportunity to cross-examine; and 3) the opportunity for the trier of fact to observe the demeanor of the declarant if hearsay evidence is used.[28]

[24] The authors of a recent casebook devote approximately forty pages to the rationale and meaning of the hearsay rule. D. LOUISELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 50–99 (1968).

[25] The word "assertion" is used instead of "statement" to emphasize that hearsay may be non-verbal. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 225 (1954) [hereinafter cited as MCCORMICK]. *Cf.* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1971 REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, Rule 801(a) (2) (1971) [hereinafter cited as PROP. FED. R. EVID.].

[26] The definition used is essentially that found in LOUISELL, *et al.*, *supra* note 24, at 56. *See also* CAL. EVID. CODE § 1200 (West 1966). Wigmore does not attempt to define hearsay in his treatise on evidence. 5 J. WIGMORE, EVIDENCE §§ 1360–66 (3d ed. 1940) [hereinafter cited as WIGMORE]. McCormick offers a definition, but warns that not too much should be expected from any definition. MCCORMICK § 225. PROP. FED. R. EVID. 801(c) defines hearsay as "a statement other than one made by the declarant at the trial or hearing offered in evidence to prove the truth of the matter asserted."

[27] *See* PROP. FED. R. EVID., Introductory Note to Article VIII; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV 177 (1948); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 485 (1937); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

[28] MCCORMICK § 224. *See also* PROP. FED. R. EVID., Introductory Note to Article VIII; Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 495–96 (1951); *see*

Of these three indicia of trustworthiness, the absence of an opportunity to cross-examine is the principal justification for the rule excluding hearsay evidence.[29] Cross-examination is the primary legal instrument for testing the accuracy of a declarant's perception, memory, and ability to communicate.[30] While undergoing cross-examination, the declarant may be required to explain ambiguous, unclear or inconsistent testimony. Personality traits that influence his thinking and judgment may be disclosed. Questions may probe his state of mind at the time of perception, and numerous other factors which affect a declarant's mental processes may be investigated. The witness who reports hearsay statements can usually provide the judge and the jury with none of this information.[31] Thus, the fear of untrustworthiness upon which the hearsay rule is founded seems to require the exclusion of all out-of-court assertions offered as proof if the declarant does not appear in court.

Although the hearsay rule is founded upon the notion that "a mere hearsay is no evidence," [32] exceptions to the hearsay rule have been recognized by the law for as long as the rule itself has existed.[33] Indeed, the nature of the hearsay rule is difficult to ascertain because there are so many exceptions. Many legal scholars have offered explanations of the rule and its exceptions, some with an eye to rationalization. Wigmore suggested that the exceptions attempt to accommodate two interests: the reliability of[34] and necessity for[35] particular evidence. Maguire adds a third interest, one which is said to reflect the demands of the adversary system.[36]

It is beyond the scope of this article to rationalize the hearsay rule and its exceptions. It may be said, however, that the rule exists in the context of an adversary system which requires that proof of disputed facts be of a quality which satisfies the litigants that the means of reaching a decision are fair.[37] This need not require determination of anything approaching "truth" in an absolute sense. In this context, the hearsay rule may be viewed as predicated upon one or more of four considerations:[38]

1. To exclude evidence because, although relevant, its probative value is too slight to justify the time and expense to be spent in receiving it;

2. To exclude evidence because it has such a tendency to prejudice or to confuse that its use would probably do more harm than good;

3. To exclude evidence because it may be false, and because the opposite party could not be prepared to meet and rebut it;

4. To exclude evidence because it is inferior to other evidence which could have been produced.

Not all exceptions to the hearsay rule may be rationalized by any single one of these theories, but it is submitted that any exception may be rationalized by one or more of them.

The Co-Conspirators Exception

The co-conspirators exception, like other exceptions to the hearsay rule, is purportedly founded on considerations of the declaration's probable reliability and the need for it as evidence. As the exception is usually formulated, "any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy." [39] According to this definition, three conditions must be satisfied before hearsay evidence is deemed admissable: 1) furtherance;[40]

generally Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A.J. 580 (1961).

[29] California v. Green, 399 U.S. 149, 158 (1970); McCormick § 224; 5 Wigmore § 1367; Morgan, *supra* note 27; Prop. Fed. R. Evid., Introductory Note to Article VIII.

[30] *See* authorities cited at note 29 *supra*.

[31] *See, e.g.*, Coleman v. Southwick, 9 John. 50 (N.Y. 1812), quoted in 5 Wigmore § 1362:

> A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.

[32] B. Gilbert, Evidence 152 (2d ed. 1769).

[33] 5 Wigmore § 1397. *See also* Morgan, *supra* note 27.

[34] 5 Wigmore § 1422.

[35] *Id.* § 1421.

[36] J. Maguire, Evidence: Common Sense and Common Law 140–44 (1947). Maguire offers "adversary practice" as a third "motive" or reason for the "fabrication" of common law hearsay exceptions. 5 Wigmore §§ 1430–52; McCormick §§ 258–64.

[37] *See* Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 335 (1961).

[38] *See* James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 Ill. L. Rev. 788, 790–91 (1940).

[39] Levie, *supra* note 17, at 1161. *See also* Carbo v. United States, 314 F.2d 718, 735, 735 n. 21 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); *Developments*, *supra* note 7, at 985.

[40] Under the furtherance requirement, the declaration must relate in content to the conspiracy, and must be made with the intent to advance the objects of the conspiracy. Many jurisdictions have applied the re-

2) pendency;[41] and 3) foundation or independent proof of the existence of the conspiracy and the connection of the declarant and defendant with it.[42] This hearsay exception has long been accepted,[43] and its continued vitality is amply illustrated by the reported cases.[44]

One justification offered in support of the co-conspirators exception is that, because the crime of conspiracy is difficult to prove, a co-conspirator's direct testimony is needed. Frequently, the only direct evidence of a conspiracy is the individual conspirator's words and deeds during the conspiracy. Thus, unless a conspirator is willing to testify against his co-conspirators, the prosecution must rely heavily on circumstantial evidence. In such cases the jury is asked to draw an inference of agreement from conduct which seems to follow some plan. However, the use of circumstantial evidence is subject to inherent limitations. If the conspiracy is discovered early or is discontinued, there may be very little conduct from which to draw an inference. Moreover, the alleged conspirators may present reasonable explanations for their conduct, thereby making it difficult to prove guilt beyond a reasonable doubt.[45] Because it is usually more difficult to establish a conspiracy inferentially from circumstantial evidence than to establish a conspiracy by direct or testimonial evidence, need for direct evidence is relied upon as a principal justification for the co-conspirator's exception.

A second justification for the co-conspirators exception is the belief that a co-conspirator's testimony is probably reliable. In arguing for the admission of co-conspirators' hearsay statements on the basis of trustworthiness, some courts and authorities have analogized to other hearsay exceptions.[46] Such comparisons have been criticized, however.[47] One criticism is that treating these statements as vicarious admissions[48] confuses the relationship among conspirators with that of principal and agent. Courts generally admit into evidence vicarious admissions on the ground that a principal's substantive responsibility for his agent's acts involves an evidential responsibility for his agent's statements.[49] But the practical considerations which justify forcing a principal to adopt, for business and evidence purposes,[50] the statements of his authorized agent[51] do not apply to a conspiracy because its members often lack the power to control or authorize other members' actions.[52] Even though the substantive law of conspiracy holds one conspirator accountable for all

quirement so broadly that anything related to the conspiracy is found to be in furtherance of its objectives. Levie, *supra* note 17, at 1168. The Seventh Circuit has interpreted the requirement to mean only that the act with which the declaration is concerned must be in furtherance of the conspiracy. International Indemnity Co. v. Lehman, 28 F.2d 1 (7th Cir.), *cert. denied*, 278 U.S. 648 (1928), discussed in *Developments*, *supra* note 7, 985–86.

[41] Under the pendency requirement, the declaration must have been made after the formation and before the termination of the conspiracy. Levie, *supra* note 17, at 1172–75; *Developments*, *supra* note 7, at 986–87. Compare this with the Georgia exception, which encompasses declarations made during the concealment phase of the conspiracy which was the subject of the Supreme Court's decision in Dutton v. Evans, 400 U.S. 74 (1970). *See* discussion accompanying note 181 *infra*.

[42] Levie, *supra* note 17, at 1176–78; *Developments*, *supra* note 7, at 987.

[43] *See* United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827).

[44] It is difficult to find a conspiracy case in which some question involving this hearsay exception is not raised by one of the defendants. *See, e.g.*, United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969) (Independent proof of the conspiracy is established by a fair preponderance of the evidence independent of the hearsay utterances); Howell v. United States, 300 F. Supp. 1017 (N.D. Ill. 1969) (Defendant's state arrest for illegal possession of narcotics was not a withdrawal from a narcotics conspiracy so as to render co-conspirators' subsequent declarations inadmissible against defendant).

[45] *See* Levie. *supra* note 17, at 1160.

[46] *See, e.g.*, Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926) (vicarious admissions); Shea v. United States, 251 F. 440 (6th Cir.), *cert. denied*, 248 U.S. 581 (1918) (*res gestae*); 4 WIGMORE §§ 1077, 1079, 1080a (agency, vicarious admissions).

[47] *See* Levie, *supra* note 17, 1161–67; Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929); *Developments*, *supra* note 7, at 988–89; Note, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530 (1958); PROP. FED. R. EVID. 801(d)(2)(v), Adv. Comm. Note, at 104.

[48] The usual phrasing of the rule makes admissible against the principal the utterances of the agent made within the scope of his authority or employment. As Wigmore stated:

> So far as one person is privy in obligation with another, i.e., is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally.

4 WIGMORE § 1077. *See, e.g.*, Gambino v. United States, 108 F.2d 140, 142 (3d Cir. 1939).

[49] *See* 4 WIGMORE § 1079.

