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CRIMINAL  
PROCEDURE—EVIDENCE—COCONSPIRATORS  
EXCEPTION—INDEPENDENT EVIDENCE  
REQUIREMENT—STATEMENTS BY  
ALLEGED COCONSPIRATORS MAY BE  
CONSIDERED BY TRIAL COURT IN ITS  
PRELIMINARY DETERMINATION OF  
ADMISSABILITY OF THOSE  
STATEMENTS—*United States v. Martorano*, 557  
F.2d 1, *aff'd on rehearing*, 561 F.2d 406 (1st Cir.  
1977), *cert denied*, 46 U.S.L.W. 3579 (March 21,  
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Paul R. McCary

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CRIMINAL PROCEDURE—EVIDENCE—COCONSPIRATORS EXCEPTION—INDEPENDENT EVIDENCE REQUIREMENT—Statements by alleged coconspirators may be considered by trial court in its preliminary determination of admissibility of those statements—*United States v. Martorano*, 557 F.2d 1, *aff'd on rehearing*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 46 U.S.L.W. 3579 (March 21, 1978).

Late in the summer of 1974 Peter Pallotta grew desperate for cash to cover pressing debts from his nightclub operation in Revere, Massachusetts. His brother, Bugsy, arranged a meeting with the defendant, James Martorano, at Martorano's Boston restaurant. At that meeting Martorano agreed to lend Pallotta \$2,000.00. The interest was 5% per week. Payments were to be collected at Pallotta's nightclub every Friday night. Pallotta made a few sporadic payments, but he soon fell behind as his nightclub operation failed.<sup>1</sup> Finally, in November of 1974, Pallotta's fear of Martorano's strong-arm collection tactics prompted him to seek FBI protective custody in return for his services as a cooperating witness against Martorano.

Between November 1974 and January 1975 Pallotta cooperated with the FBI by making phone calls to Martorano, Brian Halloran (Martorano's co-defendant),<sup>2</sup> Jimmy Matera,<sup>3</sup> and Frank Pagano.<sup>4</sup> During the conversations, Pagano and Matera made statements indicating that Pallotta could be in physical danger if he went to Martorano's restaurant. These statements tended to show both that Pallotta was the victim of extortion and that Martorano was involved in the scheme to extort.

The FBI monitored these calls and the prosecution used the Matera-Pallotta and Pagano-Pallotta statements to convict Mar-

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1. Pallotta's problems went considerably beyond one delinquent loan. In a letter to his brother, Bugsy, Pallotta named his creditors as "Mario and Tony from Revere, Vinny the Pig, and Bobby, Joe Balliro, Whitey and Louie from South Boston, and your friend Johnny." Brief for Defendant-Appellant at 16, *United States v. Martorano*, 557 F.2d 1, *aff'd on rehearing*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 46 U.S.L.W. 3579 (March 21, 1978).

2. Pallotta described Halloran as "a loan shark, collector and enforcer and a madman." *United States v. Martorano*, 557 F.2d 1, 6 (1st Cir. 1977). Halloran was acquitted on four counts of extortion. Brief for Defendant-Appellant, *supra* note 1, at 5.

3. Matera was present at Martorano's restaurant when the loan was consummated. At that time he received instructions from Martorano regarding the Friday night collections. Brief for Defendant-Appellant, *supra* note 1, at 7.

4. According to Pallotta, Pagano had been Matera's loan sharking partner for twenty years. *Id.* at 8.

torano of four counts of extortion under the Consumer Credit Protection Act.<sup>5</sup> These conversations were admitted into evidence under the coconspirators exception to the hearsay rule,<sup>6</sup> which provides that a coconspirator's declaration in furtherance of the conspiracy is competent evidence against all coconspirators. On appeal Martorano argued that the trial court erred in applying the exception to the Pagano conversations. Specifically, he contended that the prosecution's preliminary showing of conspiracy, which is a precondition to applying the exception, was deficient.

