MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 12 | Issue 4 Article 7

1986

Criminal Procedure: Significant 1985 Developments

Charlene W. Hatcher

SURVEY ARTICLES

CRIMINAL PROCEDURE: SIGNIFICANT 1985 DEVELOPMENTS

Between January, 1984 and September, 1985, the Eighth Circuit Court of Appeals decided over 311 criminal appeals. The first section of this survey discusses significant developments concerning the coconspirator exception to the hearsay rule of evidence as it relates to the preliminary determination of statement admissibility. Independent evidence, establishment of a conspiracy, quantum of proof, and order of proof are also discussed.

The second section examines the entrapment defense and significant developments concerning: (1) the availability of the defense, (2) burden of proof and jury instructions, and (3) rebuttal of the entrapment defense through the use of evidence of other defenses.

I. THE COCONSPIRATOR HEARSAY EXCEPTION

A. Introduction

The coconspirator exception to the hearsay rule of evidence[1] is an evidentiary rule which permits the use of certain out-of-court statements by one criminal actor to be used against a coconspirator.[2] The Federal Rules of Evidence, which became effective in 1975,[3] codify this exception in subdivision d of Rule 801.[4]

Federal common law recognized that statements of coconspirators

---

1. This rule will hereinafter be referred to as the "coconspirator hearsay exception."

2. Courts, as well as commentators, have likened conspiracies to business partnerships in that the participants act in concert to achieve a desired end. As a result, the courts view a party conspirator as having authorized all acts and declarations of a coconspirator made during and in furtherance of the conspiracy. *See* E. W. CLEARY, MCCORMICK ON EVIDENCE § 267 (3d ed. 1984); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 57 (1978).

3. Act of Dec. 19, 1974, Pub. L. No. 93-595, § 3, 88 Stat. 1926.

4. FED. R. EVID. 801(d)(2)(E). Rule 801 of the Federal Rules provides in pertinent part:

> (d) **Statements which are not hearsay.** A statement is not hearsay if—
>
> . . .
>
> (2) **Admission by a party-opponent.** The statement is offered against a party and is . . .
>
> . . .
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Id.

were an exception to the hearsay rule in both civil[5] and criminal lawsuits.[6] This doctrine was described at common law as, "[A]ny act or declaration by one coconspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every coconspirator provided that a foundation for its reception is laid by independent proof of the conspiracy."[7] A slight variation of this rule was codified in the Federal Rules of Evidence.[8]

Federal Rule of Evidence 801 essentially adopted the common law rule with regard to the elements of "pendency" and "in furtherance of" the conspiracy.[9] It did not, however, codify the requirement of independent foundation.[10] Moreover, the adoption of Federal Rule of Evidence 104,[11] which governs preliminary questions of admissi-

5. At common law this doctrine was applied in civil cases. *See* South-East Coal Co. v. Consolidated Coal Co., 434 F.2d 767, 779 (6th Cir. 1970), *cert. denied,* 402 U.S. 983 (1971) (coconspirator hearsay exception applicable in civil anti-trust action).

6. Common law recognized this doctrine as applying to all types of joint ventures. *See* Anderson v. United States, 417 U.S. 211, 218 & n.6 (1974); Lutwak v. United States, 344 U.S. 604, 617 (1953).

7. Levie, *Hearsay and Conspiracy—A Reexamination of the Co-conspirator's Exception to the Hearsay Rule,* 52 MICH. L. REV. 1159, 1161 (1954).

8. *See* FED. R. EVID. 801(d)(2)(E). The Senate Committee on the Judiciary stated the following regarding the coconspirator exception:

> The House approved the long-accepted rule that 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy' is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged.

See S. REP. No. 93-1277, 93rd Cong., 2d Sess. 26 *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7073.

9. *See* Levie, *supra* note 7, at 1161.

10. The common law requirement of independent foundation was stated by the Supreme Court in Glasser v. United States, 315 U.S. 60, 74 (1942). Specifically, the *Glasser* court held that the existence of a conspiracy must be proven by independent, non-hearsay evidence *before* the coconspirator exception can be invoked; no "bootstrapping" was allowed. *Id.* at 74-75.

11. Federal Rules of Evidence 104 provides:

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

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

bility, has produced a majority[12] and minority[13] rule regarding the requirement that independent proof must be presented to establish the existence of a conspiracy before the coconspirator hearsay exception may be invoked.[14]

---

12. The majority rule holds that evidence independent and exclusive of the statement seeking admission pursuant to Federal Rule of Evidence 801(d)(2)(E) must establish the existence of the conspiracy and the defendant's participation therein. *See* United States v. Behrens, 689 F.2d 154, 158-59 (10th Cir.), *cert. denied,* 459 U.S. 1088 (1982); United States v. Fleishman, 684 F.2d 1329, 1337-38 (9th Cir.), *cert. denied,* 459 U.S. 1044 (1982); United States v. Hartley, 678 F.2d 961, 972 (11th Cir. 1982); United States v. Magnuson, 680 F.2d 56, 58 (8th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983)); United States v. Shelton, 669 F.2d 446, 450-51 (7th Cir. 1982); United States v. Nicoll, 664 F.2d 1308 (5th Cir.), *cert. denied,* 457 U.S. 1118 (1982) (overruled by United States v. Henry, 749 F.2d 203, 206 (5th Cir. 1984)); United States v. Truong Dinh Hung, 629 F.2d 908, 930 (4th Cir. 1980), *cert. denied,* 454 U.S. 1144 (1982); United States v. Continental Group, Inc., 603 F.2d 444, 460 (3d Cir. 1979), *cert. denied,* 444 U.S. 1032 (1980); United States v. Rucker, 586 F.2d 899, 906 (2d Cir. 1978).

13. The minority rule holds that a trial judge may consider the coconspirator's statement and other hearsay evidence to determine whether the jury should be permitted to consider the coconspirator's statement during its deliberation. *See* United States v. Guerro, 693 F.2d 10, 12 (1st Cir. 1982); United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

14. A majority of the circuits adhere to the common law requirement that the existence of a conspiracy must be proven by independent, non-hearsay evidence before the coconspirator hearsay exception will be invoked. *See supra* note 10. However, the First Circuit Court of Appeals has held that Fed. R. Evid. 104 permits a judge to base his determinations regarding the admissibility of a coconspirator's statement on hearsay and other inadmissible evidence. *See id.* For cases recognizing this approach, see *supra* note 13.

Admissibility of coconspirator statements in government prosecutions heard in the Eighth Circuit Court of Appeals requires that the following be proven by a preponderance of the evidence: (1) demonstration of the existence of a conspiracy; (2) wherein the defendant and the declarant were members; and (3) where the declaration was made in furtherance of the conspiracy. For Eighth Circuit cases recognizing this standard, see United States v. Johnson, 767 F.2d 1259, 1271 (8th Cir. 1985); United States v. Lewis, 759 F.2d 1316, 1338-39 (8th Cir. 1985); United States v. Leroux, 738 F.2d 943, 949 (8th Cir. 1984); United States v. Jankowski, 713 F.2d 394, 396 (8th Cir. 1983), *cert. denied,* 464 U.S. 1051 (1984); United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978); United States v. Lambros, 564 F.2d 26, 30 (8th Cir. 1977); United States v. Frol, 518 F.2d 1134, 1136-37 (8th Cir. 1975).

The quantum of proof required by the circuit courts to invoke the coconspirator hearsay exception varies from circuit to circuit. Four standards are recognized: (1) the conspiracy must be established by prima facie evidence; (2) once the existence of a conspiracy has been established by the evidence presented in a preliminary proceeding, only slight evidence is required to demonstrate the defendant's participation in it; (3) the existence of a conspiracy and the defendant's participation in it must be established by a preponderance of the evidence; and (4) the existence of a conspiracy and the defendant's participation in it must be established by substantial evidence. For a discussion concerning the application of these standards and the Eighth Circuit's approach to required quantum of proof, see *infra* note 110.

B. Case Evaluations

During the Eighth Circuit's January, 1984 to September, 1985 term, the court decided nineteen cases involving evidence presented for admission under the coconspirator hearsay exception.[15] Among those cases decided, the court faced compelling arguments against the admissibility of such evidence in: *United States v. Lewis*[16] and *United States v. Johnson.*[17]

1. United States v. Lewis

In *Lewis,* R.A. Milburn was the central figure in two conspiracies: a tax evasion conspiracy[18] and a narcotics distribution conspiracy.[19] The tax evasion conspiracy involved two instances concerning the admissibility of coconspirator evidence.

The first instance involved a "drug ledger"[20] which recorded drug

15. The Eighth Circuit decided the following cases during this time period: United States v. Helmel, 769 F.2d 1306 (8th Cir. 1985); United States v. Disbrow, 768 F.2d 976 (8th Cir. 1985); United States v. Arenal, 768 F.2d 263 (8th Cir. 1985); *Johnson,* 767 F.2d 1259; United States v. Reda, 765 F.2d 715 (8th Cir. 1985); United States v. American Grain & Related Indus., 763 F.2d 312 (8th Cir. 1985); United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985); *Lewis,* 759 F.2d 1316; United States v. Becton, 751 F.2d 250 (8th Cir. 1984); United States v. Fahnbulleh, 748 F.2d 473 (8th Cir. 1984); United States v. Schepp, 746 F.2d 406 (8th Cir. 1984); United States v. Resnick, 745 F.2d 1179 (8th Cir. 1984); United States v. Lee, 743 F.2d 1240 (8th Cir. 1984); United States v. Krevsky, 741 F.2d 1090 (8th Cir. 1984); United States v. Massa, 740 F.2d 629 (8th Cir. 1984); United States v. Panas, 738 F.2d 278 (8th Cir. 1984); *Leroux,* 738 F.2d 943 (8th Cir. 1984).

16. 759 F.2d 1316 (8th Cir. 1985).

17. 767 F.2d 1259 (8th Cir. 1985).

18. Milburn was convicted under 21 U.S.C. § 848 for maintaining a "continuing criminal enterprise" (CCE). *Lewis,* 759 F.2d at 1323. He was also convicted for conspiracy to commit tax fraud, a violation of 18 U.S.C. § 371. He was sentenced to life imprisonment without parole on the CCE charge and a concurrent five-year sentence and a $10,000 fine on the tax fraud charge. *Lewis,* 759 F.2d at 1323. Family coconspirators in the tax fraud conspiracy included Milburn's parents, his sister, and brother-in-law. As a result, his mother was sentenced to one year in prison and a $2,000 fine; his father was sentenced to three years in prison and a $10,00 fine; his brother-in-law was sentenced to one year in prison; and his sister was sentenced to fours years in prison and given a $5,000 fine. *Id.*

19. Three of Milburn's associate conspirators were convicted of cocaine distribution and conspiracy charges in violation of 21 U.S.C. § 846. Each of the associate conspirators were given two consecutive ten-year terms of imprisonment, a six-year term of imprisonment, and a five-year term of imprisonment with a $5,000 fine. *Lewis,* 759 F.2d at 1323.