[50] The test of admissibility is whether the agent was authorized to make, on the principal's behalf, statements concerning the subject matter. The policy behind the exception is to prevent businessmen who act through agents from avoiding liability which would be imposed on businessmen acting on their own behalf. Note, *supra* note 47, at 535.

[51] *See* United States v. Miller, 246 F.2d 486 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957). *See generally* Morgan, *supra* note 47.

[52] *See id.* at 481; Note, *supra* note 47, at 535.

acts done during the conspiracy,[53] it does not follow that the hearsay statements of one conspirator are inevitably trustworthy.

Wigmore justified the admission into evidence of co-conspirators' hearsay statements on the premise that all participants in a conspiracy have an "identity of interest." [54] He stated that:

> A conspiracy makes each conspirator liable under the criminal law for the acts of every other conspirator done in pursuance of the conspiracy. Consequently, by the principle already exemplified in other relations . . . , the admissions of a co-conspirator may be used to affect the proof against the others, on the same conditions as his acts when used to create their legal liability.[55]

Wigmore's mention of "other relations" refers to those situations where "one person is privy in obligation with another." [56] As an additional ground, Wigmore would admit co-conspirators' hearsay statements on the theory of vicarious liability. Moreover, he argued that an admission of one conspirator against his interest is against the interest of all conspirators.[57] But as one writer has said:

> [Wigmore's explanation] fails to distinguish between declarations showing the existence of a conspiracy and declarations concerning membership or aims. Of course sane men do not falsely admit to conspiracy. Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership. The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than it in fact has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law.[58]

While these justifications supporting the co-conspirator's exception can be criticized, it does seem that the requirement of independent proof of the conspiracy supplies a probability of trustworthiness. Important issues remain, however. Ultimately there is a question whether the independent proof requirement supplies sufficient trustworthiness to obviate the necessity of affording defendant an opportunity to cross-examine the declarant. Another crucial issue is whether judge or jury should make the determination of independent proof. Finally, additional issues to be resolved are the standard of proof to be used by the trier of fact and the proper time for the determination to be made. These issues are the primary focus of the discussion which follows. Since the problems raised by the requirement of independent proof begin at the trial level, the next section starts with an examination of the judge's instructions to the jury.

I. The Role of the Judge and the Jury in Making the Preliminary Fact Determinations

One of the most significant decisions dealing with the co-conspirators exception to the hearsay rule is *Carbo v. United States*.[59] There the appellants, defendants below, argued that the district court had erred in rejecting the following instruction to the jury:

> You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of a defendant was received on a tentative basis in evidence. Such testimony was received subject to independent proof of the existence of the conspiracy and the absent defendant's knowing participation in the conspiracy. If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy, the tentative basis is destroyed and all such testimony must be ignored as to him.
>
> A defendant's connection with a conspiracy must be established beyond a reasonable doubt, accordingly, by his own conduct and his own statements or declarations.[60]

The Ninth Circuit affirmed the district court's rejection of appellants' proposed instruction. The main issue in *Carbo* was whether the finding of independent proof of a conspiracy and the de-

[53] *See* Van Riper v. United States, 13 F.2d at 967.
[54] 4 Wigmore § 1079.
[55] *Id.*
[56] *Id.* § 1077.
[57] *Id.* § 1080a.
[58] Levie, *supra* note 17, at 1165–67.

[59] 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). The appellants, Carbo, Palermo, Dragno, Sica and Gibson, were convicted of extortion affecting interstate commerce, and conspiracy to extort, in the Southern District of California. The statutes involved were: 18 U.S.C. §§ 875(b) (1964) (interstate transmission of threats and conspiracy to transmit threats), 1951 (extortion affecting interstate commerce), and 371 (conspiracy to commit an offense against the United States). The appellants had attempted to gain managerial control of a well-known professional boxer, who at that time was a top contender for the welterweight crown. By bringing pressure to bear on this fighter's manager, the appellants would control the welterweight crown, since they already dominated the other top contenders.
[60] *Id.* at 735.

fedant's participation in it was to be made by the judge or by the jury.[61] Appellants argued that before the jury could integrate the challenged hearsay testimony and weigh it with the other evidence, it must first make an independent finding both that a conspiracy existed and that the declarant and the other defendants were parties. Moreover, appellants contended that the jury must make such findings beyond a reasonable doubt.

The Ninth Circuit rejected appellants' contentions. Judge Merrill, writing for the court, held that to require the jury to make findings of the existence of a conspiracy and the accused's participation in it beyond a reasonable doubt, without relying on the hearsay evidence, would render consideration of the hearsay evidence unnecessary.[62] To do so would be tantamount to the trial judge telling the jury "you may not consider this evidence unless you first find the defendant guilty." [63] Instead of treating it as a question of the required burden of proof, the court characterized the issue as one of "admissibility of evidence." If it was required that the jury, applying the reasonable doubt test, must make the preliminary finding of independent proof of conspiracy, then the preliminary question and the ultimate question of guilt or innocence on the conspiracy charge would coincide, with the result that the co-conspirators' hearsay testimony would not be considered on the question of guilt. The court rejected that result, saying: "the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt." [64]

The *Carbo* court also rejected appellants' further contention that the jury should have decided the preliminary question of the existence of sufficient independent proof of the conspiracy, and of declarant's and defendant's connection with it, on the basis of a prima facie case rather than proof beyond reasonable doubt. The court noted:

> The jury is already concerned with the evidence-weighing standards involved in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence separating that produced by the declarations from all other, but as well to apply to the independent evidence the entirely different evidence-weighing standards required of a *prima facie* case, is to expect the impossible.[65]

In rejecting appellants' argument that the jury should decide the preliminary question, the court held that the judge, not the jury, is to determine admissibility of co-conspirators' hearsay statements.[66] Once hearsay statements are admitted into evidence by the trial judge, the jury can consider them together with any other evidence on the issue of guilt. *Carbo* thus reaffirmed the so-called orthodox rule on allocation of functions between judge and jury. According to this view, the judge decides preliminary questions of fact upon which competence depends, and the jury determines the weight to be given the evidence once admitted.[67]

In affirming the district court's rejection of appellants' proposed instruction, however, the Ninth Circuit failed to clarify the confusion arising from the similarity between the rejected instruction and the instruction actually given.[68] For example, as to appellant Gibson, the lower court charged the jury:

> You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other de-

[61] *See, e.g.*, Rizzo v. United States, 418 F.2d 71 (7th Cir. 1969); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969).

[62] 314 F.2d at 736.

[63] *Id.* The court in *Carbo* noted that an identical argument had been rejected previously by the Second Circuit in United States v. Dennis, 183 F.2d 201, 230–31 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), where the court stated that such requirement of an independent finding by the jury "altogether withdrew the declarations from the jury, and it was idle to put them in at all."

[64] 314 F.2d at 736.

[65] *Id.* at 737.

[66] *Id.*

[67] *Id.* The *Carbo* court again cited Judge Learned Hand's opinion in United States v. Dennis with approval on the question of allocation of functions between judge and jury, where he stated:

> The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for laymen, and for that matter, for most judges, to keep their minds in the isolated compartments that this requires.

United States v. Dennis, 183 F.2d at 231.

[68] 314 F.2d at 735 n. 20.

> fendant were spoken in aid of and to further the purpose of the conspiracy.[69]

And, with regard to appellant Palermo, the trial court charged:

> Now, before you can hold any one of these defendants to be bound by this conversation with Mr. Palermo, if you believe that there was such a conversation, it would be necessary for you to find from other evidence that such person, as to whom you are making applicable that conversation, was in fact a conspirator.[70]

If the words "from other evidence" in the above instruction have substantially the same meaning as the phrase "on independent proof" in the rejected instruction,[71] and a literal interpretation indicates that they do, the two sets of instructions are identical. Therefore, the criticism of the proposed instruction could also be leveled at the instruction actually given. But although the Ninth Circuit affirmed, it did not necessarily approve the lower court's instruction. Instead, it noted only that while such an instruction was not necessary, it was nevertheless not error to include it in the charge to the jury because it was in appellants' favor.[72]

Not only was there still considerable confusion as to the proper content of a trial court's instruction, but *Carbo* also left two additional problems unresolved: the standard to be used by the trial judge and the proper time for the judge to determine the admissibility of co-conspirators' testimony. As to the proper standard for admissibility, it has been held that a prima facie showing of a defendant's membership in a conspiracy by independent evidence is sufficient to allow the jury to consider an alleged co-conspirator's acts and statements as evidence against the defendant.[73] The *Carbo* decision approved this approach.[74] In a more recent case, however, the Second Circuit ignored the prima facie test and instead phrased the standard in terms of "preponderance" of the evidence:

> [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.[75]

The question thus raised is whether it makes a difference if the "preponderance" as opposed to prima facie standard is used.

Prima facie evidence is that which, unless rebutted by sufficient evidence to the contrary, is adequate to support but does not compel a conclusion based on it.[76] In a conspiracy case, it is independent proof of a defendant's participation in the conspiracy which creates a reasonable inference sufficient to support a finding of guilt. On the other hand, the "preponderance" of the evidence standard requires that evidence in support of a proposition be of greater weight or more convincing than that offered in opposition. The "preponderance" test is met if the evidence on the whole shows that the fact or causation sought to be proved is more probable than not.[77]

Comparing the two standards, the "preponderance" test seems to place a more difficult burden on the prosecutor because it requires the judge to "weigh" the evidence and determine that proof that a defendant was a conspirator is more convincing than evidence to the contrary. In addition it should be noted that since there must be contradictory evidence for the judge to "weigh," use of the "preponderance" standard may shift to defendant the burden of going forward with the evidence. In this way, the "preponderance" standard can create additional burdens for both prosecution and defense.