In affirming the conviction, the Court of Appeals for the First Circuit held that the trial court, in its preliminary evaluation of the evidence showing a Martorano-Pagano conspiracy, properly considered the contents of some of the monitored conversations.<sup>7</sup> In the view of the appellate court these conversations,<sup>8</sup> when considered along with independent evidence of the conspiracy,<sup>9</sup> formed a sufficient preliminary showing of conspiracy to permit these and other Pagano-Pallotta conversations to be admitted into evidence against Martorano under the coconspirators exception. Because the purpose of the preliminary evaluation was to determine the admissibility of the Pagano hearsay statements under the exception, the court's reliance on the content on some of the statements to make

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5. 18 U.S.C. §§ 891-896 (1970). The indictment charged Martorano with two counts of conspiracy and two substantive offenses (extortionate extension of credit and collection by extortionate means). 18 U.S.C. § 892(a) (1970) provides: "Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both." 18 U.S.C. § 894(a) (1970) provides:

Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both.

Matera and Pagano were also indicted on similar charges, but were tried separately. Brief for Defendant-Appellant, *supra* note 1, at 5.

6. "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." FED. R. EVID. 801(d)(2)(E).

7. *United States v. Martorano*, 557 F.2d 1, 12, *aff'd on rehearing*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 46 U.S.L.W. 3579 (March 21, 1978).

8. The specific conversations relied on by the court of appeals revealed that Pagano and Matera had supplied to Martorano half the money he loaned to Pallotta. *Id.* This fact conclusively links Pagano and Martorano in conspiracy, which allows all the other Pagano statements into evidence against Martorano under the coconspirators exception.

9. The court found the independent, nonhearsay evidence of Pagano's involvement "not terribly compelling." *Id.*

out a preliminary showing resulted in the hearsay declarations "bootstrapping" their way to the level of competent evidence. To the extent that the court relied on the hearsay to establish its own competence, it in effect abandoned the requirement of independent evidence.

This application of the coconspirators exception not only differs markedly from the common law procedures,<sup>10</sup> but also conflicts with interpretations of the Federal Rules of Evidence forwarded by the other circuits.<sup>11</sup> In these other circuits, as well as at common law, a showing of conspiracy from evidence independent of the hearsay sought to be admitted remains a prerequisite to admitting coconspirator declarations.

The court of appeals tempered its unprecedented holding in *United States v. Martorano*<sup>12</sup> in an opinion on rehearing, *Martorano II*.<sup>13</sup> In the second opinion, the court ruled that certain statements made by Pagano to Pallotta were admissible in their own right as "verbal acts."<sup>14</sup> These verbal acts could be considered along with the other independent, nonhearsay evidence linking Pagano and Martorano in conspiracy. Because the evidence considered in the preliminary determination was now characterized as admissible, and hence prima facie reliable, the court found a sufficient preliminary showing of conspiracy without resorting to the bootstrap procedures of *Martorano I*.<sup>15</sup>

The "verbal act" reasoning in *Martorano II* represented a second attempt to bring the statements in question within the bounds of the traditional hearsay exception. However, even on rehearing,

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10. *Glasser v. United States*, 315 U.S. 60, 75 (1942), describes the traditional requirement of independent evidence. In passing on the sufficiency of the evidence convicting a former U.S. Attorney of fraud and corruption, the Court held: "However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy . . . . Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Id.* at 74-75 (citations omitted).

11. *United States v. Holder*, 560 F.2d 953, 956-57 (9th Cir. 1977); *United States v. Haynes*, 560 F.2d 913, 915 (8th Cir. 1977); *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977); *United States v. McManus*, 560 F.2d 747, 750 (6th Cir. 1977); *United States v. Stanchich*, 550 F.2d 1294, 1298-99 (2d Cir. 1977); *United States v. Savell*, 546 F.2d 43, 46-47 (5th Cir. 1977); *United States v. Trowery*, 542 F.2d 623, 626-27 (3d Cir.), *cert. denied*, 429 U.S. 1104 (1976); *United States v. Stroupe*, 538 F.2d 1063, 1065-66 (4th Cir. 1976); *United States v. Haldeman*, 559 F.2d 31, 118 n.246 (D.C. Cir. 1976), *cert. denied*, 97 S. Ct. 2641 (1977).