20. A "drug ledger" is an accounting record of drug finances. The information contained in this ledger included names, dollar figures, and telephone numbers. This information was used to maintain the conspirators' continued smuggling activities and to maintain accurate records of the purchase of drugs and the concealment of taxable income. *Id.* at 1338-39.

finances of the conspirators.[21] One page of this ledger, entitled "Paula," apparently listed approximately $100,000 which was disbursed to two of the conspirators[22] for purchasing and improving one conspirator's home as well as the defendant's parents' home.[23] When this evidence was presented at trial, counsel for the conspirators objected, arguing that it was inadmissible hearsay,[24] since the conspirator who kept these records, Ms. Martin,[25] was not named in the action and had died prior to the commencement of this action.[26]

The court disposed of these arguments by holding that, although Martin was an unnamed coconspirator, this evidence was admissible because each of the requirements of Federal Rule of Evidence 801(d)(2)(E)[27] had been met.[28] The existence of a conspiracy was demonstrated by correspondence between Martin and Milburn,[29] which established "a likelihood of illicit association between the declarant and the defendant."[30] This evidence[31] also established that

21. *Id.* at 1338. The government relied heavily upon these records to substantiate the conspirators' purchase of drugs and the concealment of the conspirators' taxable income for tax fraud purposes. *Id.*

22. According to the "Paula" ledger page, the $100,000 disbursement was made to family conspirators Paula and Ron Throop. *Lewis*, 759 F.2d at 1338.

23. *Id.*

24. *Id.* The family's counsel also argued that this key evidence was never authenticated. The Eighth Circuit, however, held that the genuineness of this document had been sufficiently authenticated by circumstantial evidence presented at trial. *Accord* United States v. De Gudino, 722 F.2d 1351, 1355-56 (7th Cir. 1983) (approving admission of lists of information regarding the smuggling of illegal aliens; contents of the lists provided prima facie evidence that they were written by someone involved in the smuggling conspiracy and were seized from the operation's headquarters); United States v. Wilson, 532 F.2d 641, 645 (8th Cir.) (genuineness of writing can be established by circumstantial proof without resort to handwriting or typewriting), *cert. denied*, 429 U.S. 846 (1976).

25. Martin was the girlfriend of Milburn. *Lewis*, 759 F.2d at 1338-39.

26. *Id.* at 1338.

27. For the text of FED. R. EVID. 801(d)(2)(E) see *supra* note 3.

28. *Lewis*, 759 F.2d at 1338-39. The common law standard to which the court referred is that the government must demonstrate that:

> (1) a conspiracy existed;
> (2) defendant and declarant were both members of the conspiracy; and
> (3) the declaration was made during the course of and in furtherance of the conspiracy.

Id. "In establishing the existence of a conspiracy, the government must only demonstrate 'a likelihood of illicit association between the declarant and the defendant.' " *Id.* at 339 (citing United States v. Scholle, 553 F.2d 1040, 1043 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977)).

29. *Lewis*, 759 F.2d at 1339. This correspondence was written by both parties while Ross A. Milburn had been incarcerated in Arkansas on a marijuana charge. *Id.*

30. *Id.* This standard for the establishment of the existence of a conspiracy was set out in *Scholle*, 553 F.2d at 1117.

31. The court stated that other independent evidence also supported the existence of the conspiracy and these parties' membership in it. *Lewis*, 759 F.2d at 1339.

Martin and Milburn were members of the conspiracy.[32]

The court held that the "Paula" page of the ledger was made in the course of the conspiracy because evidence demonstrated its authenticity.[33] Finally, the court held that the "Paula" page was used in furtherance of the conspiracy because accounting records are essential even for "[a] criminal enterprise's continued vitality; without accurate bookkeeping, the purchase of drugs and concealment of taxable income could not have continued."[34]

The second instance involving the tax evasion conspiracy concerned evidence of a conversation between two conspirators in the presence of nonconspirators.[35] This conversation was admitted into evidence by a nonconspirator[36] who recalled Paula Throop discussing with her husband a conversation between Ross E. Milburn and Alan Milburn.[37] While Throop explained this conversation as relating to a "family business,"[38] its real effect was to attempt to shelter drug sales money through the purchase of real property.[39] The coconspirators objected to the admission of this evidence as "triple hearsay."[40]

Again, in disposing of the coconspirators' argument, the court held that evidence regarding these statements was admissible under Federal Rule of Evidence 801(d)(2)(E).[41] The court held that the existence of a conspiracy and the couples' participation in it was es-

---

32. *Id.*

33. *Id.* The authenticating evidence involved the fact that the figures written in the ledger correlated with property expenditures. These entries were dated and five annotated entries tied these entries to the property expenditures made by Paula and Ron Throop. The death of Debbie Martin refuted any suggestion that the "Paula" page could have been composed after the expiration of the conspiracy. *Id.*

34. *Id. Accord De Gudino,* 722 F.2d at 1356 (lists, consisting of names of smuggled aliens and their sponsors as well as records of payments, were admissible as coconspirator statements where contents of the lists clearly showed that their author was familiar with the workings of the conspiracy, fact that lists contained dates and records of payments was evidence that they were written during the course of and in furtherance of the conspiracy, and names and other information were evidence that the lists were utilized to maintain information necessary to continue the conspiracy).

35. *Lewis,* 759 F.2d at 1339.

36. Charles Goodale and his wife, who were casual friends of Paula and Ronald Throop, overheard Paula Throop discuss with her husband a phone call she had received from Ross E. Milburn. In this conversation Ross E. Milburn told Paula that Alan Milburn had directed him to purchase highway frontage lots (in an effort to shelter drug sales money). *Id.*

37. *Id.*

38. Paula Throop explained to the Goodales that the conversation related to a "family business" engaged in real estate speculation. *Id.* at 1339-40.

39. *Id.* at 1340.

40. *Id.*

41. *Id. See supra* notes 4, 14, and 28.

tablished by circumstantial evidence.[42] The court record reflected that the conspiracy was fully functioning before the Throops' and Goodales' visit on the evening in question.[43] Also, contrary to the coconspirators' contentions, Marion Milburn's failure to be implicated in the conspiracy until after Throop's statement to the Goodales did not bar admission of this evidence because the court had previously observed that "one charged with conspiracy may not avoid criminal responsibility by merely having had the fortuity or foresight to join a clearly illegal venture sometime after agreement concerning its objective was reached."[44] Finally, the court held that Throop's statement appeared to have been made in furtherance of the conspiracy,[45] since it gave Ronald Throop explanations as to the new developments and progress of the conspiracy.[46]

In *Lewis,* the court also decided the admissibility of evidence con-

42. *Lewis,* 759 F.2d at 1340. The circumstantial evidence referred to by the court is as follows:

> Ross E. Milburn had apparently taken steps in 1976 to conceal his son's property interest in his own home by changing the title from "Alan Milburn and Deborah L. Martin Milburn, his wife" to "Ross Milburn and Debra L. Martin, as joint tenants." According to stipulation, Ross E. Milburn also signed the new deed and assumed the mortgage in his name. In 1977, the Milburns worked a similar arrangement regarding Alan Milburn's truck, which was titled under "Ross Milburn." In March, 1978, [Ross E.] Milburn wrote Debbie Martin a letter confirming his involvement in the real estate business and telling her, "Paula and Ron will need money. So give them what they ask for." At about the same time as the conversation with the Goodales, the Throops and Ross E. Milburn conferred with their tax advisor about the tax consequences of constructing their home with cash, which led to the formation of the Creative Builders and P & R bank accounts. Shortly after this meeting, in April 1978, the couples began purchasing lots in conformity with [Ross E.] Milburn's plan.

Id. For cases recognizing the use of circumstantial evidence to establish the existence of a conspiracy and the parties' participation in the conspiracy, see *Glasser,* 315 U.S. at 80 (a common purpose and plan may be inferred from a development and collection of circumstances); *Leroux,* 738 F.2d at 950 (independent evidence established a course of action).

43. *Lewis,* 759 F.2d at 1340.

44. *Id.* (quoting United States v. Heater, 689 F.2d 783, 788 (8th Cir. 1982)). *See Leroux,* 738 F.2d at 949-50.

45. In evaluating the "in furtherance of" requirement, the court will consider the nature of the statement as well as the time and circumstances under which it was made. *Lewis,* 759 F.2d at 1340. *See* United States v. Handy, 668 F.2d 407, 408 (8th Cir. 1982).

46. *Lewis,* 759 F.2d at 1340-41. The court went on to state: "[w]e have previously found that statements of explanation which reveal the progress of the conspiracy are made in furtherance of it." *Id.* at 1340; *see also Massa,* 740 F.2d at 638 (statements made were in furtherance of the conspiracy since they were made to other participants in the scheme and either explained events important to the conspiracy or gave directions to facilitate it); *Handy,* 668 F.2d at 408 (statements made, clearly helped identify the role of one coconspirator to another; not only was the progress of the conspiracy revealed but by testimony an explanation was made as well).

cerning two instances of coconspirator statements and distribution of narcotics. The first instance involved a recorded conversation between Ross A. Milburn and Ron Humphries in which Milburn referred to an individual named Terry Crafton.[47] While Crafton agreed that the government's evidence may have established a conspiracy, he argued that none of this evidence established his participation in it.[48]

In refuting this argument, the court recognized that admissibility of the taped conversation was without error because the requirements of Federal Rule of Evidence 801(d)(2)(E) had been met.[49] The conspiracy's existence had been aptly established, the court said, through circumstantial evidence already presented.[50] In addition, Crafton's membership in the conspiracy was established through his participation in the buying of cocaine on several occasions from various alleged members of the conspiracy.[51]

Crafton argued that the admitted[52] statements were not made during the course of the conspiracy because by this time the focus of the conspiracy had changed to attempting to conceal the extent of the group's drug dealing and, therefore, no conspiracy existed in which to connect him.[53] The court disposed of this argument by stating that adequate evidence[54] had been presented to demonstrate that

---

47. *Lewis*, 759 F.2d at 1342.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* The special events which led the court to the determination that Terry Crafton was a member of the conspiracy are as follows:

> Michael Richmond testified that in February, 1980, with Gary Darnall, he and [Ross A.] Milburn met Crafton in Memphis and sold him twelve ounces of cocaine. Richmond also testified that Milburn had doubted the trustworthiness of one of his salesmen and had decided to deal directly with Crafton in his place. Mark McClellan testified that he drove to Kennett, Missouri, in August, 1980, and gave a bulky envelope weighing several ounces to Crafton in exchange for an envelope filled with cash. McClellan also testified that he had planned to meet Crafton in December, 1980, to deliver another bulky envelope, but Crafton did not appear . . . Crafton's telephone records also corroborate his link to [Ross A.] Milburn by confirming that calls were made on the day of the aborted cocaine sale with McClellan. Thus, the evidence clearly demonstrates the existence of a conspiracy of which Crafton was a member.