Unlike the "preponderance" standard, the prima facie standard does not seem to call for a weighing of the evidence offered to prove defend-

[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 737–38.
[73] *See, e.g.*, Orser v. United States, 362 F.2d 580 (5th Cir. 1966); National Dairy Products Corp. v. United States, 350 F.2d 321 (8th Cir. 1965), *vacated and remanded on other grounds*, 384 U.S. 883 (1966); United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).
[74] 314 F.2d at 737 (emphasis added):
> It is for the judge then, and not for the jury, to determine the admissibility of the declarations. In making this determination the test is not whether the defendants' connection had by independent evidence been proved beyond a reasonable doubt, but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made. Thereafter it is the jury's function to determine whether the evidence, including the declarations, is credible and convincing beyond a reasonable doubt.

[75] United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969) (emphasis added).
[76] McCormick § 53.
[77] *Id.* § 319.

ant's participation in a conspiracy. Instead, the prosecutor need only present independent evidence tending to show that defendant was a conspirator. On the basis of this evidence alone, the judge decides whether to admit the challenged co-conspirators' hearsay testimony. If the judge admits the hearsay evidence, the alleged conspirator must then contradict it.[78] Therefore, because no weighing of defendant's contradictory evidence is involved, the prima facie requirement resembles the first stage of the "preponderance" test.

Despite these distinctions, however, there may be no real difference between the two standards as they are applied. When viewed from the position of the trial judge, it may be difficult to say more than that he must satisfy himself, as a reasonable man, of a defendant's participation in the conspiracy on the basis of non-hearsay evidence.[79]

The second unresolved problem in *Carbo* is the question of the proper time for the judge to decide that co-conspirators' hearsay testimony will be admitted into evidence. Because the judge has discretion as to the order of trial, most courts hold that hearsay can be admitted without a prior prima facie showing of conspiracy and the declarant's and the defendant's connection to it.[80] Generally the judge will either admit the hearsay statements, subject to a later motion by the prosecutor to apply them to all or certain defendants, or admit the hearsay statements as to all defendants, subject to a motion to strike if not "connected up" by independent proof with all or certain defendants.[81] Thus, the judge may postpone his determination of the admissibility of co-conspirators' hearsay testimony until all the evidence has been presented.[82]

Despite the Ninth Circuit's disapproval of appellants' proposed instruction, conspiracy cases subsequent to *Carbo* reveal that other federal courts continue to charge juries with instructions similar to the rejected instructions in *Carbo*.[83] The continued use of such instructions suggests that *Carbo* is not being followed and that there must be some justification for allowing the jury to decide the preliminary questions of conspiracy on which the admissibility of evidence depends. To seek such a rationale it is necessary to reexamine the role of the judge and jury in light of the cases subsequent to *Carbo* and other recent developments in the law.

Recent appellate court decisions indicate that *Carbo* is followed in the Second[84] and Ninth Circuits.[85] Conspiracy cases in other federal jurisdictions, however, illustrate that juries continue to be charged with instructions similar to those rejected in *Carbo*.[86] For example, in *United States v. Rizzo*,[87] the Seventh Circuit approved instructions which advised the jury that it must first determine whether the existence of a conspiracy was proved, and then determine "from the acts and declarations of each defendant whether he became a participant in that conspiracy. . . ." [88] Further, the instruction stated that "contingent upon the jury's finding, *beyond a reasonable doubt*," that both facts were proved, then all acts and declarations of each co-conspirator could be admitted against all persons whom the jury found to have joined in the conspiracy.[89]

[78] If the government fails to present prime facie proof of a defendant's participation in a conspiracy, it seems that the criminal proceeding against defendant should be dismissed.

[79] United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

[80] *See, e.g.*, United States v. Halpin, 374 F.2d 493, 495 (7th Cir.), *cert. denied*, 386 U.S. 1032 (1967); Parenti v. United States, 249 F.2d 752, 754 (9th Cir. 1967); United States v. Sansone, 231 F.2d 887, 893 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956).

[81] *See* United States v. Acuff, 410 F.2d 463, 465–66 (6th Cir. 1969); Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963).

[82] United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

[83] *See, e.g.*, Rizzo v. United States, 418 F.2d 71 (7th Cir. 1969); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969); United States v. Kahn, 381 F.2d 824 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967); National Dairy Products Corp. v. United States, 350 F.2d 231 (8th Cir. 1965); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966); Dennis v. United States, 346 F.2d 10 (10th Cir. 1965), *rev'd and remanded on other grounds*, 384 U.S. 855 (1966).

[84] *See* United States v. Ragland, 375 F.2d 471, 479 (2d Cir.), *cert. denied*, 390 U.S. 925 (1967); United States v. Nuccio, 373 F.2d 168 (2d. Cir.), *cert. denied*, 387 U.S. 906 (1967).

[85] 314 F.2d at 735–38; *see* United States v. Knight, 416 F.2d 1181, 1186 (9th Cir. 1969); White v. United States, 394 F.2d 49, 54 (9th Cir. 1968); United States v. Ragland, 375 F.2d at 478–79; United States v. Nuccio, 373 F.2d at 173; United States v. Dennis, 183 F.2d at 230–31.

[86] *See* cases cited at note 83 *supra*.

[87] 418 F.2d 71 (7th Cir. 1969).

[88] *Id.* at 82.

[89] *Id.* (emphasis added). *See also* Dennis v. United States, 346 F.2d 10, 16 (10th Cir. 1965), *rev'd and remanded on other grounds*, 384 U.S. 855 (1966), where the Tenth Circuit stated:

> The jury was told they must first determine the existence of the conspiracy charged, and if they entertained a reasonable doubt of the conspiracy as charged, their task was at an end, and they should acquit all the defendants. But, if on the other hand, they were convinced *beyond a reasonable doubt* of

Another decision which left a preliminary question to the jury is *United States v. Hoffa*,[90] where the Sixth Circuit approved instructions restricting the jury's consideration of out-of-court statements as to the particular defendant who made the statement, "until and unless the jury was satisfied from other evidence in the case that the defendant making the statement was a co-conspirator of one or more of the other defendants. . . . " The instructions made it clear that the other evidence could not consist of hearsay declarations.[91] Finally, in *United States v. Ragland*,[92] the Second Circuit noted with approval that the trial judge, without expressly finding that a conspiracy had been proved, told the jury that it could consider co-conspirators' hearsay statements "if it first found a *prima facie* case of conspiracy to have been established." [93]

Because they allow the jury to decide the preliminary question upon which admissibility depends, the above instructions reject the belief expressed in *Carbo* that the jury should not become involved in the technical niceties of foundational questions. It is therefore disappointing that the federal courts which have continued to use such instructions seldom attempt to explain why. The cases and the commentators, however, do suggest three possible reasons. First, the use of such instructions is merely "harmless error." [94] Second, the admissibility of the co-conspirators' hearsay evidence turns on relevancy, rather than competency, and therefore the existence of the preliminary fact (essential for the disputed evidence to be relevant) is for the jury to determine.[95] Third, to allow the judge finally to determine the existence of the preliminary fact would deprive an alleged conspirator of his constitutional right to trial by jury.[96] Each of these suggested reason will be considered separately.

Harmless Error

Some courts, while affirming the use of instructions which require that the jury find a conspiracy before it considers the hearsay statements, have stated that such instructions constitute mere "harmless error." [97] Since the trial judge has al-

the existence of a conspiracy, they should then proceed to consider which, if any, of the appellants were members of it. And, they should determine the participation of any defendant in the conspiracy from the evidence relating to his own acts, declarations and conduct with the actions and conduct of others; that guilt was personal and individual, but once a conspiracy was formed each member became the agent of the other in all things done or said in furtherance or in promotion of the unlawful purpose. [emphasis added].

See also United States v. Lawler, 413 F.2d at 628; White v. United States, 394 F.2d at 54; National Dairy Products Corp. v. United States, 350 F.2d 231.

[90] 349 F.2d 20 (6th Cir. 1965).

[91] *Id.* at 41. *See also* United States v. Stromberg, 268 F.2d 256, 265, 265 n. 10 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), where the Second Circuit quoted from the trial judge's instructions:

'In your consideration, then, of the evidence you should first determine whether or not the conspiracy to import and distribute existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine as to each defendant separately whether or not he or she was a party to or member of the conspiracy with knowledge of its illegal purpose and with the intention to assist the conspiracy to achieve its illegal objective.

'In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to his or her membership in the conspiracy from his or her own statements or declarations or acts or conduct.

'If and when the existence of the conspiracy charged in the indictment and the membership of any or all of the defendants in such conspiracy has been found, then the acts done and the statements or declarations made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an objective or purpose of the conspiracy.

'So, if you conclude from the evidence that a defendant was a member of the conspiracy and you do so based upon the independent evidence, as I have already told you, based upon his own acts or her own acts or her declarations, or her or his conduct, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, even though they are not named as defendants in the indictment, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment.'

See United States v. Schneiderman, 106 F. Supp. 892, 903 (S.D. Cal. 1952).

[92] 375 F.2d 471 (2d Cir. 1967).

[93] *Id.* at 478–79.

[94] *Id. See also* United States v. Knight, 416 F.2d at 1186; White v. United States, 394 F.2d at 54; United States v. Nuccio, 373 F.2d at 173; United States v. Stadter, 336 F.2d 326, 330 (2d Cir. 1964); United States v. Stromberg, 268 F.2d at 266.

[95] *See* Prop. Fed. R. Evid. 104, Adv. Comm. Note at 11–14 (1971); Cal. Evid. Code § 403, Assem. Comm. Comment (West 1966).

[96] *See* authorities cited at note 95 *supra*.

