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Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony

J. Arthur L. Alarcon

SUSPECT EVIDENCE: ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS AND UNCORROBORATED ACCOMPLICE TESTIMONY

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I. INTRODUCTION

Where standards of appellate review limit the role of the courts of appeal, the trial court's duty to achieve justice becomes critical. This duty takes on pressing importance when the government has used a crime partner's words to persuade the jury of an accused's guilt. In such cases, the question whether a conviction rests on sufficient evidence is perhaps one of the most troubling in appellate review.

Under the Federal Rules of Evidence, a criminal cohort's extrajudicial statements are admissible if made in furtherance of a conspiracy.[1] The United States Supreme Court has held that an appellate court can sustain a conviction based solely on the uncorroborated testimony of an accomplice.[2]

Appellate judges cannot reweigh conflicting evidence to determine whether an alleged co-conspirator made a statement in furtherance of a conspiracy and, if so, whether it was truthful.[3] In addition, appellate judges may not decide the credibility of an accomplice who testifies as a government witness. Accordingly, courts of appeals must accept co-conspirator or accomplice testimony as truthful and in the light most favorable to the prosecution. Such evidence is admissible even when uncontradicted evidence at trial has demonstrated that the co-conspirator

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1. FED. R. EVID. 801(d)(2)(E) (co-conspirator's statement made during and in furtherance of conspiracy is not hearsay).

2. Caminetti v. United States, 242 U.S. 470, 495-96 (1917) ("This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial courts.").

3. *See* United States v. Smith, 790 F.2d 789 (9th Cir. 1986) (holding that district court's conclusion that co-conspirator statement was made in furtherance of conspiracy upheld on review unless clearly erroneous); *cf.* United States v. Taylor, 716 F.2d 701, 711 (9th Cir. 1983) (stating that determining credibility of witnesses, resolving evidentiary conflicts and drawing reasonable inferences from proven facts constitutes exclusive realm of trier of fact).

or accomplice witness was a criminal of the vilest character or had been promised immunity or leniency for testifying as a government witness.

As a federal court of appeals judge, regardless of my qualms about the quality of such proof, I must follow the Federal Rules of Evidence, the United States Supreme Court's rulings and the law of my circuit, all of which hold that co-conspirator statements and uncorroborated accomplice testimony can sustain a conviction.

This Essay summarizes the current status of the Federal Rules of Evidence affecting the admissibility of co-conspirator statements and accomplice testimony. It suggests these forms of evidence are inherently unreliable. This Essay concludes that while such evidence is admissible, trial judges should exercise their discretion to exclude it when its probative value is outweighed by its prejudicial effect.

II. CO-CONSPIRATOR STATEMENTS

Before the adoption of the Federal Rules of Evidence in 1975, co-conspirator statements were not admissible unless the government made a two-pronged showing based on evidence independent of the hearsay statements: the government was required to prove (1) the defendant was a member of a conspiracy, and (2) the declaration was made in furtherance of that conspiracy.[4] In *Glasser v. United States*[5] the Court reasoned this foundational requirement was necessary because "[o]therwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."[6]

Thirty-two years later, the Supreme Court applied the *Glasser* rule against bootstrapping in *United States v. Nixon*,[7] expressing the controlling principle as follows: "Declarations made by one defendant may also be admissible against other defendants, upon a sufficient showing, by *independent evidence*, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy."[8]

Under the Federal Rules of Evidence, co-conspirator statements are not hearsay.[9] In *Bourjaily v. United States*[10] the Court abandoned the

4. Glasser v. United States, 315 U.S. 60, 74-75 (1942).

5. *Id.*

6. *Id.* at 75.

7. 418 U.S. 683 (1974).

8. *Id.* at 701 & n.14 (emphasis added).