Id.

52. The taped conversation which was challenged as being hearsay occurred in April of 1981. *Id.* at 1334.

53. *Id.*

54. *Id.* The evidence the court relied on concerning this issue is as follows:

> Crafton was receiving deliveries until August, 1980, and had planned to receive a delivery in December, 1980. In addition, other recorded conversations confirm that [Ross A.] Milburn had two pounds of cocaine ready for sale in February, that he had changed some of his personnel and purchased a "company car," and that he was planning the biggest deal of the year.

the conspiracy was actively functioning and its members were making future business plans until at least the time of the challenged conversation.[55] Furthermore, since the evidence presented at trial gave no indication of Crafton's or of his coconspirator's withdrawal, there was no indication that the drug conspiracy had ended.[56]

Finally, the court held that the challenged statements were made in furtherance of the conspiracy even though they were made during the concealment phase of the conspiracy.[57] The court held that "logic and authority support our decision to admit the evidence . . . [since] in this case . . . the conspiracy was a series of loosely knit transactions between a changing cast of members, [and the court could not] pinpoint when [the conspiracy] may have ended, other than when its members were arrested."[58]

The second instance involving coconspirator statements and the distribution of narcotics also involved the challenge of a taped conversation. This conversation was between Ross A. Milburn and Ron Humphries[59] about associate conspirator Gary Darnall.[60] While Darnall did not contest the existence of a conspiracy and his participation in it,[61] he contended that since the challenged statements

---

Id.

55. *Id.* The court went on to note that other courts have recognized that conspiracies of this sort are deemed to exist until they are actually terminated:

> [W]here a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated, and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn.

Id. (quoting United States v. Hamilton, 689 F.2d 1268 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983)). *See also* United States v. Boyd, 610 F.2d 521, 528 (8th Cir. 1979) (cessation of activities is not enough to constitute withdrawal from a conspiracy), *cert. denied*, 444 U.S. 1089 (1980).

56. *Lewis*, 759 F.2d at 1343.

57. *Id. Contra* Dutton v. Evans, 400 U.S. 74, 81 (1970) (the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators does not apply during subsequent periods when the conspirators are engaged in nothing more than concealment of the criminal enterprise); Lutwak v. United States, 344 U.S. 604, 616 (1953); Krulewitch v. United States, 336 U.S. 440, 443-44 (1949).

58. *Lewis*, 759 F.2d at 1343. *See also* United States v. Gleason, 616 F.2d 2, 23 (2d Cir. 1979) (statement made to allay suspicion of investigator admitted as being in furtherance of conspiracy), *cert. denied*, 444 U.S. 1082 (1980); United States v. Del Valle, 587 F.2d 699, 703-04 (5th Cir.) (where conspiracy was not aimed at accomplishing a single objective with a precise moment of termination but had continuing series of objectives, acts of concealment were parts of a continuing activity that was essential to and therefore in furtherance of the survival of an on-going operation), *cert. denied*, 442 U.S. 909 (1979).

59. Ron Humphries became a government informant and visited Ross A. Milburn wearing a microphone to record their conversations. *Lewis*, 759 F.2d at 1346.

60. *Id.*

61. These requirements were established through circumstantial evidence. *Id.*

took place after the last overt act of the conspiracy,[62] these statements were outside of the coconspirator hearsay exception. The statements therefore, were not made in the course of the conspiracy.[63]

The court disposed of this argument by recognizing that a conspiracy expires after the last overt act committed during the existence of the conspiracy.[64] The court went on to hold that it "was satisfied, from direct and circumstantial evidence, that the conspiracy functioned at least through the April 10, 1981, conversation."[65] Consequently, the "in the course of the conspiracy" requirement had been met.[66]

Darnall further contended that the conspiracy had been terminated by remarks made during the challenged conversations, thereby taking them out of the coconspirator hearsay exception.[67] Aside from finding that this argument was inconsistent with Darnall's original position,[68] the court held that this evidence did not "rise to the threshold necessary to establish a bona fide withdrawal from the conspiracy."[69] Stronger evidence of termination was not produced,

---

62. Darnall argued that the duration of a conspiracy is determined by the last overt act of the conspirators. Further, since the indictment stated that this act occurred on February 10, 1982, and this date was before the challenged statements had been made, these statements were hearsay and not admissible. *Id.* at 1347.

63. *Id.*

64. *Id. See* Fiswick v. United States , 329 U.S. 211, 216 (1946).

65. *Lewis,* 759 F.2d at 1347. The direct and circumstantial evidence specifically relied upon by the court included the following:

> Although no evidence confirms actual cocaine distribution after February 11, [1981] ample evidence demonstrates a pattern of continued activity akin to the pattern of transactions alleged in Count II of the indictment (particularly [Ross A.] Milburn's efforts to "recruit, organize, supervise, manage, and terminate conspiracy personnel and [Ross A.] Milburn's travels and meetings with coconspirators"). On March 12, 1981 [Ross A.] Milburn's brown Pontiac Bonneville (which he described to Humphries as his "company car") was seen in Fort Lauderdale, parked in front of Darnall's home. A month later, on April 10, 1981, Darnall was seen in Sikeston, driving the 1977 Thunderbird which Darnall and [Ross A.] Milburn had purchased with cash in Michael Richmond's name for transporting cocaine. In addition, telephone toll records through April, 1981, prove regular and extensive contact between [Ross A.] Milburn, Darnall, Crafton and Ralph Ed Purdy.

Id. at 1348.

66. *Id.*

67. *Id.* Darnall suggested that Milburn's remark of: "Hey, we've quit. Gary and I have decided to lock it up," showed the termination of the conspiracy. *Id.*

68. The court held that this argument would urge the admission of hearsay evidence to prove the inadmissibility of the challenged hearsay evidence. The court concluded that this suggestion was without merit. *Id.*

69. *Id.* The court went on to state that in order for a conspirator to effectively withdraw from a conspiracy, "the defendant must demonstrate 'that he took affirmative action to defeat or disavow the purpose of the conspiracy . . . . The [m]ere cessation of the activity in furtherance of the conspiracy does not constitute withdrawal.' " *Id.* (quoting United States v. Garrett, 720 F.2d 705, 714 (D.C. Cir. 1983));

therefore, this conspiracy was presumed to have continued until there was an affirmative showing of termination.[70]

With regard to whether the challenged statements were made in furtherance of the conspiracy, Darnall suggested that since Humphries had become a government informant when these conversations had taken place, Humphries could not have conspired with Milburn when the two talked and, therefore, the remarks could not have been made in furtherance of the conspiracy.[71] The court refuted this argument, stating "the fact that one conspirator allies himself with the government has no effect on the continuing conspiratorial efforts of his former associates who remain at large."[72] Furthermore, the court held that where the other coconspirators could still perpetuate the on-going conspiracy, their statements to an informant are admissible under the coconspirator hearsay exception, even when the arrested conspirator is acting under surveillance and direction of government agents to obtain evidence against the coconspirators.[73] Since the remarks[74] made in the taped conversations helped to maintain trust and cohesiveness between the conspirators

see also Boyd, 610 F.2d at 528 (the defendant has the burden of demonstrating his withdrawal in a manner reasonably calculated to reach the coconspirators); United States v. Mayes, 512 F.2d 637, 642-43 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975) (members continue to be conspirators until there has been an affirmative showing that they have withdrawn (citing United States v. Etheridge, 424 F.2d 951, 964 (6th Cir. 1970)).

70. *Lewis*, 759 F.2d at 1347; *see also Mayes*, 512 F.2d at 642-43 (where conspiracy contemplates continuity of purpose and continued performance of acts, it is presumed to exist until there has been affirmative showing that it has terminated and its members continue to be conspirators until there has been affirmative showing that they have withdrawn).

71. *Lewis*, 759 F.2d at 1348.

72. *Id.* (citing United States v. Smith, 600 F.2d 149, 153 (8th Cir. 1979)).

73. *Id.* (citing *Hamilton*, 689 F.2d at 1269); *accord* United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977) (statements made by coconspirators who were not aware of the arrest of one of their group and intended to further the conspiracy, are admissible under the conspiracy hearsay exception) (citing United States v. Bennett, 409 F.2d 888, 893-94 (2d Cir. 1969); United States v. Williams, 548 F.2d 228, 231 (8th Cir. 1977) (the test is not the arrest of some of the conspirators, but whether the remaining conspirators are able to continue with the conspiracy).

74. The remarks relied upon by the court include the following:

> The February 6 and 11 conversations undoubtedly include admissible [remarks] . . . Humphries and [Ross A.] Milburn discussed personnel problems with certain members of the cocaine ring, the availability and quality of up to two pounds of cocaine, and the possibility of Humphries working for [Ross A.] Milburn in exchange for debt forgiveness. On April 10, [Ross A.] Milburn allays Humphries' fears about the DEA investigation and details his efforts to evade detection. He instructs Humphries to keep silent when he goes before the grand jury, and reminds him that the entire group has agreed to remain silent, thereby attempting to preserve the cohesiveness of the group.

Lewis, 759 F.2d at 1348.

and tended to inform the members of the conspiracy's current status, the court held that these statements were in furtherance of the conspiracy and were, therefore, admissible.[75]

2. United States v. Johnson

Johnson[76] involved a conspiracy to transport a stolen automobile from Oklahoma to Missouri.[77] The conspirators affixed new vehicle identification numbers in Missouri and falsely titled it in Oklahoma.[78]

The specific evidence objected to as hearsay was a taped conversation[79] amongst coconspirators, Charles Bailey, Leonard Breedlove, and Ronald Schlup.[80] Bailey and Breedlove advised Schlup on how to "retag"[81] vehicles.[82] The court held that the recorded conversation was not admissible against coconspirators Lee Morgan and Morris Johnson under the coconspirator heresay exception.[83] The court further held, however, that the admission of this conversation was harmless beyond a reasonable doubt because the tape was cumula-

75. *Id.; see also* United States v. Ammar, 714 F.2d 238, 252 (3d Cir. 1983) (statements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them or to inform each other of the current status of the conspiracy furthers the ends of the conspiracy and are admissible as long as the other requirements of Rule 801(d)(2)(E) are met), *cert. denied*, 464 U.S. 936 (1983); United States v. Mason, 658 F.2d 1263, 1270 (9th Cir. 1981) (statements of reassurance further a conspiracy).

76. 767 F.2d 1259 (8th Cir. 1985).