[97] *See* cases cited at note 94 *supra*.

ready determined the admissibility of the challenged co-conspirators' hearsay testimony, these instructions unnecessarily give the jury an opportunity to "second-guess" his decision, and are "unduly generous" to a defendant.[98] Thus, the courts have held that "[a]n error of this sort, so favoring a defendant, provides no basis for a reversal of a judgment of conviction entered upon the jury verdict." [99]

Relevancy versus Competency

This rationale takes issue with the Ninth Circuit's statement in *Carbo* that co-conspirators' hearsay evidence is "concededly relevant but challenged under a technical evidentiary rule of competence. . . ." [100] Its proponents argue that the relevancy,[101] rather than the competency,[102] of co-conspirators' hearsay evidence depends on the existence of the preliminary fact.[103] Relevant evidence is evidence which has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.[104] In the context of the co-conspirators exception to the hearsay rule, one might view the independent proof requirement as a parallel to the preliminary fact requirement in a relevancy problem. In other words, if there is no conspiracy proven and if the declarant is not shown to be a party to it, then his declarations are not probative of conspiracy as to alleged co-conspirators. Proponents of the relevancy rationale admit that where the competency of an item of evidence depends upon the existence of a disputed fact, the orthodox rule applies and the question is one of admissibility to be determined by the judge.[105] They also point out, however, that where the relevancy of the evidence turns on the existence of a preliminary fact, the authorities generally agree that the question of the existence of the preliminary fact is for the jury.[106]

Support for this rationale is found in the Assembly Committee's Comments to Section 403 of the California Evidence Code.[107] Section 403 provides in part:

> (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
>
> (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
>
> . . .
>
> (c) If the court admits the proffered evidence under this section, the court:
>
> (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.
>
> (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists. . . .[108]

In its Comments, the Assembly Committee offers the admission of co-conspirators' hearsay evidence as an example of the type of preliminary fact questions that should be decided under Section 403.[109]

It is unclear whether the preliminary fact question of the existence of a conspiracy and a defendant's participation in it is one of relevancy or competency. The Assembly Committee notes that it is often difficult to distinguish preliminary questions of fact on this basis.[110] However, the rule stated in Section 403 does eliminate uncertainty.[111]

[98] *See* cases cited at note 94 *supra*.

[99] United States v. Ragland, 375 F.2d at 479.

[100] 314 F.2d at 736.

[101] Relevant evidence is evidence which is pertinent or applicable in determining a fact in question. It is evidence having probative value in proving or disproving a point. It is evidence which tends to render probable a certain inference involved in a case. McCormick §§ 151 *et seq. See also* Prop. Fed. R. Evid. 401, at 28.

[102] Competent evidence is evidence which is legally adequate and sufficient. Competency of evidence concerns its reliability rather than its bearing upon the issues. McCormick §§ 151 *et seq.*

[103] *See* Cal. Evid. Code § 403, Assem. Comm. Comment (West 1966). *See generally* Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165 (1929).

[104] Prop. Fed. R. Evid. 401.

[105] *See* authorities cited at note 73 *supra*.

[106] *Id.*

[107] Cal. Evid. Code § 403 (West 1966).

[108] *Id.*

[109] *Id.* Assem. Comm. Comment.

[110] *Id.* The Assembly Committee notes that:
It is difficult, however, to distinguish all preliminary fact questions upon this principle. And eminent legal authorities sometimes differ over whether a particular preliminary fact question is one of relevancy or competency. For example, Wigmore classifies admissions with questions of relevancy (4 Wigmore, Evidence 1 (3d ed. 1940)) while Morgan classifies admissions with questions of competency to be decided under the standard prescribed in Section 405. (Morgan, Basic Problems of Evidence 244 (1957)).
But see Cal. Evid. Code § 405 (West 1966):

Additional support for the "relevancy" rationale appeared in the Preliminary Draft of the proposed Rules of Evidence for United States Courts and Magistrates.[112] Rule 1-04 and the Advisory Committee's note adopted and cited Section 403 of the California Evidence Code with apparent approval.[113] Rule 1-04 provided in part:

> (a) *General Rule.* Preliminary questions concerning . . . the admissibility of evidence shall be determined by the judge, subject to the provisions of subdivision (b). . . .
> (b) *Relevancy Conditioned on Fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled. If under all the evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence. . . .[114]

The Revised Draft deleted everything from subsection (b) after the first sentence and the Advisory Committee's Note reflects the deviation from the California rule.[115] Thus, the California rule will not become the accepted procedure in all federal jurisdictions if the Revised Proposed Rules are adopted.

Moreover, Proposed Federal Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[116] If, in order to be considered relevant, an item of evidence must merely "tend to prove the matter sought to be proved,"[117] co-conspirators' hearsay evidence is relevant, and Rule 104 (the Revised Draft version of Rule 1-04 of the Preliminary Draft) would not apply.

Trial by Jury

The possible denial of a defendant's constitutional right to a trial by jury[118] is advanced as an additional justification for the procedure outlined in the California rule and the Preliminary Draft of the Proposed Federal Rules (*i.e.*, to commit the "preliminary fact" or "independent proof" questions to the jury).[119] The California Assembly Committee stated that the preliminary fact questions of the existence of a conspiracy and a defendant's participation in it should not be finally decided by the trial judge "because they have been traditionally regarded as jury questions."[120] The Committee concluded that:

> The questions involve. . . the probative value of evidence that it is admitted on the ultimate issues. It is the jury's function to determine the effect and value of the evidence addressed to it. . . . Hence, the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question.

With respect to preliminary fact determinations not governed by Section 403 or 404:
(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.
(b) If a preliminary fact is also a fact in issue in the action:
(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.
(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact. . . .

[111] *Id.* The California Committee states that:
To eliminate uncertainties of classification, subdivision (a) lists the kinds of preliminary fact questions that are to be determined under the standard prescribed in Section 403. And to eliminate any uncertainties that are not resolved by this listing, various Evidence Code sections state specifically that admissibility depends on 'evidence sufficient to sustain a finding' of certain facts. *See, e.g.*, Evidence Code §§ 1222, 1223 [Admission of co-conspirator], 1400.

[112] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (Preliminary Draft, 1969) [hereinafter cited as Prelim. Draft Prop. Fed. R. Evid.].

[113] *Id.* Rule 1-04, at 186–87, Adv. Comm. Note, at 187–90.

[114] *Id.* at 186–87.

[115] Prop. Fed. R. Evid. 104, Adv. Comm. Note, at 13.

[116] *Id.* Rule 401, at 28.

[117] *Id.* Adv. Comm. Note to Rule 401, at 28.

[118] U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

[119] Cal. Evid. Code § 403, Assem. Comm. Comment (West 1966); Prelim. Draft Prop. Fed. R. Evid., Adv. Comm. Note to Rule 1-04, at 190.

[120] Cal. Evid. Code § 403, Assem. Comm. Comment (West 1966).

> ... If the judge finally determined the existence or non-existence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury.[121]

The drafters of the Preliminary and Revised Drafts of the Proposed Federal Rules of Evidence reached a similar conclusion. The Advisory Committee noted that the trial judge does not make the final determination with respect to preliminary questions of conditional relevancy.[122] If he did, "the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed." [123] The Revised Draft provides that the judge shall commit preliminary fact questions to the jury if he concludes there is sufficient proof to take the questions to them; however, the jury will not be specially instructed to disregard the evidence if the conditions are found by them not to be fulfilled.[124] In effect, then, the Revised Draft withdraws from the jury the preliminary fact question. This, of course, is consistent with the *Carbo* decision.

Despite the concern that the jury's role not be reduced, allowing the judge to decide preliminary fact questions does not appear seriously to restrict the jury's function. As the Ninth Circuit pointed out in *Carbo*, the conspiracy situation is confusing because the preliminary fact question, upon which the admissibility of co-conspirators' hearsay evidence depends, coincides with the ultimate question for the jury on the issue of guilt.[125] Since the decision on the ultimate issue is entrusted to the jury, it should also decide preliminary questions.[126] In fact, however, the judge only decides the preliminary questions of the existence of a conspiracy and a defendant's connection with it for purposes of admissibility. The judge's decision does not prevent the jury from giving the ultimate decision on the basis of all the evidence. Moreover, the sixth amendment does not seem to require a jury determination of all questions of fact in a criminal trial.[127]

One conclusion to be drawn is that the jury should play a limited role in deciding preliminary fact questions. The Ninth Circuit in *Carbo* and the drafters of Section 403 and Rule 104 agree that the judge must determine the admissibility of co-conspirators' hearsay evidence.[128] This approach finds analogous support in Supreme Court decisions requiring the judge to make a preliminary determination of the voluntariness of a confession.[129] These cases suggest that in the absence of a preliminary finding of admissibility by the trial judge, submission of the issues of the existence of a conspiracy and a defendant's connection with it to the jury does not afford a defendant a reliable determination of these issues and is therefore an unconstitutional denial of due process.[130]

[121] *Id.*

[122] PROP. FED. R. EVID., Adv. Comm. Note to Rule 104, at 13; PRELIM. DRAFT PROP. FED. R. EVID. at 190.

[123] *Id.*

[124] *See* note 122 *supra*.

[125] 314 F.2d at 736.

[126] *See* MAGUIRE, *supra* note 36, at 220; MAGUIRE & EPSTEIN, *supra* note 103, at 418.

[127] *See* note 114 *supra*.

[128] 314 F.2d at 736–37; *see* CAL. EVID. CODE § 403, Assem. Comm. Comment (West 1966); PROP. FED. R. EVID., Adv. Comm. Note to Rule 104, at 11–14.