12. 557 F.2d 1, *aff'd on rehearing*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 46 U.S.L.W. 3579 (March 21, 1978).

13. 561 F.2d 406 (1st Cir. 1977).

14. See text accompanying notes 42-47 *infra*.

15. 561 F.2d at 406-07.

the court reaffirmed its initial reading of the Federal Rules, and defended its reasons for allowing the bootstrap procedure. Both the bootstrapping of *Martorano I* and the verbal act reasoning of *Martorano II* represent clear departures from the preliminary showing required under the exception at common law.

The coconspirators exception at early common law grew out of the rule, still in force today, which considered a party's out of court admissions<sup>16</sup> to be competent evidence, even when introduced to prove the truth of the matter asserted. Admissions are competent evidence, not because they are inherently reliable, but rather because a party to an adversary proceeding should be held responsible for her past statements. The party has the responsibility to explain away the inconsistencies between the admission and the position maintained at trial.<sup>17</sup>

Admissions by a coconspirator were deemed competent evidence against a defendant because the declarant was said to be the defendant's agent.<sup>18</sup> The declarant's admission was imputed to the defendant by the principle of respondeat superior. The term "vicarious admission" aptly describes the exception in this early common law form.

Agency principles no longer support the exception.<sup>19</sup> Rather, the prosecution's great need for this evidence presently explains the admissibility of coconspirator declarations.<sup>20</sup> The significance of

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16. An admission is "anything said by the party-opponent . . . provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony." 4 J. WIGMORE, EVIDENCE § 1048, at 4 (Chadbourn rev. 1972) (emphasis in original).

17. [The witness] is confronting the very person whose statements he is reporting, he is subject to cross-examination by counsel who has at his elbow the person who knows all the facts and circumstances of the alleged statements and who is therefore in the best possible position to conduct a searching inquiry, and, finally, the declarant may himself go upon the stand and deny, qualify or explain the alleged admissions.

Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 361 (1921).

18. *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir. 1926), contains Learned Hand's classic statement of the conspiracy-agency theory. "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." 13 F.2d at 967.

19. *Levie, Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1165 (1954).

20. *Id.* at 1164; Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 989 (1959).

the new rationale is that, even though the rule remains in the same form, the admissibility of coconspirator declarations can no longer be justified on the basis of an "imputed admissions" theory. Instead, the admissibility issue must be recast in terms of reliability.<sup>21</sup>

Consequently, the modern coconspirators exception seeks to separate reliable from unreliable coconspirator declarations. Courts accomplish this separation by requiring that the three elements of the exception be satisfied as a precondition to the admissibility of coconspirator statements. These elements are that 1) the statement must have been made during the conspiracy, 2) in furtherance of the conspiracy, and 3) there must be independent evidence of the conspiracy and the defendant's participation therein.<sup>22</sup> Under the modern exception, the requirement of independent evidence serves to demonstrate the reliability of the hearsay rather than to establish an agency relationship.

Under Federal Rule 801(d)(2)(E)<sup>23</sup> the coconspirators exception remains substantially similar to the common law exception. The federal rule omits express reference to the independent evidence requirement, but impliedly retains the requirement by its use of the word "conspirator."<sup>24</sup> Furthermore, the comments to the rule

21. Morgan, *Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 463 (1929). The reliability of coconspirator declarations is questionable. The speaker may be intentionally deceiving his audience, bragging, or sincerely misinformed. In order to narrow the scope of this note, bona fide coconspirator declarations are presumed reliable. The remaining problem is identifying a bona fide coconspirator declaration. "In the absence of some special guarantee of reliability inherent in the circumstances surrounding the making of such statements, their admission in criminal cases presents a significant danger of misguided convictions." Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1972).