77. *Id.* at 1263. The concealment and illegal transport of this vehicle was in violation of 18 U.S.C. §§ 2, 371 and 2314-2315 (1982).

78. *Id.*

79. This conversation took place on January 29, 1982. *Id.* at 1271.

80. *Id.* Schlup was a paid informant. The FBI set up an undercover operation in Lebanon, Missouri where Schlup and FBI Agent Richard Rindt ran a salvage yard that would presumably be used to refit stolen cars. *Id.* at 1264.

81. The court described "retagging" as follows:

> A salvage vehicle and title are purchased and the small metal vehicle indentification number (VIN) plate is removed from the vehicle. The salvage title is then processed through a state with lax titling requirements so that a non-salvage title is issued. This processing is termed 'title washing.' Shortly after the salvage vehicle is obtained, a car is stolen that matches the vehicle and washed title as to engine size, upholstry, color and accessories. The characters on the salvage VIN and washed title will thus closely correspond to the appearance of the stolen car. The true VIN is removed from the stolen car and replaced with the salvage VIN. Derivative VINs are ground off the motor, transmission, and frame, and new derivative numbers that match the salvage VIN are stamped over the old numbers. Once a stolen car has been retagged the stolen car appears to be legitimate.

Id. at 1263-64.

82. *Id.* at 1271. This taped conversation had been played for the jury. *Id.*

83. *Id.* at 1271. Although Morgan and Johnson were not participants in the taped conversation, they were the defendants who objected to the admissibility of this evidence. *Id.* at 1272.

tive concerning advice about the tags.[84]

Conspirators Morgan and Johnson argued that these statements were inadmissible hearsay because the duration of a conspiracy is limited by the indictment.[85] The indictment stated that the conspiracy did not commence until on or about February 3, 1982. The taped conversation occurred on January 29, 1982. The conspirators argued, therefore, that these conversations were outside the scope of the coconspirator hearsay exception.[86] The court found that the indictment was not dispositive of a conspiracy's duration because the coconspirator hearsay exception can be invoked even when the defendants have not been charged with conspiracy.[87]

In turn, the government argued that evidence of the taped conversation was admissible because January 29th was "on or about" February 3rd and the conversation, therefore, was within the duration of the conspiracy.[88] The court rejected this argument, recognizing that statements made before the existence of a conspiracy do not fall within the coconspirator hearsay exception.[89] Furthermore, the court stated that the government failed to produce any independent evidence that a conspiracy actually existed on or before January 29, 1982.[90] Consequently, the taped conversation was inadmissible hearsay, but the admission was harmless beyond a reasonable doubt.[91]

---

84. *Id.* at 1271. The court went on to hold that this evidence was harmless because no proper objection was made to the question and answer given concerning retagging. The challenged conversation mentioned neither of the objecting defendants. *Id.* at 1271-72.

85. *Id.*

86. *Id.*

87. *Id.*; *accord Lewis*, 759 F.2d at 1339 (the defendants need not be charged with conspiracy to invoke the coconspirator hearsay rule).

88. *Johnson*, 767 F.2d at 1271.

89. *Id.* (citing *Leroux*, 738 F.2d at 949 (coconspirator statements made before the inception of the conspiracy do not fall within the coconspirator hearsay exception)); *accord* United States v. Coe, 718 F.2d 830, 840 (7th Cir. 1983) ("statements by coconspirators made either before formation of conspiracy or after its termination are not admissible under coconspirator hearsay exception"); United States v. Tombrello, 666 F.2d 485, 490 (11th Cir.) (statements before inception of conspiracy do not fall within the exception), *cert. denied*, 456 U.S. 994 (1982); United States v. Vaught, 485 F.2d 320, 323 (4th Cir. 1973) (statements prior to formation of conspiracy irrelevant); *cf.* Brown v. United States, 150 U.S. 93, 98 (1893) (declarations are admissible under the conspiracy exception only when made while conspiracy pending).

90. *Johnson*, 767 F.2d at 1271. The court inferred, however, that had the government presented adequate independent proof that an "illegal plan" involving Johnson and Morgan had existed prior to February 3, 1982, this evidence may have been deemed admissible under the coconspirator hearsay exception. *Id.* The case which used the "illegal plan" standard for determination of independent evidence substantiating the existence of a conspiracy is *Leroux*, 738 F.2d at 950.

91. *Johnson*, 767 F.2d at 1271-72.

C. Circuit Court Comparison

Analysis of the preceding Eighth Circuit decisions in light of other circuit court decisions reveals some confusion surrounding the coconspirator hearsay exception. Application of this exception has created areas of consensus and significant disagreement.

1. Preliminary Determination of Admissibility—a Question of Law

The circuits generally agree that, unlike the common law trend, where the jury had the ultimate decision of determining whether coconspirator statements were admissible,[92] Federal Rule of Evidence 104[93] requires that the preliminary determination concerning coconspirator statement admissibility is a question for the court.[94] While neither *Lewis* nor *Johnson* specifically agreed with this analysis, the Eighth Circuit approved of this change in role in *United States v. Bell.*[95] This application of Rule 104 is well founded because the jury is not competent to determine whether the exception applies.[96]

---

92. At common law, the jury played the prominent role in deciding coconspirator statement admissibility. Specifically, if the judge was satisfied that the government had presented sufficient independent evidence to support a finding by the jury that the alleged conspiracy existed and the declarant and defendant against who the statement was offered were members of the conspiracy, then the jury was instructed to consider the hearsay against that particular defendant if it first found: (1) the conspiracy existed; (2) the declarant and defendant were members of the conspiracy; and (3) the statement was one made in furtherance of the conspiracy. *See, e.g.*, United States v. James, 590 F.2d 575, 577-78 (5th Cir. 1979); United States v. Apollo, 476 F.2d 156, 162-63 (5th Cir. 1973).

93. *See supra* note 11.

94. United States v. Mastropieri, 685 F.2d 776, 789-90 (2d Cir.) (the court, not the jury, determines the admissibility of hearsay statements), *cert. denied*, 459 U.S. 945 (1982); United States v. Federico, 658 F.2d 1337, 1342 (1981); *Gantt*, 617 F.2d at 844 (court determines whether requisite evidence is produced); De Mier v. United States, 616 F.2d 1295, 1300 (5th Cir. 1980) (court determines admissibility); United States v. Nickerson, 606 F.2d 156, 157 (6th Cir.) (Rule 104 requires judge to make determination of admissibility), *cert. denied*, 444 U.S. 994 (1979); *Continental Group*, 603 F.2d at 456; United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976) (admissibility determined by judge).

95. 573 F.2d 1040 (8th Cir. 1978). In *Bell*, the court recognized the subtle but significant changes Rule 801(d)(2)(E) caused in the coconspirator hearsay area. The court stated: "[t]his shift in the relative functions of the judge and jury has occasioned a reevaluation of the level and type of proof necessary to demonstrate a defendant's involvement in a coconspirator's statement." *Id.* at 1043.

96. The complexity of the coconspirator hearsay doctrine is exemplified by the fact that a determination of the exception's applicability to a particular situation requires the analyzer to weigh and assess the evidence presented as the evidence relates to the issue of whether the statement is admissible under the exception. Notably, however, this inquiry must be kept separate and distinct from the preliminary issue whether independent non-hearsay evidence has established the conspiracy's existence in the first place. For a detailed discussion concerning the shift of judge and jury functions regarding questions of admissibility, see Mueller, *The Federal*

2. *Independent Evidence*

a. *Majority View*

The courts also concur on the use of independent evidence in establishing the existence of a conspiracy. A majority of the circuits adhere to the common law doctrine[97] which requires that independent evidence must be used to establish the existence of a conspiracy and the defendant's involvement before statements of a coconspirator will be admissible.[98] Both *Lewis* and *Johnson* demonstrate the Eighth Circuit's adherence to this principle.[99]

b. *Minority View*

The First Circuit has suggested that coconspirator statements which have not been admitted into evidence may be considered in determining whether a conspiracy exists.[100] The First Circuit's position is based on an exempting phrase in Federal Rule of Evidence 104(a), which states that trial judges are not bound by rules of evidence[101] when they are deciding questions of admissibility.[102]

Of the two views regarding independent evidence, the common law approach is more principled. A fundamental aspect of the common law approach is the recognition that a coconspirator's statement, standing alone, should not be allowed to establish its own provenance.[103] Independent proof should be required so that reliance on the coconspirator statements themselves will not create a "slippery slope"[104] which erodes and eventually destroys a need for corroboration.

Coconspirator Exception: Action, Assertion, and Hearsay, 12 HOFSTRA L. REV. 323, 366-70 (1984). *See also* Comment, *Evolution of the Coconspirator Exception to the Hearsay Rule in the Federal Courts*, 16 NEW ENG. L. REV. 617, 624-28 (1981).

97. *See supra* note 10.

98. *See supra* note 12.

99. *Lewis*, 759 F.2d at 1342; *Johnson*, 767 F.2d at 1271.

100. *See, e.g., Guerro*, 693 F.2d at 12. Hearsay is admissible "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy. . . ." *Id.* (citing FED. R. EVID. 801(d)(2)(E)).

101. Trial judges are not bound to the Federal Rules of Evidence except regarding privileges in making their determinations concerning admissibility of coconspirator hearsay statements. *See* FED. R. EVID. § 104(a). *See generally* MCCORMICK, MCCORMICK ON EVIDENCE § 53 (E. Cleary ed. 1978).

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

103. *Glasser*, 315 U.S. at 74-75; United States v. Nixon, 418 U.S. 683, 701 & n.14 (1974).

104. "Slippery slope" is a term of art which is used to connote that the efficacy of a court's rules are gradually being destroyed by the cumulation of exceptions.

c. *Quantum of Proof*

Circuit courts also disagree as to the required quantum of proof once a conspiracy has been established. At present, the circuit courts have applied four views. First, is the view that the conspiracy must be established by prima facie evidence before statements of a coconspirator, made during the course and in furtherance of the conspiracy, may be admitted against the defendant.[105] Second, some courts recognize that the defendant's participation in the conspiracy may be established by "slight" evidence presented in a preliminary hearing.[106] Third, and most prominent, is the view that the preliminary issues concerning the existence of a conspiracy and of the defendant's participation in it must be established by a preponderance of the evidence.[107] A relatively new trend has developed in this area and comprises a fourth view. Some circuits hold that a conspiracy and a defendant's participation in it must be established by substantial evidence.[108]

d. *Order of Proof*

Each circuit has recognized the district court's discretion to allow coconspirator statements to be introduced before the existence of the conspiracy and the defendant's participation has been established.[109] The specific procedures used by each circuit to address

105. For decisions recognizing the prima facie evidence standard, see United States v. Perez, 658 F.2d 654, 658 (9th Cir. 1981); United States v. Metz, 608 F.2d 147, 153 (5th Cir. 1980); United States v. McManus, 560 F.2d 747, 750 (6th Cir.), *cert. denied*, 434 U.S. 1047 (1978).