9. FED. R. EVID. 801(d)(2)(E). Rule 801(d)(2)(E) provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *Id.*

10. 483 U.S. 171 (1987).

foundational requirement of proof, independent of the challenged hearsay, based on its interpretation of Rule 104(a).[11] The Court reasoned that Rule 104(a) authorized a district court to consider hearsay when determining the admissibility of a co-conspirator's statement.[12] In response to defendant Bourjaily's argument that a co-conspirator's statement is deemed unreliable, the Court reasoned "out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof."[13] In a later passage the Court reasoned: "[A] piece of evidence, unreliable in isolation, may become quite probative *when corroborated by other evidence*."[14]

The Court declined to decide whether a district court may rely solely upon a co-conspirator's hearsay statement in determining that a conspiracy has been established by a preponderance of the evidence.[15] The Court noted, however, that a district court may conclude that each of the conspirator's statements in the matter before it "may itself be unreliable, but taken as a whole, the entire conversation between [the co-conspirators] was corroborated by independent evidence."[16]

The Court in *Bourjaily* also rejected the argument that the admission of co-conspirator statements violates the Sixth Amendment when the declarant is unavailable as a witness.[17] The Court held that the Confrontation Clause does not mandate independent indicia of reliability of a co-conspirator's statement because this exception to the hearsay rule is "firmly enough rooted in our jurisprudence."[18] The Court concluded: "Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)."[19]

Bourjaily left unresolved the question whether independent evidence of a conspiracy is necessary to prove the reliability of co-conspirator statements. *Bourjaily* also did not reach the question whether presumptively unreliable co-conspirator's statements should be excluded if their probative value is outweighed by the prejudicial effect of the hearsay on

11. *Id.* at 178-79. Rule 104(a) provides: "Preliminary questions concerning . . . [t]he admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." FED. R. EVID. 104(a).

12. *Bourjaily*, 483 U.S. at 178.

13. *Id.* at 179.

14. *Id.* at 180 (emphasis added).

15. *Id.* at 181.

16. *Id.* at 180-81.

17. *Id.* at 181-82.

18. *Id.* at 183.

19. *Id.* at 183-84.

the outcome of the trial. The Supreme Court has not heard a subsequent case that presents these issues. However, since *Bourjaily*, every federal court of appeals that has addressed the issue has held that the government must present evidence independent of a co-conspirator's statement in order to establish its admissibility.[20]

In *United States v. Gomez-Pabon*[21] the First Circuit Court of Appeals declined to decide whether a co-conspirator's statement, standing alone, was sufficient to support its admissibility pursuant to Rule 801(d)(2)(E) because "sufficient corroborating evidence exist[ed] independent of the challenged co-conspirator's statements."[22] The Third Circuit, in *United States v. Gambino*,[23] did not address the question directly because it found "sufficient evidence external to the hearsay statement itself" to establish admissibility.[24] Likewise, the Fifth,[25] Sixth,[26]

20. United States v. Gambino, 926 F.2d 1355, 1361 n.5 (3d Cir. 1991); *see, e.g.*, United States v. Jackson, 863 F.2d 1168, 1171 (4th Cir. 1989) ("To admit evidence as non-hearsay under Rule 801(d)(2)(E) the moving party must show by a preponderance of independent evidence that 1) a conspiracy existed; 2) that the declarant and the defendant were members of the same conspiracy; and 3) the statement was made in the course of and in furtherance of that conspiracy."); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988) ("To abandon the requirement that *some* evidence aside from the proffered co-conspirator's statements be presented to show that the defendant knowingly participated in the alleged conspiracy would be to render all such statements self-validating."); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir. 1988) ("[T]he court may take into account the proffered out-of-court statements themselves if those statements are sufficiently reliable in light of independent corroborating evidence."); United States v. Zambrana, 841 F.2d 1320, 1345 (7th Cir. 1988) ("[T]he heart of the Chief Justice's reasoning" in *Bourjaily* is that presumably unreliable hearsay statements become probative when corroborated by independent evidence.).

21. 911 F.2d 847 (1st Cir. 1990).

22. *Id.* at 856-57 n.3.

23. 926 F.2d 1355 (3d Cir. 1991).

24. *Id.* at 1361.

25. *See, e.g.*, United States v. Triplett, 922 F.2d 1174, 1181 (5th Cir.) (Defendant's incriminating statements were "sufficient evidence to establish a prima facie case of conspiracy."), *cert. denied*, 111 S. Ct. 2245 (1991); United States v. Perez, 823 F.2d 854, 855 (5th Cir. 1987) ("[W]hen [the declarant's statements] are added to the other evidence of his relationship to [the defendant], there can be little doubt that they were co-conspirators.").