22. *E.g.*, *United States v. Lambros*, 564 F.2d 26, 29-30 (8th Cir. 1977).

23. *See* note 6 *supra*.

24. This language is designed to deal with two conditions which in the Uniform Rules are stated separately. The first Uniform Rule condition, which the unpublished comments of the Advisory Committee indicate was intended to be expressed in Rule 801 "without difference in meaning," is that "the party and the declarant were participating in a plan to commit a crime or civil wrong." The significance of this condition is that there must be evidence independent of the hearsay establishing a defendant's participation in the conspiracy before such declarations are admissible against him.

4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(E)(01) at 801-148 (footnotes omitted). *United States v. Dixon*, 562 F.2d 1138 (9th Cir. 1977), expressly supports this view. "In the present case, the relevant prerequisites to admission of [coconspirator statements] are embodied in the word 'coconspirator': The government must show by evidence independent of the statement (1) that a conspiracy existed and (2) that [defendant] was a member of it." 562 F.2d at 1141.

cite the California<sup>25</sup> and New Jersey<sup>26</sup> versions of the exception as being comparable to the federal rule. Independent evidence of conspiracy is required in both states.<sup>27</sup>

Although the substantive content of the exception remains as it was at common law, the Federal Rules provide a different mechanism for applying the exception. Prior to the adoption of the Federal Rules, the jury evaluated the preliminary independent showing of conspiracy. Only if the jury was convinced beyond a reasonable doubt,<sup>28</sup> from evidence independent of the hearsay, that a conspiracy existed between the declarant and the defendant, was it permitted to consider the hearsay against the defendant. Jurors, however, were often unwilling or unable to ignore the hearsay in

25. CALIF. EVID. CODE § 1223 (West 1966) provides:

ADMISSION OF CO-CONSPIRATOR. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
- (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
- (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

26. N.J. R. EVID. 63(9) provides:

VICARIOUS ADMISSIONS. A statement which would be admissible if made by the declarant at the hearing is admissible against a party if . . . (b) at the time the statement was made the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan.

27. The New Jersey statute more closely resembles the Federal Rule in that it contains no express requirement of independent evidence. In *State v. Benevento*, 138 N.J. Super. 211, 350 A.2d 485 (App. Div. 1975), *cert. denied*, 70 N.J. 276, 359 A.2d 488 (1976), the court interpreted the provision as implicitly including the requirement:

It is clear that in a conspiracy case a statement by one conspirator is admissible against another conspirator if made in furtherance of the conspiracy. Since there was proof *aliunde* of the complicity of [defendant] as a conspirator the out-of-court statement of Benevento was properly admitted. See *Glasser v. United States*, 315 U.S. 60 (1941).

*Id.* at 217, 350 A.2d at 488, (citations omitted).

28. The practical limitations of the jury favor using the severe "beyond a reasonable doubt" standard:

The jury is already concerned with the evidence-weighting standards involved in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence . . . , but as well to apply to the independent evidence the entirely different evidence-weighting standards required of a *prima facie* case, is to expect the impossible.

*Carbo v. United States*, 314 F.2d 718, 737 (9th Cir. 1963).

making the preliminary determination.<sup>29</sup> Furthermore, the identity of the preliminary and ultimate issues often made the exercise seem futile.<sup>30</sup> As a result of these problems, the common law method allowing the jury to decide the preliminary issue was ineffective. Jurors' confusion often caused them to forgo the preliminary determination entirely.