[129] *See, e.g.*, Sims v. Georgia, 385 U.S. 538 (1967); Jackson v. Denno, 378 U.S. 368 (1964). In *Jackson* the Supreme Court held that in the absence of an independent finding of the voluntariness of a confession by the trial judge, submission of the question of voluntariness to the jury which also adjudicates guilt does not afford a defendant a reliable determination of the voluntariness issue and is therefore an unconstitutional denial of due process. 378 U.S. at 376–78. The Court was influenced by the possibility that even when the jury decides that the confession was involuntary, it would be unable to disregard what it believes to be an involuntary, but truthful, confession in making a decision as to innocence or guilt. *Id.* The Court noted that there is no "indication of how the jury resolved disputes in the evidence concerning the critical facts," and that it cannot be discovered "whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it." *Id.* at 379. When the issue of voluntariness is resolved by the jury, findings of fact cannot be ascertained from the general verdict. Consequently, an appellate court can only speculate as to which evidence actually led to the verdict of guilty. *Id.* at 380. Thus, the voluntariness issue cannot be submitted to the jury unless there has been a preliminary determination by the trial court that the confession is voluntary.

[130] The conspiracy cases illustrate that defendants often raise this issue. *See, e.g.*, White v. United States, 394 F.2d at 54; United States v. Ragland, 375 F.2d at 479; United States v. Hoffa, 349 F.2d at 41. But no defendant has argued that the absence of a preliminary finding of a conspiracy and a defendant's connection with it by the trial judge constitutes an unconstitutional denial of due process. However, such an argument seems destined to fail, since where there is no clear ruling by the trial judge on this issue, the appellate courts assume that he made the essential preliminary finding, and will affirm if there is evidence to support the finding. For example, the Sixth Circuit stated in *Hoffa:*

> We think there was sufficient evidence to make out a *prima facie* case linking Appellants with the conspiracy and the Court would have been justified in so holding in accordance with the rule of *Carbo* and *Dennis*.

349 F.2d at 41 (emphasis added). And, in *White*, the Ninth Circuit concluded:

> The fact that the trial judge denied a motion for acquittal ... indicates that he did find that there

While the division of responsibility between judge and jury is reasonably clear, it is more difficult to reach conclusions as to the correct jury instruction. There is substantial disagreement over instructions between the *Carbo* court and the drafters of Section 403.[131] However, the possibility that a defendant's sixth amendment right to a jury trial may be violated if the jury is not permitted to reconsider the judge's determination of the preliminary fact questions seems to outweigh any argument based on jury confusion, particularly when the courts which have followed the *Carbo* rationale characterize such a procedure as "harmless error." [132]

On the other hand, instructions similar to those found in *Rizzo v. United States*,[133] which require the jury to decide the preliminary questions of the existence of a conspiracy and a defendant's participation in it upon proof beyond a reasonable doubt, seem clearly erroneous. As the Ninth Circuit pointed out in *Carbo*,

> [I]f by independent evidence the defendant's position as a co-conspirator is to be established by the jury beyond a reasonable doubt, there is no occasion ever to resort to the declarations at all.[134]

Since the procedure set forth in Section 403 does not specify any particular standard of proof for the jury,[135] it may be presumed that it calls for a lesser standard—*e.g.*, "prima facie" proof or "preponderance" of the evidence.

Consequently, if the trial judge concludes that the jury might reasonably find, on the basis of the independent evidence presented, that there was a conspiracy and that the defendant was a conspirator, he should admit the challenged co-conspirators' hearsay statements. He then should instruct the jury to disregard the co-conspirators' hearsay evidence unless they also find, from the other evidence, a conspiracy and the defendant's participation in it. Accordingly, a proper instruction would read:

> If you conclude that a conspiracy did exist, you should next determine whether the defendant was a member of the conspiracy. In making this determination, you may consider only the statements and conduct of the defendant. If you do not find that the defendant was a member of the conspiracy, you must acquit him. However, if you do find that the defendant was a member of the conspiracy, you may consider against the defendant the statements of any other person found by you to be a member of the conspiracy.

This instruction is consistent with current federal practice, although it goes further than *Carbo* would strictly require. Moreover, it adopts the approach of the Revised Draft of the Proposed Federal Rules by giving the jury an affirmative function only—*i.e.*, the jury is not told to disregard the evidence if the preliminary facts are not found by them to exist.

Despite the care with which the instruction is drawn, there is a real possibility that the jury may be confused by the instruction and will utilize the co-conspirators' hearsay statements regardless of its preliminary finding.[136] Other courts have questioned the ability of a jury to follow limiting instructions.[137] This likelihood of jury confusion emphasizes the importance of the trial judge's decision to admit the co-conspirators' hearsay statements into evidence. His preliminary determination of admissibility is said to provide a circumstantial guarantee of the trustworthiness of the co-conspirators' hearsay statements, thereby obviating the necessity of affording the defendant an opportunity to cross-examine the declarants.[138] Recent Supreme Court decisions[139] dealing with hearsay and confrontation bear upon the validity of this assumption and provide an interesting vehicle for consideration of the interplay between the hearsay rule and the confrontation clause.

II. Confrontation and the Co-Conspirators Exception

By definition, the admission of hearsay statements into evidence denies a criminal defendant

was sufficient other evidence, otherwise he would have been bound to grant the motion pursuant to Federal Rules of Criminal Procedure, Rule 29. We agree that there was sufficient other evidence, which if believed, would establish the existence of a conspiracy. It was not error to submit this issue to the jury.

394 F.2d at 54.

[131] Carbo v. United States, 314 F.2d at 736–37; Cal. Evid. Code § 403, Assem. Comm. Comment (West 1966).

[132] *See* cases cited at note 94 *supra*.

[133] *See* note 88 *supra* and accompanying text.

[134] 314 F.2d at 736.

[135] *See* note 93 *supra* and accompanying text.

[136] 314 F.2d at 737.

[137] *See, e.g.*, Bruton v. United States, 392 U.S. 123 (1968), where the instruction challenged directed the jury to consider a confession of one defendant which implicated another only against the defendant who made the confession. The Court held that the instruction was ineffective to carry out its purported purpose and thus did not safeguard the accused's right to confrontation. *Id.* at 137. *See also* United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (dissenting opinion of Frank, J.); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

[138] *See* 4 Wigmore § 1080a; 5 Wigmore §§ 1420–22.

[139] *See* cases cited at note 152 *infra*.

an opportunity to cross-examine the witnesses against him.[140] The confrontation clause of the sixth amendment provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[141] Cross-examination is an essential element of the right of confrontation.[142] However, neither the hearsay rule[143] nor the confrontation clause[144] guarantees an absolute right that all evidence against an accused be presented by first-hand testimony with its originator available for cross-examination.

Since both the hearsay rule and the confrontation clause are primarily concerned with the opportunity for cross-examination, some federal courts have held that the admission of evidence under an established exception to the hearsay rule satisfies the confrontation requirement.[145]

In so linking hearsay and confrontation, these courts approximated the views of John Henry Wigmore. Wigmore conceived cross-examination to be the root concern of both doctrines. For him the confrontation clause was intended to guarantee a criminal defendant the same opportunity to cross-examine adverse witnesses that the hearsay rule had afforded.[146] The sixth amendment might have contained a hearsay clause or a cross-examination clause. Although Wigmore believed that the confrontation clause endorsed the principles of the hearsay rule and its common law exceptions, he did not see this "constitutionalization" of common law doctrine as a bar to the progressive development of hearsay exceptions.[147]

The relationship between the hearsay rule and the sixth amendment confrontation requirement has always been elusive, yet the Supreme Court has but recently begun defining it.[148] The Court, moreover, has expressly declined to develop the entire relationship at one time,[149] but rather has left its development to a case-by-case unfolding. The unfolding scheme, confined to a mere six years of decisions, has failed to disentwine hearsay principles from the confrontation clause. The resulting overlap, an ill-defined congruence of the two doctrines, has stultified the emergence of an independent confrontation standard,[150] as well as hopes of applying it consistently.

Beginning in 1965[151] the Supreme Court rendered a series of decisions[152] which suggested, not unlike Wigmore, that the confrontation clause and the hearsay rule with its exceptions are closely intertwined, perhaps equivalent.[153] In *Pointer v. Texas*[154] the Court held that the admission of testimony at defendant's trial taken at a preliminary hearing, where the defendant was unrepresented, violated the confrontation clause. The Court ruled that the lack of opportunity to cross-examine the declarant at the hearing and the declarant's unavailability at trial rendered the testimony inadmissible against the defendant.[155]

In *Douglas v. Alabama*,[156] decided with *Pointer*, the confession of an alleged accomplice, which implicated the defendant, was admitted against the defendant at trial. The accomplice invoked his privilege against self-incrimination, refusing to

[140] *See* text accompanying notes 27–31 *supra*.

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

[142] Pointer v. Texas, 380 U.S. 400, 404–05 (1965). *See* 5 WIGMORE § 1397; *see also* Salinger v. United States, 272 U.S. 542 (1926); Diaz v. United States, 223 U.S. 442 (1912); Dowdell v. United States, 221 U.S. 325 (1911); Motes v. United States, 178 U.S. 458 (1900); Kirby v. United States, 174 U.S. 47 (1899); Mattox v. United States, 156 U.S. 237 (1895).

[143] *See* note 26 *supra*.

[144] *See, e.g.*, Mattox v. United States, 156 U.S. 237 (1895); Campbell v. United States, 415 F.2d 356 (6th Cir. 1969).

[145] *See, e.g.*, Campbell v. United States, 410 F.2d 21 (2d Cir. 1970).

[146] 5 WIGMORE § 1397 at 130–31.

[147] The revision and extension of [the hearsay exception] is gradually progressing, and it is well to appreciate fully that there is in this progress nothing inconsistent with constitutional sanctions. So bold are nowadays the attempts to wrest the Constitution in aid of crime, and so complaisant are some Courts in listening to fantastic and unfounded objections to evidence, that the permissibility of such changes should not be left in the slightest doubt.