26. *See, e.g.*, United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir. 1989) (agreeing with trial court's conclusion that independent evidence of conspiracy supported admissibility of co-conspirator's statement).

Seventh,[27] Eighth,[28] Tenth[29] and Eleventh Circuits[30] have not expressly decided whether independent evidence is required because in each post-*Bourjaily* case, the reviewing courts have found independent evidence of a conspiracy.

The Supreme Court has recognized that Rule 104(a) authorizes trial courts to evaluate the evidentiary worth of a hearsay declaration when determining whether to admit such a statement to prove guilt.[31] Still, the Court was mindful of the unreliability of co-conspirator statements.[32] As discussed above, the federal courts of appeals appear to be unanimous in assuming that facts asserted in co-conspirator statements must be rejected as presumptively unreliable unless corroborated by independent evidence.[33]

The Court in *Bourjaily* also ruled that co-conspirator statements are admissible if the district court is persuaded by a mere preponderance of the evidence that the defendant was a member of a conspiracy.[34] It follows that a district court may admit co-conspirator statements even if it entertains a reasonable doubt about the reliability of the facts asserted or the veracity of the declarant.[35] However, nothing in *Bourjaily* precludes the suppression of co-conspirator statements if a district court has a reasonable doubt as to whether the government's proof establishes that the defendant was a member of a conspiracy. Under such circumstances, it appears to be the duty of the district courts to deny admission of co-conspirator statements notwithstanding their relevance and admissibility under Rule 104(a). In holding that co-conspirator statements may be considered in determining whether the government has proven a conspir-

27. *See, e.g.*, United States v. Romo, 914 F.2d 889, 897 (7th Cir. 1990) ("The Court's express refusal to decide whether the hearsay statement itself could alone be sufficient to prove a defendant's participation in a conspiracy is irrelevant here, because there was also evidence outside of Juanita's hearsay statement to demonstrate Ann's participation in the ongoing drug conspiracy.") (citation omitted), *cert. denied*, 111 S. Ct. 1078 (1991).

28. *See, e.g.*, United States v. Meggers, 912 F.2d 246, 249 (8th Cir. 1990) ("Independent evidence of a conspiracy to distribute cocaine also supports the admission of [co-conspirator's] statement.").

29. *See, e.g.*, United States v. Esparsen, 930 F.2d 1461, 1475 (10th Cir. 1991) ("[T]he independent evidence . . . plus the disputed statements themselves, establish the foundation for Rule 801(d)(2)(E) beyond cavil."), *cert. denied*, 112 S. Ct. 882 (1992).

30. *See, e.g.*, United States v. Byrom, 910 F.2d 725, 736-37 (11th Cir. 1990) ("Given the abundant independent evidence of a cocaine importation conspiracy involving . . . [the defendant] . . . the district court's admission of the videotape was not clearly erroneous.").

31. Bourjaily v. United States, 483 U.S. 171, 180 (1987).

32. *Id.* at 179-80.

33. *See supra* note 20.

34. *Bourjaily*, 483 U.S. at 176.

35. *See id.* at 175 (citing Colorado v. Connelly, 479 U.S. 157, 167-69 (1986)).

acy existed, the Court noted: "There is no reason to believe that [trial] courts are any less able to properly recognize the probative value of evidence in this particular area."[36]

It seems self-evident that a district court judge should prevent a jury from being persuaded to render a guilty verdict based on evidence of doubtful reliability. Federal Rule of Evidence 403 provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[37] In fact, the Advisory Committee's Notes to the Federal Rules of Evidence describe the district court's duty under Rule 403 to balance "the probative value of and need for the evidence against the harm likely to result from its admission."[38]

Rule 403 gives trial judges the power and the duty to ensure that the determination of guilt is not affected by evidence that does not persuade the court beyond a reasonable doubt. Trial judges spend their professional lives in a search for the truth. Appellate judges are confined to a search for error. Appellate judges cannot prevent a jury from being swayed by unreliable evidence that satisfies the preponderance of the evidence test.