106. For decisions recognizing the "slight" evidence standard, see United States v. Brooklier, 685 F.2d 1208, 1219 (9th Cir.), *cert. denied*, 459 U.S. 1206 (1983); United States v. Andrews, 585 F.2d 961, 964 (10th Cir. 1978).

107. For decisions recognizing the preponderance of the evidence standard, see *Legato*, 682 F.2d at 183; United States v. Provenzano, 620 F.2d 985, 999 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *Grassi*, 616 F.2d at 1300; United States v. Petersen, 611 F.2d 1313, 1328-29 (10th Cir. 1979); United States v. Dalzotto, 603 F.2d 642, 644 (7th Cir.), *cert. denied*, 444 U.S. 944 (1979); United States v. De Fillipo, 590 F.2d 1228, 1236 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979); United States v. Enright, 579 F.2d 980, 987 (6th Cir. 1978); *Mortorano*, 557 F.2d at 11.

108. For decisions recognizing the substantial evidence standard, see *Gantt*, 617 F.2d at 845; *Stroupe*, 538 F.2d at 1065.

109. *See* United States v. Rodriguez, 689 F.2d 516, 518 (5th Cir. 1982) (before the jury can hear testimony under the coconspirator hearsay exception the trial court must believe that there is substantial independent evidence of a conspiracy between the defendant and the declarant and that the statements were uttered in furtherance of that conspiracy); United States v. Regilio, 669 F.2d 1169, 1175 (7th Cir.) (evidence of presence, suspicious behavior, and significant prior dealings was sufficient independent circumstantial evidence when viewed in light most favorable to the government, established by a preponderance of the evidence that defendants participated in conspiracy to distribute cocaine; hearsay statements of coconspirators were admissible in prosecution of defendant for violation of federal narcotics laws).

this question vary.[110] The Eighth Circuit, in *Bell*, set forth the procedures to be followed by its district courts.[111] The court may conditionally admit an out-of-court statement subject to the prosecutor's ability to prove the statements of conspiracy by a preponderance of independent evidence.[112]

---

cert. denied, 457 U.S. 1133 (1982); *Gantt*, 617 F.2d at 845 (to avoid what may become a separate trial on the issue of admissibility, the court may admit declarations of coconspirators subject to connection to the conspiracy).

110. *See, e.g.*, United States v. Roe, 670 F.2d 956, 962 (11th Cir.) (district court admitted statements subject to government's promise to connect them up by laying a proper foundation for the statements during the course of the trial), *cert. denied*, 459 U.S. 856 (1982); United States v. Jackson, 627 F.2d 1198, 1218 (D.C. Cir. 1980) (district court can admit statements subject to connection or the judge may hold a "mini-trial" out of the jury's presence to determine whether the government will present sufficient evidence of the conspiracy to the jury); United States v. Vinson, 606 F.2d 149, 152-53 (6th Cir.) (acceptable methods judges may use to determine admissibility of hearsay include: (1) holding a mini-hearing where the court hears the government's proof of conspiracy and makes the preliminary finding; if the hearsay is found admissible, the case including the hearsay is presented to the jury; (2) the judge may require the government to meet its initial burden by producing the non-hearsay evidence of conspiracy first then requiring proof regarding the conspiracy's existence, defendant's membership in the conspiracy and establishment that the statement was made in the course and in furtherance of the conspiracy; or (3) the judge may admit the hearsay subject to later demonstration of its admissibility by a preponderance of the evidence), *cert. denied*, 445 U.S. 904 (1979); *Andrews*, 585 F.2d at 964-65 (acts and declarations of one coconspirator are admissible against another if the existence of a conspiracy is first established by independent evidence if the acts and declarations occurred in furtherance of conspiracy); *Santiago*, 582 F.2d at 1131 (trial judge has option of conditionally admitting coconspirator's declaration before conspiracy has been independently established but subject to subsequent fulfillment of that critical condition; in event of such failure, mistrial may be required and even if not, an instruction for jury to disregard coconspirator's declaration should be given); United States v. depeda-Santana, 569 F.2d 1386, 1388-89 (5th Cir.) (trial court did not err by conditionally admitting hearsay testimony without prior establishment of conspiracy by independent evidence or in absence of request by the defendant by failing to give cautionary jury instruction), *cert. denied*, 437 U.S. 907 (1978); United States v. McCormick, 565 F.2d 286, 289 n.5 (4th Cir.) (district court may, in its discretion, admit statements of coconspirators prior to proof of conspiracy, subject to being connected up and followed by evidence of existence of conspiracy), *cert. denied*, 434 U.S. 1021 (1977); *Lambros*, 564 F.2d at 30 (the trial judge determining preliminary admissibility has wide discretion and must only be satisfied that there is independent evidence, credible and sufficient to support a finding of a joint undertaking the independent evidence may be completely circumstantial or may consist of the conspirator's own conduct and admissions) (citing *Sholle*, 553 F.2d at 1117); *Petrozzeillo*, 548 F.2d at 23 (if judge determines it is more likely than not that declarant and defendant were members of the conspiracy when hearsay statement was made and that statement was in furtherance of the conspiracy, the hearsay is admissible).

111. *Bell*, 573 F.2d at 1044.

112. In *Bell* the court stated the procedure as follows:

> (1) If the prosecutor propounds a question which obviously requires a witness to recount an out-of-court declaration of an alleged coconspirator, the court, upon a timely and appropriate objection by the defendant, may con-

In light of the diverse standards interpreting Federal Rule of Evidence 801(a)(2)(E), the Eighth Circuit has adeptly waded through the confusion. The Eighth Circuit has chosen to modify the common law requisites concerning standards of proof and preliminary questions of coconspirator statement admissibility.[113] In so doing, the Eighth Circuit has adopted the majority view. The majority view, however, is not applied uniformly. Lack of uniformity is demonstrated by the diverse standards recognized by the circuits concerning independent evidence and (1) the establishment of a conspiracy's existence, (2) quantum of proof, and (3) order of proof. This lack of uniformity is detrimental to defendants faced with over-zealous prosecutors who view this trend as fostering an atmosphere of easy convictions through the prospect of bootstrapping, that is, using the hearsay statement to prove the existence of the conspiracy. Before any uniform modifications can be effectuated, however, either the Supreme Court should once again intervene and give the federal circuit courts guidance, or each of the federal circuit courts should reassess the theoretical functions of this exception and define what they expect the coconspirator hearsay exception to accomplish.

II. The Entrapment Defense

A. Introduction

Entrapment is a criminal defense used to protect defendants

---

ditionally admit the statement. At the same time, the court should, on the record, caution the parties

(a) that the statement is being admitted subject to defendant's objection;

(b) that the government will be required to prove by a preponderance of the independent evidence that the statement was made by a coconspirator during the course and in furtherance of the conspiracy;

(c) that at the conclusion of all the evidence the court will make an explicit determination for the record regarding the admissibility of the statement; and

(d) that if the court determines that the government has failed to carry the burden delineated in (b) above, the court will, upon appropriate motion, declare a mistrial unless a cautionary instruction to the jury to disregard the statement will suffice to cure any prejudice. (citation omitted).

The foregoing procedural steps should transpire out of the hearing of the jury. *See* Fed. R. Evid. 104(c).

(2) After a ruling on the record that the out-of-court declaration is admissible under Rule 801(d)(2)(E), the court may submit the case to the jury. The court should not charge the jury on the admissibility of the coconspirator's statement, but should, of course, instruct that the government is required to prove the ultimate guilt of the defendant beyond a reasonable doubt. An appropriate instruction on credibility should be given and the jury should be cautioned with regard to the weight and credibility to be accorded a coconspirator's statement.

Bell, 573 F.2d at 1044.

113. Prior to enactment of Rule 801(d)(2)(E), the jury was given the duty to determine whether a conspiracy existed and if the defendant was a participant in it.

against law enforcement activities which seek to secure criminal prosecutions by inducing the commission of criminal offenses.[114]

The early federal court of appeals decision of *Woo Wai v. United States*,[115] recognized the entrapment defense. The Supreme Court has since adopted this defense[116] in an effort to curb the "*manufacturing of*"[117] illegal activity by law enforcement authorities.[118] The defense of entrapment encompasses two elements: (1) the inducement of the defendant into an offense by the actions and conduct of government agents; and (2) the lack of the defendant's predisposition to commit such an offense.[119] The defendant has the burden of proof regarding the first element and the government has the burden of proof regarding the defendant's predisposition.[120] Successful assertion of the defense results in a verdict of not guilty even though it is proven that the defendant committed the proscribed criminal act.[121]

Two views are recognized by the federal courts regarding the oc-

114. *See* Sorrells v. United States, 287 U.S. 435, 452 (1932); *see also* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, ch. 5 (1984); W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 48 (1972).

115. 223 F. 412, 414 (9th Cir. 1915) (conviction reversed on the ground of entrapment).

116. The United States Supreme Court first recognized the entrapment defense in *Sorrells*, 287 U.S. at 452.

117. Lopez v. United States, 373 U.S. 427, 434 (1963). It is generally agreed that the defense of entrapment should be applied in instances where crimes have been "manufactured." *See* United States v. Russell, 411 U.S. 423, 439 (1973) (Stewart, J., dissenting); Sherman v. United States, 356 U.S. 369, 372 (1958).

118. The basic assumption underlying the defense of entrapment is that Congress did not intend to punish defendants who committed criminal offenses upon the inducement of law enforcement authorities. *See* Hampton v. United States, 425 U.S. 484, 488-91 (1976); *Russell*, 411 U.S. at 428-29 (1973); *Sherman*, 356 U.S. at 375; *Sorrells*, 287 U.S. at 448.

119. *See Hampton*, 425 U.S. at 484 (focus on defendant's predisposition); *Russell*, 411 U.S. at 429 (focus on defendant's predisposition); United States v. Glaeser, 550 F.2d 483, 486-87 (9th Cir. 1977); United States v. Garcia, 546 F.2d 613, 615 (5th Cir.), *cert. denied*, 430 U.S. 958 (1977); United States v. Glassel, 488 F.2d 143, 146 (9th Cir.), *cert. denied*, 416 U.S. 941 (1974); United States v. Watson, 489 F.2d 504, 509 (3d Cir. 1973); United States v. Viviano, 437 F.2d 295, 298 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971).

120. This view concerning burden of proof is recognized by circuits adhering to the bifurcated theory of entrapment. *See* United States v. Steinberg, 551 F.2d 510, 513-14 (2d Cir. 1977); *Viviano*, 437 F.2d at 299.