Id. at 135.

[148] In Pointer v. Texas, 380 U.S. 400 (1965), the Court applied the confrontation clause, through the fourteenth amendment, to the states. Prior to 1965, the relationship between confrontation and the hearsay rule was never squarely faced by the Court, and otherwise only casually alluded to in dictum. *See, e.g.*, Stein v. New York, 346 U.S. 156, 196 (1953); Snyder v. Massachusetts, 291 U.S. 97, 107 (1934).

[149] California v. Green, 399 U.S. 149, 162 (1970).

[150] Conversely,

If [the Court] has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well.

Note, *infra* note 153, at 1436.

[151] *See* note 148 *supra*.

[152] *See, e.g.*, Nelson v. O'Neil, 402 U.S. 622 (1971); Bruton v. United States, 391 U.S. 123 (1968); United States v. Wade, 388 U.S. 218 (1967); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[153] *See* Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966).

[154] 380 U.S. 400 (1965). The Court also held that the confrontation clause applied to the states through the fourteenth amendment due process clause.

[155] 380 U.S. at 408.

[156] 380 U.S. 415 (1965).

answer questions about the confession. The Court held:

> In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. . . . Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his.[157]

Pointer and *Douglas* were consistent with the position that the hearsay rule and its exceptions are coextensive with the scope of the confrontation clause.[158] Thus the denial of confrontation in *Pointer* was merely the erroneous admission of hearsay testimony, which resulted from the failure of the testimony at the preliminary hearing to qualify under the previously recorded testimony exception to the hearsay rule.[159] Though the *Pointer* Court never mentioned hearsay in finding the confrontation violation, it acknowledged that dying declarations and testimony of "deceased witness[es] who [have] testified at a former trial" have been held constitutionally admissible against an accused.[160] Such statements fall squarely within the "traditional" hearsay exceptions for dying declarations and previously recorded testimony. Moreover, the Court suggested that:

> The case before us would be quite a different one had [the witness'] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine.[161]

Similarly, in *Douglas* the inability to cross-examine the declarant rendered the statement incapable of being fit into any traditional hearsay exception. The statement could only be an admission as to the declarant.[162] The statement could not qualify as a declaration against interest because it was against penal, not pecuniary or proprietary interest.[163] Thus, one might conclude that if a hearsay statement is offered which does not fit within a traditional exception to the hearsay rule, the Supreme Court would find its admission violative of the confrontation clause.

A less secure conclusion is that the Court would uphold the admission of hearsay evidence satisfying the requirements of a traditional hearsay exception. The latter conclusion was the first to be rejected by the Court.

In *Barber v. Page*[164] the Court held that the admission of prior recorded testimony violated the confrontation clause where the declarant was available to testify, though imprisoned in another jurisdiction. Under the traditional hearsay exception, unavailability was satisfied where the witness was beyond a court's power of service of process.[165] The Supreme Court ruled that today's increased cooperation between the states and the federal government, and among the states, required an updating of a prosecutor's burden of showing unavailability.[166] Confrontation required the prosecu-

[157] *Id.* at 419–420.

[158] The dangers of this view were ably presented in Note, *supra* note 153, which article the Supreme Court subsequently cited in California v. Green, 399 U.S. 149, 156 n. 8 (1970), and quoted from in Dutton v. Evans, 400 U.S. 74, 86 n. 17 (1970).

[159] Testimony given as witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct cross or redirect examination, with motive and interest similar to those of the party against whom offered.
PROP. FED. R. EVID. 804(b)(1). *See generally* Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U.L. REV. 651, 651 n. 1 (1963). *Cf.* MCCORMICK §§ 231–32.

[160] 380 U.S. at 407, citing Mattox v. United States, 156 U.S. 237 (1895) (former testimony); Mattox v. United States, 146 U.S. 140 (1892) (dying declarations).

[161] 380 U.S. at 407.

[162] MCCORMICK § 239 (emphasis added):
> Admissions are the words or acts of a party-opponent or of his predecessor or representative, offered as evidence against *him*.

The Proposed Federal Rules, PROP. FED. R. EVID. 801(d) (2) takes a new approach to admissions. Instead of making admissions admissible within an exception to the hearsay rule, they are excluded from the definition of hearsay and are thus admissible. However, to qualify as an admission the declaration must be "offered against a party. . . ."

[163] *See* MCCORMICK § 255. The scope of the hearsay exception for declarations against interest has been narrowed to exclude declarations against penal interest from the exception and from admission into evidence. For an excellent review of the background of this rule, *see* McClain v. Anderson Free Press, 232 S.C. 448, 102 S.E.2d 750 (1958). However, the limitation seems to be withering. *See, e.g.*, People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); CAL. EVID. CODE § 1230 (West 1966); PROP. FED. R. EVID. 804(b)(4).

[164] 390 U.S. 719 (1968).

[165] *See* 5 WIGMORE § 1404; MCCORMICK § 234: "Permanent or indefinite residence without the state should always suffice" to satisfy the unavailability requirement of the previously recorded testimony exception. The Proposed Federal Rules, PROP. FED. R. EVID. 804(a)(5) defines "unavailability," a requisite for the exceptions illustrated by Rule 804(b), to mean that the declarant:
> Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

[166] The Court noted, in reaching this conclusion, the power of federal courts to issue writs requiring attend-

tor's good faith effort[167] to secure presence of the witness in light of available contemporary procedures.[168]

Subsequently, in *California v. Green*,[169] the Court eclipsed the first conclusion that non-traditional hearsay exceptions would be found unconstitutional. In *Green*, the Court considered the admissibility of prior testimony of a witness who claimed a lapse of memory at trial. Unlike most other jurisdictions, California permits the introduction of prior inconsistent statements into evidence to prove the truth of the matter asserted,[170] not merely to impeach credibility.[171] The Supreme Court held that the California rule is not inconsistent with the confrontation clause.

In *Green*, after the chief prosecution witness, Porter, claimed a lapse of memory, the state introduced his sworn, cross-examined testimony taken at a preliminary hearing in which he stated that Green had sold him marijuana. A police officer testified that Porter had recounted a similar story to him. These two out-of-court statements, admitted for their truth under the California statutory definition of hearsay, constituted the case-in-chief against Green. The Supreme Court stated that the issue was "whether a defendant's constitutional right 'to be confronted by the witnesses against him' is necessarily inconsistent with a State's decision to change its hearsay rules to reflect the minority view." [172]

In holding that the confrontation clause had not been violated the Court stated:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber v. Page*... *Pointer v. Texas*.... The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. [citations omitted][173]

The specific holding of *Green* was twofold. First, the Court ruled that if a declarant was available for cross-examination at trial, the confrontation clause did not bar admission of out-of-court statements made by the declarant.[174] Though a state's evidentiary rules might bar substantive use of prior inconsistent statements, the confrontation clause was satisfied so long as the defendant could "confront" the declarant as to any statements he had made. Second, the Court held that where the declarant was not present at trial, the sixth amendment was satisfied if the opportunity to cross-examine was present when the declarant made the incriminating statement.[175] Consequently, in

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ance of witnesses from outside their jurisdiction. 390 U.S. at 724.

The Court also held that the defendant had not waived his right to cross-examine at the preliminary hearing, but noted that even had he done so, the decision would have been the same. *Id.* at 725. This point was reaffirmed in Berger v. California, 393 U.S. 314 (1968), which held *Barber* to apply retroactively. In *Berger* the defendant had been afforded a full opportunity at a prior hearing to cross-examine the subsequently unavailable witness. The Court again held that absent a showing of a good faith effort by the prosecution to produce the witness for trial, the confrontation clause precludes the admission of such evidence.

[167] *Barber* has been viewed as a case of prosecutorial misconduct. 400 U.S. at 87.

[168] Mr. Justice Marshall, speaking for the Court in *Barber*, noted that "[t]he right of confrontation may not be dispensed with so easily." 390 U.S. at 725. He suggested that under 28 U.S.C. § 2241(c)(5) the federal courts had power to issue writs of habeas corpus *ad testificandum* at the request of state prosecution authorities, in order to provide the state with a federally incarcerated witness.

[169] 399 U.S. 149 (1970).

[170] CAL. EVID. CODE § 1235 (West 1966). The Proposed Federal Rules also permit the use of prior inconsistent statements as substantive proof. PROP. FED. R. EVID. 801(d)(1). The Supreme Court of Illinois recently held that prior inconsistent statements may be used for impeachment purposes only, declining an invitation to follow the California and Proposed Rules' "reform." *See* People v. Collins, 49 Ill. 2d 179, 274 N.E.2d 77 (1971) (opinion of Mr. Justice Schaefer). The Supreme Courts of Wisconsin and Kentucky have permitted the use of prior inconsistent statements as substantive proof. *See* Gelhaar v. State, 41 Wis. 2d 230, 164 N.W.2d 609 (1969); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

[171] *See, e.g.*, Ellis v. United States, 138 F.2d 612, 616–21 (8th Cir. 1943); State v. Saporen, 205 Minn. 358, 361–62, 285 N.W. 898, 900–01 (1939). For a collection of cases *see* 3A WIGMORE § 1018.

[172] 399 U.S. at 155.

[173] *Id.* at 155–56.

[174] The Court noted that prior *consistent* testimony was not susceptible to effective cross-examination at trial because it tended to "harden" with time. This danger, felt the Court, was not present in *Green* where "the witness has changed his testimony so that... his prior statement has softened to the point where he now repudiates it." 399 U.S. at 159.

[175] *Id.* at 165.