Given their authority under Rule 403, trial judges cannot wash their hands of the responsibility to ensure that only the guilty are convicted. When a district court is persuaded that admitting a co-conspirator's statement may result in the conviction of a person whose guilt is not supported by proof beyond a reasonable doubt, it should exclude the evidence on the grounds that the probative value of the evidence is outweighed substantially by its prejudicial effect on the search for the truth.[39]

The case of *United States v. Silverman*[40] presents a forceful example of the formidable task presented to an appellate court when asked to review a conviction obtained in part by the admission of a co-conspirator's statement. In *Silverman*, an accomplice testified he obtained cocaine from Pearl Silverman on three occasions.[41] The accomplice told the jury he and Pearl Silverman flew to the Van Nuys Airport to obtain the narcotics.[42] Each time after the plane landed, Pearl Silverman told the accomplice she was going to telephone her brother. Cab records

36. *Id.* at 180.
37. FED. R. EVID. 403.
38. FED. R. EVID. 403 advisory committee's note.
39. FED. R. EVID. 403.
40. 771 F.2d 1193 (9th Cir. 1985) (*Silverman I*), *vacated*, 796 F.2d 339 (9th Cir. 1986).
41. *Id.* at 1195.
42. *Id.*

showed that Pearl Silverman was taken to locations close to her brother David Silverman's residence on each occasion.[43] The record on appeal showed that Pearl Silverman had two brothers who lived in the San Fernando Valley in the general vicinity of the Van Nuys Airport.

The accomplice testified that Pearl Silverman told him her brother David Silverman was her source of cocaine. The accomplice also testified that a person who looked like David Silverman drove Pearl Silverman to the Van Nuys airport just prior to the delivery of the cocaine on the third trip.[44]

Two months after the accomplice agreed to cooperate in an investigation, Drug Enforcement Administration agents went to David Silverman's home. David Silverman falsely informed the officers that David Silverman was not home. Shortly thereafter, David Silverman's attorney made arrangements for his client's voluntary surrender in exchange for lower bail.[45] David Silverman was convicted even though the case presented no testimonial evidence that someone supplied cocaine to Pearl Silverman.

The Ninth Circuit Court of Appeals affirmed Silverman's conviction. A majority of the three-judge panel concluded that the accomplice testimony was sufficient to connect David Silverman to the conspiracy and to support admission of Pearl Silverman's extrajudicial statements.[46] Upon rehearing, in *United States v. Silverman* (*Silverman II*),[47] the court reversed the conviction on the ground that the district court had erred in concluding that the Government had demonstrated by a preponderance of the evidence that David Silverman was connected to the conspiracy.[48] The majority in *Silverman II* concluded that the independent evidence offered by the Government was insufficient to overcome the "presumption of unreliability" of the co-conspirator's statements.[49]

Ironically, when the district court in *Silverman* originally overruled the objection to a question posed to the accomplice concerning whether Pearl Silverman told him the name of her supplier, the judge stated that it was "a fairly close, tough question for the court to tackle but nevertheless I think that it does meet the test of [Federal Rule] 801(d)(2)(E), and so I'm going to permit the question to be answered."[50] Had the district

43. *Id.*
44. *Id.*
45. *Id.* at 1195-96.
46. *Id.* at 1199-1200.
47. 861 F.2d 571 (9th Cir. 1988) (*Silverman II*).
48. *Id.* at 580.
49. *Id.* at 579.
50. *Id.* at 574.

court used its authority under Rule 403 and weighed the probative value of the presumptively unreliable co-conspirator statement against its highly prejudicial effect, the accomplice's testimony would most likely have been excluded. The accused and the court of appeals would have been saved many wasted years of unnecessary travail.

III. ACCOMPLICE TESTIMONY

In *Bourjaily v. United States*[51] the Supreme Court reasoned that presumptively unreliable co-conspirator statements "may become quite probative when corroborated by other evidence."[52] This same analysis appears to apply to an accomplice's testimony. If so, the Supreme Court's conclusion in *Caminetti v. United States*[53] that an accomplice's testimony is admissible without corroboration may be ripe for reexamination.