Federal Rule 104,<sup>31</sup> which deals with preliminary questions of admissibility, remedies the weakness of the common law method by reallocating the responsibility for making the preliminary determination to the trial judge.<sup>32</sup> This reallocation, however, creates serious new difficulties.<sup>33</sup> *Martorano I* spotlights the most impor-

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29. The Supreme Court noted the heavy burden that application of the coconspirators exception placed on jurors in *Lutwak v. United States*, 344 U.S. 604, 619 (1953).

30. "The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty." *Carbo v. United States*, 314 F.2d 718, 736 (9th Cir. 1963). Where substantive crimes are charged in addition to a conspiracy count, the limiting instruction may have some effect. The less congruous the preliminary and ultimate issues are, the more likely the jurors will perceive the nature of the two separate tasks. See 1 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 33 (1977).

31. FED. R. EVID. 104 provides in part:

(a) **QUESTIONS OF ADMISSIBILITY GENERALLY.** Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **RELEVANCY CONDITIONED ON FACT.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

32. FED. R. EVID. 104(a). See note 31 *supra*. Overtones of conditional relevance are often superimposed on the preliminary evaluation in conspiracy cases. Preliminary questions of conditional relevance remain jury questions under FED. R. EVID. 104(b). However, when applying the coconspirators exception, the issue is more properly framed as a question of admissibility for the judge under rule 104(a). See Advisory Committee's Notes to rule 104(b); 1 D. LOUISELL & C. MUELLER, *supra* note 30, § 26; 1 J. WEINSTEIN & M. BERGER, *supra* note 24, ¶ 104(05); 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE*, §§ 5053, 5055 (1977). But see Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back into the Conspirator Rule*, 5 HOFSTRA L. REV. 77 (1976).

33. One problem with the new approach is that it does not specify the strength of the preliminary showing needed to justify application of the exception. One view suggests that the preliminary proof must be beyond a reasonable doubt. 1 J. WEINSTEIN & M. BERGER, *supra* note 24, ¶ 104(05). This standard protects defendants. However, since such protection is not constitutionally required, see, e.g., *United States v. Nixon*, 418 U.S. 683, 701 (1974), and places a heavy burden on the prosecution, most courts use a lower standard. No consensus exists among the circuits regarding the proper preliminary standard. E.g., *United States v. Stanchich*, 550 F.2d 1294, 1299 n.4 (2d Cir. 1977). The circuits even disagree as to the relative severity of

tant new difficulty and clearly illustrates the potential magnitude of the modification.

The most dramatic problem raised by allowing the judge alone to determine the sufficiency of the evidence comprising the preliminary showing is that it becomes unclear which types of evidence he or she may consider. Rule 104(a) provides: "In making its [the court's] determination it is not bound by the rules of evidence except those with respect to privileges." In *Martorano I & II*, the First Circuit interpreted this language as allowing the preliminary determination to be based on inadmissible evidence, including hearsay and perhaps the very statement to be admitted. The court reasoned that, because the trial judge is sensitive to the weaknesses of hearsay, he or she is capable of assessing its proper weight in making a preliminary determination. Furthermore, the court perceived no difference between hearsay in general and a coconspirator's hearsay statement.<sup>34</sup> Therefore, the judge may consider the statement seeking admittance, along with other hearsay and independent evidence, when making a preliminary determination regarding conspiracy.

Although easing the independent evidence requirement<sup>35</sup> initially appears to be a reasonable result under the Federal Rules, a more comprehensive examination of the rules and the policies they embody reveals the result to be unwarranted. The arguments favoring retention of the independent evidence requirement range from statutory construction of the Federal Rules themselves, to sixth amendment constitutional limitations.

Working within the Federal Rules, the abrogation of the independent evidence requirement must fail for two reasons. First, it conflicts with the implied retention of the requirement in rule 801(d)(2)(E).<sup>36</sup> Second, the provision of rule 104(a) freeing the

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the standards they use. Compare *Stanchich*, with *United States v. Trotter*, 529 F.2d 806, 811-12 (3d Cir. 1976) and *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). In *Petrozziello* the First Circuit held that the reallocation requires a higher standard of proof than the common law method because the defendant no longer enjoys the safeguards of a jury decision on the preliminary determination. *Id.* at 23.