Green, Porter's failure to cooperate at trial, if found to preclude effective cross-examination, did not render his prior statement inadmissible. As in *Douglas*, the confrontation clause was satisfied by "a complete and adequate opportunity to cross-examine" at the preliminary hearing.[176]

In *Green*, the Court laid to rest speculation that the confrontation clause was defined by the hearsay rule and its traditional exceptions. More exactly, the Court disclaimed that the sixth amendment codified hearsay rules "as they existed historically at common law."[177] This disclaimed congruence would define confrontation narrowly by the state of the common law, always confused,[178] at some arbitrary, historic time. Thus the *Green* Court merely disassociated the confrontation clause from some arbitrary set of hearsay rules and exceptions. The Court, however, did not divorce confrontation requirements from the strictures of hearsay principles. *Green* left unanswered the extent to which the confrontation clause borrowed from common law notions of necessity, availability of witnesses, opportunity to cross-examine and testimonial reliability. Yet to the degree that a confrontation standard partakes of hearsay principles, a congruence is established, albeit not so narrowly defined an equation as *Green* disclaimed. The Court should not be quick to establish such a congruence, for it suggests that the Court will be in the business of reviewing a trial court's determinations of evidentiary trustworthiness and weight, a task for which it is ill-suited.[179]

Within six months of deciding *Green*, the Court faced just such a task in *Dutton v. Evans*.[180] The defendant, Evans, was tried for the murder of three police officers in Georgia. Two other men allegedly participated in the crime, Truett and Williams. Truett was granted immunity and testified against Evans and apparently against Williams, who was tried separately. At Evans' trial the prosecution called a man named Shaw as a witness. Shaw testified that he and Williams were fellow prisoners in the federal penitentiary in Atlanta at the time Williams was brought to state court for arraignment on the murder charges involved in *Dutton*. Shaw testified that when Williams returned to the prison from the arraignment Shaw asked Williams, "How did you make out in court?" and that Williams responded: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."

Defense counsel's objection that this statement was hearsay and violative of Evans' right of confrontation was overruled by the trial court. The Georgia Supreme Court[181] upheld the ruling on the basis of a Georgia statute which provides:

> After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.[182]

This statute differs from the generally accepted co-conspirator's exception, and that existing in the federal system, in that it permits admission of out-of-court statements made after the commission of a crime and while the conspirators are concealing their guilt.[183]

Speaking for the Court in a plurality opinion, Justice Stewart first dimissed the defendant's claim that the Georgia hearsay exception violated the confrontation clause by exceeding the scope of the common law or federal co-conspirator hearsay exception. Justice Stewart noted that *Green* explicitly denied that common law hearsay exceptions defined the limits of admissibility under the sixth amendment.[184] Furthermore, he pointed out that the narrow scope of the co-conspirators hearsay exception was a product of the "Court's 'disfavor' of 'attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.'"[185] Since *Dutton* did not involve the substantive offense of conspiracy, the Court concluded that such policy questions as might arise from this "disfavor" were not present.[186]

[176] Justice Brennan, dissenting in *Green* felt that *Barber* undermined the view that cross-examination at a preliminary hearing could satisfy the confrontation clause. *Id.* at 195. *See* People v. Green, 70 Cal. 2d 654, 663, 451 P.2d 422, 428, 75 Cal. Rptr. 782, 788 (1969) (differences between a trial and a preliminary hearing).

[177] 399 U.S. at 155–56.

[178] MCCORMICK § 231.

[179] *See* Note, *supra* note 153, at 1436.

[180] 400 U.S. 74 (1970).

[181] 222 Ga. 392, 150 S.E.2d 240 (1966). The district court's denial of habeas corpus was reversed by the Fifth Circuit. Evans v. Dutton, 400 F.2d 826 (5th Cir. 1968).

[182] GA. ANN. CODE § 38-306 (1954).

[183] *See* 18 U.S.C. § 3771 (1968); FED. R. CRIM. P. 26. *See also* note 47 *supra*. For a criticism of the traditional co-conspirator exception, *see* Comment, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 755–56 (1965).

[184] 400 U.S. at 82.

[185] *Id.*

[186] *Id.* at 83. The Court thereby reserved consideration of whether the co-conspirator exception to the hearsay role violates the confrontation clause in conspiracy prosecutions. But there is little reason to sus-

The Court then turned to its recent decisions to determine whether Evans' conviction had to be set aside under their "impact." *Pointer* was distinguished with *Pointer's* own words that use of the transcript there " 'denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him.' " [187] *Douglas* was said to involve "an even more flagrant violation of the defendant's right of confrontation," referring to the fact that the out-of-court statements had been read to the jury by the prosecutor and that the *Douglas* Court considered these statements to be of "crucial importance" in the case.[188] *Barber* was distinguished because it turned upon an "unavailability" issue—the Court stating that *Barber* was "even further afield." [189]

The Court then asserted that it would confine itself to a determination of the case before it.[190] It affirmed the conviction upon two grounds. First, it found that the disputed evidence was not "in any sense 'crucial' or 'devastating' " as in the cases it had distinguished.[191] Second, application of the Georgia evidentiary rule in the "circumstances of this case" was not found to violate the sixth amendment.[192]

In concluding that Shaw's testimony was not critical, the Court noted that the prosecution in *Dutton* had presented nineteen witnesses other than Shaw and that all were available for cross-examination at Evans' trial. The Court concluded that the disputed evidence consisted of "a brief conversation," that the evidence "was of peripheral significance at most," and "was admitted under a co-conspirator exception to the hearsay rule long established under state statutory law." [193]

The Court's conclusions as to the brief and peripheral nature of the testimony relied on the presumption that the jury was not unduly influenced by Shaw's statement. This presumption, the Court suggested, arose from the vague nature of Shaw's assertion which "carried on its face a warning to the jury against giving the statement undue weight." [194] But surely such judicial second-guessing is an unseemly basis for a constitutional decision. Indeed, as Mr. Justice Marshall pointed out in his dissent in *Dutton*, [195] the impropriety of such speculation appeared to provide the basis for the Court's decision in *Bruton v. United States*.[196]

The Court's additional notation that Shaw's statement was admitted under a long-standing state rule of evidence must be deemed gratuitous. There was no dispute that the statement was within the Georgia co-conspirators exception. The longevity of the statutory exception does not bear upon whether the evidence admitted under it is crucial or devastating, or whether it violates the sixth amendment.[197]

The Court's analysis would support the conclusion that admission of the disputed evidence was harmless error, but the plurality opinion never used that language.[198] Thus the Court left unanswered what weight it gave its finding that the disputed statement was not crucial evidence in determining that there was no confrontation violation.

Whatever Justice Stewart's opinion was intended to communicate on the "devastating and crucial" issue, it disturbingly recalls the justification given for the admission of the hearsay evidence at the trial of Sir Walter Raleigh. As Mr. Justice

pect that the Court would fashion a general rule finding such a violation.

The case-by-case approach to confrontation clause issues adopted by *Dutton* precludes such a possibility. Moreover, the policy considerations in conspiracy trials are likely to be resolved in favor of admission of co-conspirator's hearsay statements by the current and prospective "law and order" Court. Given the secretive nature of most conspiracies and the problems encountered with circumstantial proof of them, co-conspirator's hearsay testimony will likely be viewed as necessary for conviction—more necessary, on balance, than defendants' rights to confrontation. Even Mr. Justice Harlan, balancing the problems of proof of conspiracy against a defendant's right to a fair trial, resolves the issue in favor of admitting hearsay evidence. *See* Dutton v. Evans, 400 U.S. 74, 99–100 (1970) (concurring opinion of Harlan, J.).

[187] *Id.* at 84, quoting *Pointer*, 380 U.S. at 403.

[188] 400 U.S. at 84, quoting *Douglas*, 380 U.S. at 417.

[189] 400 U.S. at 85. Other cases distinguished, concededly of little significance in the determination of *Dutton*, were Brookhart v. Janis, 384 U.S. 1 (1966) (involving the issue of waiver of the right to cross-examine); Bruton v. United States, 391 U.S. 123 (1968) (involving the ability of a jury to follow instructions, in a joint trial, not to consider one defendant's statements in determining the guilt of another defendant, there being no dispute that the declarant's statements were inadmissible against the co-defendant); and Roberts v. Russell, 397 U.S. 293 (1969) (holding *Bruton* applicable to the states and retroactive).

[190] 400 U.S. at 86.

[191] *Id.* at 87.

[192] *Id.* at 88.

[193] *Id.* at 87.

[194] *Id.* at 88.

[195] *Id.* at 103–04.

[196] 391 U.S. 123 (1968).

[197] As Justice Marshall noted, the plurality opinion "surely does not mean that a defendant's constitutional right must give way to a state evidentiary rule." 400 U.S. at 105.

[198] *But see* Justice Blackmun's concurring opinion finding the statement's admission "harmless error if it was error at all." *Id.* at 90.

Stewart notes in his opinion in *Dutton*, "It has been suggested that [the confrontation clause] is based on a common-law principle that had its origin in a reaction to abuses at the trial of Sir Walter Raleigh. . . ." [199] At Sir Walter Raleigh's trial for treason, the confession of an alleged co-conspirator, Lord Cobham, implicating Raleigh, was admitted into evidence. Lord Cobham was not called to testify, although he was "in the house hard by, and may seen [sic] be brought hither. . . ." [200]

In response to Sir Walter Raleigh's demand that Cobham be produced as a witness at the trial, Chief Justice Popham explained why this could not be done:

> Where no circumstances do concur to make a matter probable, then an accuser may be heard; *but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced;* for, having first confessed against himself voluntarily, and so charged another person, if we shall now hear him again in person, he may for favour or fear, retract what formerly he hath said, and the jury may, by that means, be inveigled. [emphasis added][201]

Yet Mr. Justice Stewart stressed that the *Dutton* decision rested weightedly on the "not crucial or devastating" conclusion.[202] This so, the difference between this justification for *Dutton* and the long criticized thinking behind Lord Popham's decision in Sir Walter Raleigh's case disappears.