The danger of prejudicial impact on a jury is probably far greater when a crime partner testifies in exchange for a prosecutor's promise of leniency than when a co-conspirator's statements are admitted against the accused. An accomplice is liable for prosecution for the crime charged against the defendant. He or she is usually testifying in the hope of receiving lesser punishment. Thus, "[i]t is in his interest not only to implicate others but to minimize his own role and exaggerate the roles of his co-conspirators."[54] Because of an accomplice's first-hand knowledge of the details of the criminal conduct charged in the indictment, his or her testimony concerning the role played by the accused may appear quite believable, and its veracity can only be challenged by another accomplice.[55]

The frustration experienced by appellate judges when reviewing cases involving accomplice testimony was well expressed in *Lyda v. United States*.[56] Lyda was convicted of bank robbery. McCarter, who also was charged with bank robbery, gave "[t]he telling evidence against [Lyda]."[57] McCarter testified that he paid Lyda $500 for driving the

51. 483 U.S. 171 (1987).

52. *Id.* at 180.

53. 242 U.S. 470, 495 (1917).

54. Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990).

55. *Id.* at 786-87.

56. 321 F.2d 788 (9th Cir. 1963).

57. *Id.* at 793.

getaway car.[58] An eyewitness could not identify the driver of the car used by the bank robbers.[59]

Judge Duniway expressed his concern about the reliability of accomplice testimony in the following words:

> McCarter's testimony is suspect for a number of reasons. He is a convicted felon. He was awaiting sentencing for his part in the crime, and his remarks make clear that he hoped for a lighter sentence because he testified against the appellants. Statements he made before trial inconsistent with his testimony there were offered, and there is an apparent inconsistency within his testimony at the trial. His version of Lyda's entrance into the conspiracy is somewhat bizarre.
>
> On the other hand, McCarter's story of Lyda's part in the crime is not unbelievable. It obtains some slight corroboration from the evidence recited above. McCarter's description of the commission of the two crimes, apart from Lyda's recruitment, is detailed and has the ring of truth. It was not seriously shaken on cross-examination, and is amply corroborated. Further, the jury was instructed that accomplice testimony was to be received with caution and weighed with great care.
>
> We find ourselves in something of a dilemma. The credibility of witnesses is a matter for the jury, not an appellate court. . . . If McCarter were an ordinary witness, though a felon and impeached by inconsistencies, we could not reverse. But McCarter is an accomplice, and as such he has a "built-in" untrustworthiness. It is true that in federal courts a conviction may be based on the uncorroborated testimony of an accomplice. . . . We think this to be the rule even though the accomplice is in a position to gain favors from the government by his testimony, . . . and even though there are inconsistencies in his story, . . . so long as it is not "incredible or unsubstantial on its face." Obviously there comes a point when the witness'[s] qualifications are so shoddy that a verdict of acquittal should have been directed.
>
> *Bearing in mind the limited role of an appellate court in a criminal appeal*, we do not think that point was reached here. But we think the sufficiency of the evidence so close a question as to bring into sharp relief the other errors which Lyda

58. *Id.*
59. *Id.* at 794.

assigns.[60]

The court reversed Lyda's conviction because the government improperly introduced evidence that the defendant had been previously arrested for burglary.[61] The court found this error reversible "[s]ince the other evidence against Lyda was scanty."[62] Thus, although the accomplice's "somewhat bizarre" testimony connecting Lyda to the bank robbery was supported by "slight corroboration," it was insufficient to uphold the conviction in the face of the erroneous admission of character evidence.

As pointed out by Judge Duniway, an accomplice's testimony is inherently untrustworthy. Any conviction based on unreliable evidence should not stand. The Supreme Court has characterized accomplice testimony as suspect and unreliable in *Caminetti v. United States*;[63] nonetheless, in that same case the Court held that corroboration of an accomplice's testimony is not required.[64] Seven years earlier, in *Holmgren v. United States*,[65] the Court held that an instruction cautioning jurors about the unreliability of accomplice testimony is not mandatory.[66] In more recent decisions, several circuits have recognized that a district court should caution the jury concerning reliance on the testimony of accomplices, although failure to do so does not always constitute reversible error.[67]

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60. *Id.* at 794-95 (emphasis added).