34. "It seems that, once hearsay is placed before the district court, it would be a matter of indifference to the criminal defendant what its source is." 561 F.2d at 408.

35. The court maintained that "under any view of the law we would, as we said in our original opinion, require significant independent evidence of the existence of the conspiracy . . ." *Id.* at 408. However, "significant independent evidence" is simply too amorphous a standard to review. Once the preliminary evaluation is tainted with bootstrap evidence, the independent quality is destroyed.

36. See note 24 *supra*.

judge from the rules of evidence should be viewed as a permissive feature rather than an affirmative mandate.<sup>37</sup> Since it is an overall procedural feature, the rule should complement, not supplant, substantive principles of law.<sup>38</sup> Since the coconspirators exception represents the union of hearsay and conspiracy law, it should be doubly resistant to this modification.

The abrogation of the independent evidence requirement also threatens the fundamental safeguards provided by the Constitution. Ultimately, all hearsay exceptions in criminal cases must satisfy basic reliability requirements<sup>39</sup> inherent in the sixth amendment right to confrontation.<sup>40</sup> As modified by the approach in *Martorano I*, the coconspirators exception lacks the assurances of reliability provided by the independent evidence requirement.<sup>41</sup> The deter-

37. The last sentence of the rule is not an open invitation to ignore the rules of evidence. Rather, it calls for good sense to suit the needs of speed and convenience at the trial. In many instances the evidence considered by the court will also have to be considered by the jury—as for example in determining the existence and membership of a conspiracy for admission of coconspirator's hearsay . . . . Since, in such cases, the court must decide whether a reasonable jury could decide for the proponent it makes sense on the preliminary determination only to consider the same evidence the jury will have before it—*i.e.*, admissible evidence.

1 J. WEINSTEIN & M. BERGER, *supra* note 24, ¶ 104(02) at 104-25.

38. See 21 C. WRIGHT & K. GRAHAM, *supra* note 32, at § 5053, where rule 104 is characterized as a "residual rule" and a "fall-back position." The authors emphasize that this rule should not alter substantive law. Two examples given where the rule should defer to substantive law are the parol evidence rule and the principle of agency law whereby the out-of-court statements of an agent are not admissible to prove the agent's authority. The analogy between agency and conspiracy is clear. The substance of the coconspirators exception should control here instead of the procedural provision of rule 104.

39. In *Mancusi v. Stubbs*, 408 U.S. 204 (1972), the Supreme Court concisely restated its interpretation of the confrontation clause:

The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," . . . and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," . . . . It is clear . . . from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these "indicia of reliability," referred to in *Dutton*.

408 U.S. at 213 (citations omitted) (quoting, respectively, *Dutton v. Evans*, 400 U.S. 74 (1970), and *California v. Green*, 399 U.S. 149 (1970)).

40. The sixth amendment provides in part that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

41. "The extent to which the reliability of the hearsay at issue is guaranteed depends on the reliability and probative value of the independent evidence actually presented." Davenport, *supra* note 21, at 1389.

mination that the statement was uttered during a conspiracy must precede *any* reliance on the content of the statement because the reliability of the content is directly derived from its origins in conspiracy.<sup>42</sup> Conspiracy is the *raison d'être* of the exception. Without a preliminary independent showing of conspiracy, statements of an alleged coconspirator have insufficient indicia of reliability to justify the absence of actual confrontation in open court.

While the *Martorano I* approach might yield an objectively correct result in any given case, the procedure lacks the stability and dependability that are indispensable to evidence law in the criminal setting. The specific defect of *Martorano I* is that it fails to exclude Frank Pagano's statements from James Martorano's trial; its broader defect is that the procedure it announces provides no means by which to distinguish the statements of a Frank Pagano from those of a Walter Mitty.