The second ground for the *Dutton* decision was that admission of the disputed evidence did not violate the confrontation clause. The Court explained that this decision was reached under a constitutional standard of confrontation which was not defined by hearsay doctrine. It reasserted its position in *Green* that the Court had never equated confrontation with the rules of hearsay and their exceptions and that "we decline to do so now." [203]

Justice Stewart, speaking for the Court, denied that a confrontation issue underlay the question whether the declarant made the statement Shaw related at trial. Shaw, assured the Court, was available for effective cross-examination on that issue.[204] The confrontation issue, according to Justice Stewart, arose instead because "the jury was being invited to infer that Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament." [205] Justice Stewart gave four reasons[206] why this invitation, involving a "question of identity," [207] did not violate the confrontation clause. First, the statement contained no express assertion about past fact and consequently carried with it, on its face, a warning to the jury against giving it undue weight. Second, declarant-Williams' personal knowledge of the identity and role of the other participants in the murder was "abundantly established" by other evidence. Third, the possibility that Williams' statement was "founded on faulty recollection is remote in the extreme." Finally, there was reason to "suppose" that Williams "did not misrepresent Evans' involvement in the crime" because he "had no apparent reason to lie," his "statement was spontaneous, and it was against his penal interest to make it."

The Court's first two reasons support the conclusion that the evidence was not crucial or devastating, rather than establish any standard for determining when the confrontation clause is violated by admision of evidence for some other reason. The Court's conclusion that the statement itself adequately aroused a jury against giving it undue weight means that the evidence was presumptively of little weight or importance. Similarly, that there was other evidence which "abundantly established" the declarants' personal knowledge of the identity and role of the other participants in the murder indicates that the disputed evidence was of no consequence in deciding those issues.

Thus, the first two reasons supporting no confrontation clause violation suggest the presumption that the jury gave the evidence little or no weight. In other words, admission of the evidence was harmless error at most.[208] But the Court never

[199] *Id.* at 86 n. 16. (citation omitted).

[200] J. G. PHILMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850), as quoted in D. LOUISELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 50 (1968).

[201] *Id.*

[202] The plurality opinion closed with a quotation from an opinion written by Mr. Justice Cardozo in which the Court declined to set aside a state criminal conviction on confrontation grounds. Cardozo stated:

> There is danger that the criminal law will be brought into contempt . . . if gossamer possibilities of prejudice to a defendant are to nullify a sentence . . . and set the guilty free.

400 U.S. at 89–90, quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

[203] 400 U.S. at 86.

[204] *Id.* at 88.

[205] *Id.*

[206] *Id.* at 88–89.

[207] *Id.* at 88.

[208] As noted previously, *supra* note 198 and accompanying text, Mr. Justice Blackmun asserts harmless error as a separate ground for reaching the same decision as the plurality in the case—a ground which Black-

used the term "harmless error." Since the Court repeated itself, and again hammered at the inconsequence, though not harmlessness, of Shaw's testimony, it seems fair again to question what bearing that conclusion had on the confrontation issue. If the Court meant to incorporate a test of importance or weight in the confrontation standard, it reintroduced an abuse the confrontation standard was intended to correct.[209] If the Court meant instead to distinguish *Dutton* from previous decisions finding confrontation violations, that distinction alone failed to resolve the confrontation issue in *Dutton*. Summed up, none of the Court's variations on the "not crucial or devastating evidence" theme disposed of the defendant's constitutional argument.

The third and fourth reasons advanced by Justice Stewart for the conclusion that the confrontation clause was not violated spoke to the reliability of Williams' statement. He asserted that there was reason to conclude that the declarant's recollection was accurate. Certainly, circumstantial guarantees of such accuracy may substitute for testing accuracy by cross-examination, thus making the evidence admissible without producing the declarant at trial. This reasoning is consistent with the traditional approach to determining whether hearsay evidence should be admitted; that is, whether there should be an exception from the exclusionary rule because of the inherent reliability of the statement.[210] Unfortunately, the plurality opinion failed to state why it found circumstantial guarantees of accuracy present in the case before it.

Finally, Mr. Justice Stewart stated that since Williams had no apparent reason to lie and his statement was spontaneous and against his penal interest, there was no reason to conclude that the statement was inherently untrustworthy. Stewart declared that such circumstances "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." [211] Presumably this means that the disputed evidence fell within the hearsay exceptions for spontaneous exclamations[212] and declarations against interest.[213] But neither exception, as traditionally defined, comfortably embraces the disputed statement.[214] Moreover, the opinion disclaimed using the hearsay rule as a basis for determining the confrontation issue. The Court appears to have abstracted principles of testimonial reliability from, but without reference to, traditional hearsay exceptions. *Dutton* thus announces the sixth amendment's appropriation of hearsay concepts in unknown quantities to test evidentiary reliability under the confrontation clause.[215]

The *Dutton* decision provides no reliable standards by which one may with confidence determine issues arising under the confrontation clause. Surely, in attempting to follow *Dutton*, courts will resort to subjective determination of whether or not the evidence was crucial, devastating, or prejudicial. However, such determinations do not appear relevant to standards inhering in the confrontation clause, or to be distinguishable from general notions of fairness and due process. On balance, one is tempted to conclude that the Court has in fact adopted a due process standard.

Mr. Justice Harlan, concurring in *Dutton*, felt that the plurality decision did not "explain the

mun apparently believed was absent in the plurality opinion.

[209] *See* text accompanying notes 199–202 *supra*.

[210] *See* 5 WIGMORE §§ 1420–24.

[211] 400 U.S. at 89.

[212] *See, e.g.*, MCCORMICK § 272; PROP. FED. R. EVID. 803(1)–(2).

[213] *See* MCCORMICK §§ 253–57; 5 WIGMORE §§ 1455–77; PROP. FED. R. EVID. 804(b)–(4). Although the exception for declarations against interest has been limited traditionally to statements against pecuniary or proprietary interest, the recent trend has been to allow statements against penal interest to be admitted into evidence within the exception. *See, e.g.*, in addition to authorities cited *supra*, United States v. Dovico, 261 F. Supp. 862 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 325 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967).

[214] The spontaneous utterance exception traditionally applies to statements generated by an exciting event either participated in by the declarant or witnessed by him. *See* MCCORMICK § 272; 6 WIGMORE §§ 1745–47. Other exceptions which depend upon spontaneity to qualify for admissibility include declarations of bodily condition, *see* MCCORMICK §§ 265–67; PROP. FED. R. EVID. 803(3), and declarations of mental state, *see* MCCORMICK §§ 268–71; PROP. FED. R. EVID. 803(3). Arguably, Williams' statement in *Dutton* might be within the exception for declarations of mental state, but his mental state was not in issue. Thus the statement would only be probative of an issue in dispute if it were true that Evans was the perpetrator of the murder.

As noted previously, the traditional exception for declarations against interest would not apply, since the statement was against penal, not proprietary or pecuniary interest. *See* note 163 *supra* and accompanying text. If as indicated in this analysis of *Douglas*, *supra* note 163 and accompanying text, *Douglas* could not be decided on the basis of the declarations against interest exception, then the reference to the declaration being against penal interest in *Dutton* may buttress Stewart's assertion that the case was not being decided by equating the confrontation clause with hearsay exceptions.

[215] *See generally Supreme Court Review—Confrontation*, 62 J. CRIM. L.C. & P.S. 516 (1971).

standard by which it test[ed]" the disputed statement, "or how this standard [could] be squared with the seemingly absolute command of the clause. . . ." [216] Harlan concluded that the confrontation clause was wholly inappropriate for testing rules of evidence. He contended that it should be restricted to requiring the trial presence and cross-examination of adverse witnesses. He then asserted that the due process clause of the fifth and fourteenth amendments provides the appropriate standard.[217] Harlan applied that standard to *Dutton* and concluded that due process of law had been accomplished because of the nature of conspiracies;[218] because without the admission of hearsay evidence, "the facts it reveals are likely to remain hidden from the jury";[219] because one weighing the necessity for admission against the danger of the jury giving it undue weight "might reasonably conclude that admission would increase the likelihood of just determinations of truth";[220] and because "I cannot say that [exclusion of the statement] . . . is essential to a fair trial." [221]

Dutton does nothing to clarify the entanglement of the confrontation clause and the hearsay rule and its exceptions. *Pointer* approached the problem without reference to hearsay. *Green* denied that the scope of the confrontation clause is determinable by the hearsay rule and its exceptions as defined at common law. *Dutton* is confusing. It is a plurality decision. The swing vote was provided by Justice Harlan. Yet, not only was the theory of his concurring opinion different from the plurality's, but Harlan largely rejected his prior views expressed in a *Green* concurring opinion. The *Dutton* Court introduced notions of testimonial weight which failed to relate to the central issue in *Dutton*—confrontation. The Court also announced heretofore unused standards of testimonial reliability to test the confrontation issue. These circumstances add to the decision's ambiguity and insure that *Dutton* will be of little value in future confrontation decisions.[222]

[216] 400 U.S. at 96.
[217] *Id.* at 96–97.
[218] *Id.* at 99.
[219] *Id.*
[220] *Id.*
[221] *Id.* at 100.

[222] In Commonwealth v. Thomas, 443 Pa. 234, 279 A.2d 20 (1971), the Supreme Court of Pennsylvania, relying upon *Dutton*, concluded that hearsay statements, falling within the state of mind exception, were in no sense "crucial" or "devastating" and thus their admission was not violative of the sixth amendment. This conclusion was further supported by the assertion that "the evidence was not so prejudicial that the jury could not properly evaluate it." 443 Pa. at 279 A.2d at 25. The Court did not attempt to resolve the case by reference to indicia of reliability of the disputed statement, although it noted that the fact the statements were offered to prove was shown by other evidence.