61. *Id.* at 796.

62. *Id.*

63. 242 U.S. 470 (1917).

64. *Id.* at 495.

65. 217 U.S. 509 (1910).

66. *Id.* at 524.

67. United States v. Bosch, 914 F.2d 1239, 1247 (9th Cir. 1990) (holding jury instruction regarding accomplice testimony must be given if requested by defense counsel and accomplice testimony substantially uncorroborated); United States v. Laing, 889 F.2d 281, 287 (D.C. Cir. 1989) (finding reversible error where trial court failed to instruct jury regarding uncorroborated accomplice testimony), *cert. denied*, 494 U.S. 1069 (1990); United States v. Schoenfield, 867 F.2d 1059, 1061-62 (8th Cir. 1989) (holding instruction warning jury to scrutinize accomplice testimony only necessary when testimony uncorroborated); United States v. Beard, 761 F.2d 1477, 1481 (11th Cir.) (holding defendant entitled to cautionary instruction on credibility of accomplice testimony where testimony uncorroborated and defense counsel requests instruction), *cert. denied*, 474 U.S. 907 (1985); United States v. Skandier, 758 F.2d 43, 46 (1st Cir. 1985) (holding harmless error where trial court failed to instruct jury to scrutinize accomplice testimony where abundant evidence supported conviction); United States v. Slocum, 695 F.2d 650, 656 (2d Cir. 1982) (holding jury instruction to scrutinize accomplice testimony discretionary and only required to avoid substantial prejudice to defendant), *cert. denied*, 460 U.S. 1015 (1983); United States v. Hill, 627 F.2d 1052, 1053 (10th Cir. 1980) (holding failure to instruct jury regarding accomplice testimony was reversible error where testimony uncorroborated); United States v. McCallie, 554 F.2d 770, 772 (6th Cir. 1977) (finding that trial court's jury instruction regarding credibility of accomplice testimony plus defense counsel's

III. CONCLUSION

As eloquently explained by Judge Duniway, federal appellate judges cannot overturn a conviction where the connection of the accused to the crime is proved primarily by the testimony of an accomplice.[68] In contrast, trial judges have the power to prevent a conviction based upon such unreliable testimony by ruling, pursuant to Federal Rule of Evidence 403, that the probative value of such proof is outweighed by its prejudicial effect on the factfinding function of the jury.[69] In such a case, a trial court may also direct a verdict of acquittal.[70]

The United States Supreme Court has declined to apply the Sixth Amendment Confrontation Clause to "firmly rooted" exceptions to the hearsay rule.[71] In *White v. Illinois*[72] the Court reiterated that "the admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address."[73] Thus, the protections set forth in the Federal Rules of Evidence take on an even greater importance in criminal trials.

Until the Supreme Court has occasion to explain whether independent evidence of an accused's connection to a conspiracy is required, trial judges have the responsibility of preserving the integrity of our adversary system of justice by exercising their discretion under Rule 403 to prevent a conviction based on unreliable evidence.

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ability to cross-examine accomplice witness precluded due process violation or finding of reversible error); Tillery v. United States, 411 F.2d 644, 646-47 (5th Cir. 1969) (holding trial court's failure to warn jury on accomplice testimony not reversible error where substantial evidence to convict exists).

68. Lyda v. United States, 321 F.2d 788, 794-95 (9th Cir. 1963).

69. FED. R. EVID. 403.

70. *See Lyda*, 321 F.2d at 795.

71. *See* White v. Illinois, 112 S. Ct. 736, 740 (1992) (holding spontaneous declarations admissible without confrontation); United States v. Inadi, 475 U.S. 387, 392 (1986) (rejecting Confrontation Clause challenge to admissibility of out-of-court statements made by co-conspirator in course of conspiracy).

72. 112 S. Ct. 736 (1992).

73. *Id.* at 740 (citing Coy v. Iowa, 487 U.S. 1012, 1016 (1988)). Justice Thomas, joined by Justice Scalia, goes a step further in his concurring opinion in *White* stating that "it is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition." *Id.* at 746 (Thomas, J., concurring).