Perhaps after considering the extent to which its initial holding departed from settled principles of evidence in conspiracy cases, the court attempted to muffle the ramifications of *Martorano I* in its opinion on rehearing. *Martorano II* reiterated the validity of the approach in the earlier opinion, but sought alternative grounds on which to affirm the conviction. Since upholding the conviction depended upon the proper application of the coconspirators exception, the court needed an alternative method of satisfying the independent evidence requirement.

To satisfy this requirement the court resorted to the amorphous notion of "verbal acts."<sup>43</sup> Verbal acts, as used by the court in *Martorano II*, are statements that inferentially indicate the declar-

42. The quandary can be symbolized:

Let A = a coefficient of reliability,

x = the content of the coconspirator's statement, and

y = independent evidence.

Admissibility of x turns on the value of A. The court determines the value of A by evaluating the preliminary showing of conspiracy. The probative value, Q, of the coconspirator's statement is a function of A such that

$$Q = Ax.$$

The traditional application of the exception is illustrated as

$$A = y_1 + y_2 + y_3 + \dots + y_n.$$

If the value of A exceeded the preliminary standard, Q was used on the ultimate issue of defendant's guilt. But the *Martorano I* approach applies the exception as

$$A = y_1 + y_2 + y_3 + \dots + y_n + Q.$$

Since Q is a function of A, substituting for Q in the *Martorano I* equation yields an infinite circle.

43. "[T]he phrase 'verbal act' . . . is less vague than *res gestae* only because it is couched in English, instead of Latin." Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 235 (1922).

ant's state of mind.<sup>44</sup> Since they are not offered to prove the truth of the matter asserted, they are admissible as nonhearsay. The evidentiary significance of a verbal act lies not in the correctness of its assertion, but rather in the bare fact that the statement was made. The utterance allows an inference about the speaker's state of mind. This inference need not be tested by cross-examination because it is not dependent on the memory, perception, or narration of the speaker.<sup>45</sup>

The court applied this principle to certain Pagano statements which indicated his complicity in the Pallotta loan. As verbal acts, these statements were admissible "in their own right."<sup>46</sup> The court considered these newly admissible statements along with other independent evidence linking Pagano and Martorano in conspiracy. It concluded that this evidence constituted a sufficient independent showing of conspiracy, as required by the traditional form of the exception.<sup>47</sup>

Because the initial use of Pagano's statements as "verbal acts" is properly limited to showing his state of mind, close analysis reveals a logical flaw in the use of these statements in the independent preliminary showing of conspiracy at Martorano's trial. Dubbing the statements "verbal acts" does not cure any possible objective unreliability in Pagano's statements. Verbal act theory allows those statements to inform the factfinder only of Pagano's then existing state of mind. It does no more; the permissible use of the statement has been narrowed to the point at which hearsay objections do not come into play. The statements, used as "verbal acts," cannot tell us whether Pagano is a competent reporter of any external facts. To learn whether these facts exist as reported, one must test the accuracy of his belief by cross-examination.

Consequently, the broadest permissible inference from Pagano's statements is that Pagano thought he was a coconspirator with Martorano. The reasoning process must stop with that inference. To continue on to the next logical step, that there actually was a conspiracy, is to infer from Pagano's state of mind the truth of the external reality that allegedly gave rise to his state of mind. This

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44. 561 F.2d at 407. The court cites 6 J. WIGMORE, *supra* note 16, at § 1790 entitled "Utterances as indicating circumstantially the speaker's own state of mind."

45. This list omits sincerity, the fourth potential infirmity of hearsay, because it affects the validity of the inference. If, for example, the speaker is joking, the inference of her state of mind will be inaccurate. See Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 6 (1937).

46. 561 F.2d at 407.