The unitary theory of entrapment holds that a defendant has no burden of proof whatsoever; but the government has the burden of proving that the defendant was not entrapped. *See, e.g.*, United States v. Quinn, 543 F.2d 640, 647 (8th Cir. 1976). For further discussion, see *infra* notes 207-15 and accompanying text.

121. Notably, however, the defense of entrapment cannot be utilized where the law enforcement authorities "use[d] stealth, strategy, or deception to trap an 'unwary criminal' or merely provide[d] the defendant with an opportunity or facility to commit a crime." *Sherman*, 356 U.S. at 372; *see Sorrells*, 287 U.S. at 442; *see also* W. LAFAVE & J. ISRAEL, *supra* note 114, ch. 5; W. LAFAVE & A. SCOTT, *supra* note 114, § 48.

currence of entrapment. The prevailing view holds that entrapment occurs only when a government agent "implants the criminal design in the mind of the defendant."[122] This view employs a subjective standard whereby the courts focus on the accused's state of mind. The key issue is whether the accused was predisposed to commit the illegal act.[123] If evidence substantiates that government inducement occurred, the defendant must be acquitted unless the government can prove that the defendant was predisposed to engage in the illegal acts.[124]

The minority view holds that entrapment occurs when government agent conduct "is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it," even where the accused *was* predisposed to commit the criminal offense.[125] An objective standard is invoked under this view.

The Eighth Circuit Court of Appeals recognizes the majority view.[126] During the Eighth Circuit's January, 1984 to September, 1985 term, it decided a number of cases[127] where the accused sought to invoke the defense of entrapment. Particularly intense arguments and judicial analysis were set out in *United States v. Lard*[128] and *United States v. Dion.*[129]

---

122. *Hampton,* 425 U.S. at 489; *Russell,* 411 U.S. at 436; *see Sorrells,* 287 U.S. at 442.

123. Courts have looked to a variety of factors in determining predisposition. *See* United States v. Hunt, 749 F.2d 1078, 1085 (4th Cir. 1984) (whether the defendant readily responded to the inducement offered; evidence of prior involvement in similar conduct); United States v. Williams, 705 F.2d 603, 618 (2d Cir.) (decision to commit crime is own preference, not government persuasion), *cert. denied,* 464 U.S. 1007 (1983); United States v. Jannotti, 673 F.2d 578, 604 (3d Cir.) (the "jury must determine the defendant's subjective intent"), *cert. denied,* 457 U.S. 1106 (1982); United States v. Townsend, 555 F.2d 152, 155 n.3 (7th Cir. 1977) (the degree of coercion relative to defendant's criminal background); United States v. Groessel, 440 F.2d 602, 605 (5th Cir.), *cert. denied,* 403 U.S. 933 (1971) (whether the defendant had already formed the design to commit the crime for which he is charged); *Viviano,* 437 F.2d at 299 (whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged); Kadis v. United States, 373 F.2d 370, 374 (1st Cir. 1967) (whether the defendant has refused to commit similar acts on other occasions).

124. *Sherman,* 200 F.2d at 882-83.

125. *See Russell,* 411 U.S. at 445 (Stewart, J., dissenting); *Sherman,* 356 U.S. at 383 (Frankfurter, J., concurring).

126. In Butts v. United States, 273 F. 35 (8th Cir. 1921), the Eighth Circuit first recognized and applied the Supreme Court's majority view regarding application of the defense of entrapment. *Id.* at 38.

127. *Dion,* 762 F.2d 674, 682 (8th Cir. 1985); United States v. Woosley, 761 F.2d 445, 448 (8th Cir. 1985); United States v. Underhill, 753 F.2d 645, 646-47 (8th Cir. 1985); *Leroux,* 738 F.2d 943 (8th Cir. 1984); United States v. Randolph, 738 F.2d 244, 245 (8th Cir. 1984); *Lard,* 734 F.2d 1290, 1292-93 (8th Cir. 1984).

128. 734 F.2d 1290, 1292-96 (8th Cir. 1984).

129. 762 F.2d 674 (8th Cir. 1985).

B. *Case Evaluations*

1. United States v. Lard

Lard involved a situation where two undercover agents, and a government informant, went out drinking with one of the accused, Lloyd Rigsby.[130] While these individuals were out drinking, the agents told Rigsby that they needed some guns and asked Rigsby if he knew anyone who had guns for sale.[131] Rigsby stated that he knew of several individuals who might have guns for sale. Rigsby took the men to Pete Lard's home where one agent asked Lard if his shotgun was for sale.[132] Lard stated it was not. Lard was asked if he had any other firearms for sale. Lard responded that he only had a small detonator for sale.[133] After examining the detonator, the agent told Lard that it was not powerful enough.[134] After some discussion, it was suggested that a pipe bomb would be more suitable.[135] At this point, the agents implored Lard that this was what they needed and, after more discussion, Lard agreed to manufacture a pipe bomb that evening.[136] The agents returned three hours later and picked up the bomb. The following day, Lard's pipe bomb was detonated by federal agents who concluded that the bomb was a "destructive device" under federal law.[137] Consequently, Lard and Rigsby were arrested and convicted.[138] Lard appealed his convictions on entrapment

130. *Lard*, 734 F.2d at 1291.

131. *Id.*

132. Lard was an acquaintance of Rigsby's. However, Rigsby had not spoken to Lard for several months. *Id.* at 1291-92. The facts surrounding the agents' meeting with Lard were in dispute. The agents contend that when they arrived at Lard's home, Rigsby went in alone first and after eight minutes returned and told them that Lard had a shotgun and detonator for sale. Rigsby and Lard contend, however, that this initial meeting never took place. *Id.* at 1292.

133. *Id.* at 1291-92.

134. Notably, Lard's initial offer to sell the detonator and shotgun shells would not have been unlawful. Shotguns and shotgun shells were expressly excluded from the definition of the term "destructive device" in 26 U.S.C. § 5845(f) (1982). Also, there was no suggestion that Lard's shotgun was a "firearm" within the definition of 26 U.S.C. § 5845(a). The shotgun shells clearly were not firearms. At no time did the government suggest or attempt to establish that the small detonator that Lard possessed was a "destructive device" as defined by § 5845(f). Nor did the government attempt to establish that the combination of the detonator and the shotgun shells were a "destructive device" under the above statute. *Lard*, at 1294 & n.4.

135. *Id.* at 1292. The facts are in dispute as to who actually suggested that a pipe bomb be used. It was either suggested by Rigsby or Agent Anderson. *Id.*

136. 26 U.S.C. § 5845(f) (1982); *see supra* note 132.

137. *Lard*, 734 F.2d at 1292. Lard and Rigsby were convicted of conspiring to transfer, 18 U.S.C. § 371 (1982) and transferring, 26 U.S.C. § 5861 (1982) an unregistered "firearm" (e.g. a "destructive device"). In addition, Lard was also convicted for making, 26 U.S.C. § 5861(f) (1982), and possessing, 26 U.S.C. § 5861(d), a destructive device. *Lard*, 734 F.2d at 1291.

138. *Lard*, 734 F.2d at 1294.

grounds. The Eighth Circuit held that Lard's convictions should be reversed since the evidence presented demonstrated Lard's entrapment as a matter of law. "No reasonable juror could have found beyond a reasonable doubt that Lard was ready and willing to commit the crimes and that the agents did no more than afford him an opportunity to do so."[139]

To establish an entrapment defense as a matter of law the Eighth Circuit requires the defendant to prove, "[t]hat a government agent originated the criminal design; that the agent implanted in the mind of an innocent person the disposition to commit the offense; and that the defendant then committed the criminal act at the urging of the government agent."[140] Further, the key issue to be addressed is "whether the government agent caused or induced the defendant to commit a crime he was not otherwise predisposed, i.e., willing and ready, to commit whenever a propitious opportunity arose."[141] In resolving this issue, the court acknowledged "intent or predisposition" as the principal focus.[142]

In an attempt to rebut Lard's premise that he had been induced by the agent to commit the proscribed crimes, the government put forth several arguments. First, the government argued that since Rigsby initiated the pipe bomb discussion,[143] the agent could not have been the originator of the criminal design implanted in Lard's mind to commit the criminal act.[144] The court disposed of this argument by stating that even assuming that Rigsby made this suggestion, he made it after the agent had repeatedly suggested that he needed something more powerful than the detonator Lard was willing to sell.[145] The court went on to state that the agent "served as the catalyst behind Rigsby's suggestion; and Rigsby merely served as the agent's unwitting informant."[146] The court concluded that the agent was undisputably the first to embrace Rigsby's suggestion, and the first to give it criminal significance by soliciting Lard to sell him a pipe bomb.[147] Therefore, the agent, "not Rigsby, was the one who implanted the criminal design in Lard's mind by soliciting him and offering him an inducement. Had the agent not immediately fol-

139. *Id.* at 1293 (quoting United States v. Shaw, 570 F.2d 770, 772 (8th Cir. 1978)).

140. *Id. Accord Jannoitti*, 673 F.2d at 597; United States v. Bradsby, 628 F.2d 901, 903 (5th Cir. 1980); United States v. Borum, 584 F.2d 424, 427 (D.C. Cir. 1978).

141. *Lard*, 734 F.2d at 129.

142. *Lard*, 734 F.2d at 1295.

143. This fact was disputed. *See supra* note 135.

144. *Id.* Had Lard sold the agent the detonator, he would not have been in violation of the "destructive device" statute. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

lowed through on Rigsby's suggestion, Lard would not have committed any criminal wrongdoing."[148]

The government argued that predisposition was evidenced by Lard's possession of the ingredients necessary to make the bomb and by his impressive ability to produce the bomb in a relatively short time, apparently with no assistance or guidance.[149] The court reasoned that these contentions were based on pure factual speculation because there was no evidence which substantiated that Lard had the ingredients in his possession when he accepted the agent's offer.[150] In addition, the government's own expert testified that the pipe bomb was one that did not require any special knowledge or expertise. The expert further testified that this type of bomb could have been produced in ten minutes as opposed to the three hours Lard needed to assemble one.[151] Consequently, the court concluded that Lard's predisposition to commit this crime was not supported by the surrounding circumstances.[152]

The final argument presented by the government was one relying on numerous other Eighth Circuit cases which hold that there is no entrapment where the government agent merely attempts to purchase contraband or illegal merchandise from an unsuspecting criminal.[153] The court stated that these cases did not apply to *Lard* because of the agent's conduct.[154] Specifically, the court held that

148. *Id.*

149. *Id.* The evidence presented stated only that Lard had a detonator and shotgun shells in his possession. *Id.*

150. *Id.* at 1295.

151. *Id.*

152. *Id.* The court also stated that the government had failed to prove the implication that "Lard had developed an expertise in making pipe bombs, had the necessary ingredients readily available, and eagerly awaited a propitious opportunity to ply his trade for financial gain." *Id.* at 1295-96.

153. *Id.* at 1296. *See* United States v. Zabel, 702 F.2d 704, 710 (8th Cir. 1983) (defendant was not entrapped where he acted eagerly and without hesitation to consummate offense of interstate transportation, sale, and receipt of stolen food stamp coupons; agents only afforded defendant an opportunity to commit an offense he was already predisposed to commit); United States v. French, 683 F.2d 1189, 1193 (8th Cir.) (government agent's question as to whether defendant knew if anyone was discounting food stamps merely afforded defendant opportunity or facility for commission of offense of acquiring and processing food stamps in a manner not authorized by law and was not entrapment), *cert. denied*, 459 U.S. 972 (1982); *Shaw*, 570 F.2d at 772 (defendant was not entrapped where he failed to demonstrate a government agent originated the criminal design; the agent implanted in the mind of the defendant the disposition to commit the offense and the defendant committed the criminal act at the urging of the government agent); Kibby v. United States, 372 F.2d 598, 602 (8th Cir.) (since government informer did no more than inform the defendants that he was a willing buyer, he merely afforded an opportunity and facility for the commission of the offense; entrapment did not occur), *cert. denied*, 387 U.S. 931 (1967).

154. *See Lard*, 734 F.2d at 1296. The court noted that these cases stand for the well-recognized proposition that no entrapment occurs where the agent merely af-

the agent "went beyond merely providing Lard with the opportunity to commit a crime; he ensnared Lard by implanting in him a law-breaking disposition that was not theretofore present."[155] Concluding that the agent had been over-zealous in creating this crime, the court held that fundamental fairness precluded it from putting its imprimatur on over-reaching conduct in law enforcement.[156] The agent's conduct instigated a criminal act by an otherwise innocent person in an effort to lure him into illegal activity with resultant punishment.[157]

2. United States v. Dion

The decision in *Dion*[158] produced the same result as in *Lard,* although it involved a somewhat unique set of circumstances. *Dion* involved criminal prosecutions which arose out of a Fish and Wildlife Service (FWS) undercover operation, Operation Eagle. This Operation was conducted to investigate the killing and selling of eagles and other protected birds.[159] This investigation took place in South Dakota near the Yankton Sioux Reservation.[160] In 1980, Agent Cooper was "actively assigned" to investigate the alleged illegal acts.[161] With the additional investigative efforts of Agent Nando Mauldin, substantial evidence of trafficking in protected birds had been compiled by August of 1982.[162]

Rather than prosecute the main figures involved in these illegal activities, the government expanded Operation Eagle by "actively assigning" FWS Agent Robert Standish to the Operation.[163] During the summer and fall of 1982, agents Mauldin and Standish made several visits to the Yankton Sioux Reservation representing themselves

---

fords the defendant with the opportunity to commit a crime. *Id.* This proposition was first recognized in *Sorrells,* 287 U.S. at 441.

155. *Lard,* 734 F.2d at 1296. The court went on to state that in each of the cases recognizing this proposition, the defendant's predisposition was evidenced by his prior criminal activity or his "quick and eager response to the government's initial solicitation." *Id.*

156. *Id.* at 1297. *See also Russell,* 411 U.S. at 428-29 (the entrapment defense prohibits law enforcement officers from instigating criminal behavior by individuals otherwise innocent in order to lure them into commission and ultimate punishment).

157. *Lard,* 734 F.2d at 1297.

158. 762 F.2d 674 (8th Cir. 1985).

159. *Id.* at 678.

160. *Id.* The government stated that they first learned of possible killing of protected birds in this area in 1978 through a report submitted by FWS Agent John L. Cooper. *Id.*

161. *Id.*

162. *Id.* Agent Mauldin corresponded and did business with five alleged suppliers of protected birds. His investigative compilations were achieved through his holding himself out to be a trader in the business of Indian-made items. *Id.*

163. *Id.*

as traders and art dealers in Indian crafts made from protected birds.[164]

In December of 1982, the agents purchased their first whole protected bird from Dwight Dion, Sr.,[165] and at this time made their first and only transaction with Lyle Dion, Jr.[166] The agents still did not make any arrests. Over the next few months they paid several thousand dollars to Dwight Dion, Sr.[167] and Asa Primeaux, Sr.,[168] and made their first and only transaction with Terry Fool Bull.[169]

Subsequently, each of the four individuals was tried, convicted, and sentenced for violation of various United States statutes.[170] Lyle Dion, Jr. and Fool Bull appealed their convictions contending that they were entrapped by government agents as a matter of law and therefore, that their convictions should be reversed.[171] The court held that the government failed to meet its burden of proof, thus requiring the reversal of Dion's and Fool Bull's convictions.[172] Again, as was the case in *Lard,* entrapment was proven as a matter of law. No reasonable jury could have found beyond a reasonable doubt that Dion and Fool Bull were predisposed, ready, and willing to commit the crimes, and that the agents did no more than afford them an opportunity to do so.[173]

With regard to Dion's and Fool Bull's contention that they had been induced to commit the proscribed crimes by government agents, the government presented several arguments. First, the government argued that Dion's and Fool Bull's predisposition had been proven beyond a reasonable doubt because the undercover agents

164. *Id.* Agents Mauldin and Standish paid thousands of dollars in cash for items made from protected birds. *Id.*

165. *Id.* The agents gave Dwight Dion, Sr. $2,300 for four eagle carcasses. *Id.* at 679.

166. *Id.* Lyle Dion, Jr., the son of Dwight Dion, Sr., sold an eagle tail and later the remainder of that eagle to the agents. *Id.*

167. *Id.* Dwight Dion, Sr., sold the agents four additional bird carcasses. *Id.*

168. *Id.* Asa Primeaux, Sr., sold the agents three bird carcasses. *Id.* Both Dwight Dion, Sr., and Asa Primeaux sold protected birds to agents working in Operation Eagle since the Operation's inception. *Id.* at 678.

169. *Id.* Terry Fool Bull sold the agents one bird carcass. *Id.*

170. *Id.* at 677. Each of Dwight Dion, Sr., Lyle Dion, Jr., Asa Primeaux, Sr., and Terry Fool Bull were convicted of "taking" or "selling" eagles and other protected migratory birds or bird parts in violation of the Bald and Golden Eagle Act (BGEA), 16 U.S.C. § 668-668d (1982), the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703-11 (1982) and the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-40 (1982).

171. *Dion,* 762 F.2d at 686, 690.

172. *Id.* at 691-92.

173. *Id.* at 692. Prevailing case law recognizes that in cases where entrapment has been pled, the prosecution must prove the accused's predisposition beyond a reasonable doubt. *Lard,* 734 F.2d at 1294 n.3; *French,* 683 F.2d at 1191 n.1; *Jannotti,* 673 F.2d at 597.

did no more than afford them with an opportunity to sell protected birds to the agents.[174] The government felt, therefore, that the court could avoid an examination of the myriad of factors used by the courts to determine predisposition.[175] The court refused to accept this argument because neither Dion nor Fool Bull were predisposed to commit the illegal acts.[176] Applying the majority view's subjective standard, the Eighth Circuit concluded that Dion's and Fool Bull's lack of predisposition was evidenced by the following factors: (1) neither Dion nor Fool Bull ever killed an eagle before December of 1982 even though the government claimed there was a market in the Yankton Sioux reservation area for protected birds prior to the onset of Operation Eagle;[177] (2) both Dion's and Fool Bull's conduct during the negotiations with Mauldin and Standish for sale of the eagle feathers and carcasses demonstrated that they were naive first offenders;[178] (3) neither Dion nor Fool Bull sold another eagle to government agents or anyone else;[179] and (4) although both Dion and Fool Bull were impoverished, neither of them gave in to the agent's offers until almost two years had passed.[180] Accordingly, Dion's and Fool Bull's convictions were re-

174. *Dion*, 762 F.2d at 685.

175. *Id.* Dion was directly and indirectly solicited to kill and sell eagles to Mauldin and Standish throughout the years preceding his sale of a protected bird to the agents in December of 1982. Indirect solicitation came from Dion's father who had become a friend to the agents and freely sold protected bird parts and carcasses to the agents. *Id.* at 686.

Fool Bull too was directly and indirectly solicited to kill and sell eagles to the agents. Indirect solicitation came from Fool Bull's father-in-law, Asa Primeaux, who repeatedly encouraged Fool Bull to be on the lookout for eagles or other protected birds. This direct and indirect solicitation went on for over two years before Fool Bull actually sold an eagle carcass to the agents in March of 1983. *Id.* at 690.

176. *Id.* at 687, 690. For a listing of various factors used by federal courts to determine predisposition, See *supra* note 123.

177. *Dion*, 762 F.2d at 686, 690. The court stated that this factor was particularly relevant because it demonstrated that while each of the accused had previously had the opportunity to kill and sell eagles for profit neither had chosen to do so. *Id.* at 691.

With respect to Fool Bull the court stated this was of great significance because he had been unemployed during most of Operation Eagle's existence. Fool Bull had supported himself and his family on $268 in assistance per month and lived in a dilapidated trailer home next door to his father-in-law, Asa Primeaux. *Id.* at 690.

178. *Id.* at 686, 690. Specifically, the court noted that neither Dion nor Fool Bull seemed to know anything about the protected bird trade and each was unable to set a price for sale of the eagles to the agents. *See id.* at 691.

In particular, Dion had to ask his father how much he thought an eagle would sell for. The court concluded that this evidence suggested that Dion was an unwary, innocent adolescent. *Id.* at 689. *See Lard*, 734 F.2d at 1293; *Townsend*, 555 F.2d at 155 n.7.

179. *Dion*, 762 F.2d at 691.

180. *Id.* at 690. The court recognized that individuals cannot claim the entrap-

versed by the court.[181]

C. Circuit Court Comparison

In retrospect, the Eighth Circuit's analysis and conclusions in the preceding decisions placed it in the mainstream of other circuit court decisions concerning the applicablity of the entrapment defense.[182] Application of this defense by the federal courts has resulted in areas of consensus, significant points of difference, and some general trends.

1. Availability of the Defense

The availability of the entrapment defense has resulted in some significant points of difference. The majority of circuit courts have held that the entrapment defense is not available to a defendant unless he admits committing the acts which constitute the offense charged.[183] The courts recognizing this view have reasoned that it is inconsistent for a defendant to claim that he did not commit the acts charged and to simultaneously argue that he was entrapped.[184] The Eighth Circuit is in accord with this view.[185]

Notably, the Fifth Circuit has recognized two exceptions to the above view. First, an accused who denies committing the acts which constitute the offense charged, may rely on this defense if the prosecution's own case injects susbstantial evidence of entrapment.[186] Second, an accused who is indicted for conspiracy may deny being a

---

ment defense merely because they are poor and could not resist the substantial amounts of money to be made through criminal activity. The court went on to state that in this case, the risk of the government in offering so much money over a prolonged period of time, resulted in many who would never have shot a protected bird without being enticed to do so. *Id.* at 689-90.

181. *Id.* at 690, 692.

182. For a thorough analysis of state court recognition of the majority and minority views concerning the entrapment defense, see generally Comment, *Causation and Intention in the Entrapment Defense*, 28 U.C.L.A. L. REV. 859 n.3 (1981).

183. United States v. Rey, 706 F.2d 145, 147 (5th Cir.), *cert. denied*, 464 U.S. 1038 (1983); Gibson v. Lockhart, 692 F.2d 66, 68 (8th Cir. 1982); United States v. Annese, 631 F.2d 1041, 1047 (1st Cir. 1980); United States v. Smith, 629 F.2d 650, 652-53 (10th Cir.), *cert. denied*, 449 U.S. 994 (1980); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979); United States v. Garcia, 562 F.2d 411, 418 (7th Cir. 1977).

184. *See supra* note 182 and accompanying text.

185. *Gibson*, 692 F.2d at 68.

186. United States v. Daniels, 572 F.2d 535, 538 (5th Cir. 1978); United States v. Greenfield, 554 F.2d 179, 182 (5th Cir.), *cert. denied*, 439 U.S. 860 (1977); United States v. Morrow, 537 F.2d 120, 138-39 (5th Cir.), *cert. denied*, 430 U.S. 956 (1976); United States v. Newcomb, 488 F.2d 190, 191-92 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974); Sears v. United States, 343 F.2d 139, 143 (5th Cir. 1965).

The Eleventh Circuit recognized this exception in *United States v. Haimowitz*, 725 F.2d 1561, 1573-74 (11th Cir.), *cert. denied*, 105 S. Ct. 563 (1984).

party to a conspiracy and still claim that any of his overt acts resulted from entrapment.[187]

A minority of circuit courts have held that the entrapment defense is available even though the defendant denies committing the acts which constitute the offense charged.[188] In reaching this conclusion, these courts have relied upon one or more of the following arguments: (1) the rule which generally authorizes a defendant to rely on inconsistent defenses should apply to the entrapment defense;[189] (2) the defenses of denial and entrapment are alternative but not inconsistent defenses;[190] and (3) dual defenses should be allowed where, under particular facts, proof of entrapment is not contrary or repugnant to proof that the defendant is otherwise guilty.[191]

The issue of whether a defendant must admit or deny commission of the acts constituting the charged crime appears to be an open question in the Second Circuit. A number of early cases have held that defendants who deny committing the acts constituting the offense cannot rely on the entrapment defense.[192] Subsequent cases, however, have held that this issue is an open question.[193]

2. *Burden of Proof and Jury Instructions*

Issues regarding burdens of proof and jury instructions have resulted in significant differences of opinion, including a relatively new trend.

Entrapment involves two well-defined theories: the "bifurcated" theory and the "unitary" theory.[194] The bifurcated theory recognizes that entrapment involves two issues: inducement and propensity. Under this theory, burden of proof issues are divided between the defendant and the government. Specifically, the defendant has the burden of proving that the government induced him to commit the criminal act. If the defendant is successful in this proof, then the

187. *Greenfield,* 554 F.2d at 182; United States v. O'Leary, 529 F.2d 1202, 1203 (5th Cir. 1976); *Newcomb,* 488 F.2d at 192; Marko v. United States, 314 F.2d 595, 597-98 (5th Cir. 1963).

188. United States v. Hart, 546 F.2d 798, 803 (9th Cir.), *cert. denied,* 429 U.S. 1120 (1976); United States v. Mejia, 529 F.2d 995, 996 (9th Cir. 1976); United States v. Demma, 523 F.2d 981, 984 (9th Cir. 1975).

189. *Demma,* 523 F.2d at 985.

190. *Id.* at 984-85.

191. United States v. Garrett, 716 F.2d 257, 269-70 (5th Cir.), *cert. denied,* 104 S. Ct. 1910 (1983).

192. United States v. Ramsey, 374 F.2d 192, 196 (2d Cir. 1976); United States v. Di Donna, 276 F.2d 956, 956 (2d Cir. (1960) (per curiam).

193. In United States v. Brown, 544 F.2d 1155 (2d Cir. 1976), the court held that the trial court unnecessarily decided this issue and further declared that this issue remains an open one in the Second Circuit. *Id.* at 1159.

194. *See generally* W. LAFAVE & J. ISRAEL, *supra* note 114, ch. 5.

government must rebut this argument by proving that the defendant was ready and willing to commit the crime without persuasion.[195]

Two views concerning jury instructions are recognized under the bifurcated theory. A minority of circuit courts have held it proper for a trial court to give jury instructions bifurcating the entrapment defense into two elements, allocating the burden of proof regarding these elements between the defendant and the prosecution.[196] A smaller number of circuit courts have held that it is prejudicial error for a trial court to fail to expressly instruct the jury concerning the defendant's burden of proof.[197]

The unitary theory of entrapment holds that the defendant has no burden of proof whatsoever. The government, however, has the burden of proving that the defendant was not entrapped.[198] Three views concerning jury instructions are recognized under this theory. The majority of circuits, including the Eighth Circuit, have held that a proper jury charge would indicate that the government had the burden of proving that the defendant was not entrapped.[199] Other circuit courts hold that it is reversible error for a trial court to fail to give an instruction stating that the government has the burden of proving, beyond a reasonable doubt, that the defendant was not entrapped.[200]

Notably, the Second and Ninth Circuits have begun a trend which holds that under certain circumstances the trial court's instructions on entrapment should not make any reference to the defendant having a burden of proof on the entrapment issue.[201]

---

195. United States v. Lee, 634 F.2d 383, 385 (8th Cir. 1980); United States v. Braver, 450 F.2d 799, 803-04 (2d Cir. 1971); United States v. Berger, 433 F.2d 680, 684 (2d Cir.), *cert. denied*, 401 U.S. 962 (1970).

196. *See* United States v. Tom, 640 F.2d 1037, 1040-41 n.5 (9th Cir. 1981); *Braver*, 450 F.2d at 804; *Berger*, 433 F.2d at 684.

197. United States v. Pugliese, 346 F.2d 861, 864 (2d Cir. 1965); Gorin v. United States, 313 F.2d 641, 654 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).

198. *See* United States v. Gardner, 516 F.2d 334, 348-49 (7th Cir.), *cert. denied*, 432 U.S. 861 (1975); United States v. Gurule, 522 F.2d 20, 25 (10th Cir. 1975); United States v. Eddings, 478 F.2d 67, 72-73 (6th Cir. 1973); United States v. Harrell, 458 F.2d 655, 658 (5th Cir.), *cert. denied*, 409 U.S. 846 (1972).

199. *See* United States v. Tornabene, 687 F.2d 312, 317 (9th Cir. 1982); United States v. Abushi, 682 F.2d 1289, 1301 (9th Cir. 1982); United States v. Johnson, 605 F.2d 1025, 1027-28 (7th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980); United States v. Smith, 588 F.2d 111, 116 (5th Cir. 1979); *Gurule*, 522 F.2d at 25.

200. *See* Government of Virgin Islands v. Cruz, 478 F.2d 712, 716-18 (3d Cir. 1973); Notaro v. United States, 363 F.2d 169, 172-76 (9th Cir. 1966).

201. United States v. Dearmore, 672 F.2d 738, 740-41 (9th Cir. 1982); Pratti v. United States, 389 F.2d 660, 661-62 (9th Cir. 1968); United States v. Landry, 257 F.2d 425, 429-30 (7th Cir. 1958).

3. *Rebuttal of the Entrapment Defense Through Use of Evidence of Other Offenses*

The circuit courts are in agreement that evidence of the defendant's similar unlawful acts, other than the acts the defendant is on trial for, are ordinarily admissible to rebut an entrapment defense.[202] Relying on the Supreme Court's reasoning in *Sorrells*,[203] these circuits have adopted this approach.[204] The *Sorrells* Court reasoned that if a defendant sought acquittal through use of the of entrapment defense, he could not complain about an "appropriate and searching inquiry into his own conduct and predisposition as it bears on that issue."[205]

A relatively new trend has surfaced regarding this issue. Three circuits have taken the view that to rebut a claim of entrapment, the prosecution may introduce evidence of other offenses. This may be done if it appears that the defendant will rely on a claim of entrapment.[206]

CONCLUSION

Comparatively speaking, much diversity surrounds the circuit courts' applications of the entrapment defense. The Eighth Circuit, however, has followed the majority, adopting and adeptly applying the "subjective" standard set out in *Sorrells* for determining whether a defendant has been entrapped.

Unfortunately, both the subjective and objective views fail to consider the crucial issue of the *defendant's intention* to commit prohibited criminal acts. Using either of these views, a court can decide a defendant's guilt or innocence without directly examining any of the essential elements of that particular offense.

Specifically, the subjective test fails to examine the defendant's intent by using an overly expanded view of predisposition.[207] On the other hand, the objective test fails to recognize the defendant's intent completely, by focusing exclusively on an objective standard for

202. *Braver*, 450 F.2d at 805; *Notaro*, 363 F.2d at 175-76.

203. 287 U.S. 435 (1932).

204. United States v. Smith, 629 F.2d 650, 652 (10th Cir.), *cert. denied*, 449 U.S. 994 (1980); United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979); United States v. Cohen, 489 F.2d 945, 950 (2d Cir. 1973); United States v. Perry, 478 F.2d 1276, 1280 (7th Cir.), *cert. denied*, 414 U.S. 1005 (1973); *Brown*, 453 F.2d at 108; Pulido v. United States, 425 F.2d 1391, 1393-94 (9th Cir. 1970); United States v. Johnson, 371 F.2d 800, 803 (3d Cir. 1967); Whiting v. United States, 296 F.2d 512, 516-17 (1st Cir. 1961).

205. *Sorrells*, 287 U.S. at 451.

206. *See* United States v. McCord, 509 F.2d 891, 895 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975); *Cohen*, 489 F.2d at 950; United States v. Simon, 453 F.2d 111, 115 (8th Cir. 1971).

207. *See supra* note 119.

law enforcement conduct. Consequently, the availability of this defense depends solely upon the government agent's conduct surrounding the commission of the offense.[208]

Predisposition should be recognized and included under each view. It should be limited, however, to the scope of the defendant's actual intent to commit the crime, thereby making each view more accurate in evaluating the asserted claims of entrapment. Furthermore, this modification would promote the Supreme Court's policy underlying the entrapment defense: confinement of imposed sanctions from government-induced offenses only to those who are predisposed to commit such offenses.

Charlene W. Hatcher

208. Justice Frankfurter, in his concurring opinion in *Sherman*, 356 U.S. at 382, stated: "[I]t is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers . . . ." *Id.*