47. *Id.*

inference of course depends on the accuracy of his belief. The hearsay rule forbids the final inference<sup>48</sup> because its validity depends on the memory, perception, and narration of the out-of-court speaker, Pagano.

Rather than forge an opinion based on fundamental hearsay principles, the court cited *United States v. Calarco*<sup>49</sup> as precedent for its proposition that the verbal acts of an alleged coconspirator are properly considered in the independent showing of conspiracy against the nondeclarant co-defendant. In *Calarco*, two defendants, Calarco and Riviello, were accused of hijacking a truck. The government's witness testified that after defendant Calarco spoke in private with Riviello (the nondeclarant co-defendant, analogous to Martorano in the principal case), Calarco said to the other conspirators, "This is where you are going to bring the truck."<sup>50</sup> The court characterized this statement as a verbal act and considered it as independent evidence on the preliminary issue of Riviello's participation in the conspiracy. In the court's view, the statement was a reliable indication that Riviello had given an instruction that was relayed to the other conspirators.

Although the *Calarco* court did not specify exactly which branch of the verbal act concept<sup>51</sup> it used, the usage approximates that of the First Circuit in *Martorano II*. The apparent reasoning of *Calarco* includes an impermissible inference similar to the one in *Martorano II*. Calarco's conduct inferentially indicated his belief

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48. "It is only when the statement is offered as the basis for the inferences, first, that the declarant *believed* it, and, second, that the facts were in accordance with his belief, that the evidence is said to be hearsay." C. MCCORMICK, *LAW OF EVIDENCE* § 250 (2d ed. 1972) (emphasis in original). An approximation of the reasoning in *Martorano II* is the rule from *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892). Though *Hillmon* involved an express declaration of intention, rather than an indirect expression as in *Martorano II*, the reasoning is instructive. In *Hillmon*, a third person's letter declaring an intention to leave Wichita with Hillmon was admitted into evidence to prove that Hillmon had left Wichita with the writer. The inference from the writer's stated belief, that he would leave with Hillmon, to the reality underlying that belief, the subsequent conduct, is permissible under the *Hillmon* rule. That rule, however, has been strictly limited to proving subsequent conduct. An extension of the *Hillmon* rule to include past conduct "would amount to allowing the exception for declarations of mental state to swallow substantially the entire hearsay rule." C. MCCORMICK, *supra*, § 296 (footnote omitted).

49. 424 F.2d 657 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970).

50. *Id.* at 660 n.1.

51. Wigmore divides the concept into three branches: 1) Utterances forming a part of the issue (operative facts); 2) Utterances forming a verbal part of an act; and 3) Utterances used as circumstantial evidence. 6 J. WIGMORE, *supra* note 16, §§ 1766-1792.

that he was a cog in the hijacking plan. This belief is relevant to the determination of Calarco's participation, but it clearly cannot implicate Riviello. To implicate Riviello, a further inference is necessary, specifically, that Calarco's belief in the existence of a plan to bring the truck to a certain location reflected reality. This inference is only warranted if we trust the memory, perception, narration, and sincerity of the out-of-court speaker and is therefore prohibited by the hearsay rule.<sup>52</sup> The imprecise reasoning of *Calarco* is uncritically relied upon in *Martorano II*. The misuse of the verbal acts concept in *Calarco* and *Martorano II* short-circuits the traditional independent evidence requirement and leaves the evidence admitted on the strength of that preliminary showing without sufficient assurances of reliability.

In the end we are left with two approaches that convert Pagano's hearsay into competent evidence that supports a criminal conviction.<sup>53</sup> The first approach, bootstrapping, extends the procedural provisions of rule 104(a) to the point at which that rule collides with the well-established substantive provisions of rule 801(d)(2)(E), the coconspirators exception. Surprisingly, in this collision, the substantive provisions yield, and the court is allowed to consider nonindependent evidence in its preliminary determination. The alternative "verbal acts" approach attempts to satisfy the independent evidence requirement by treating statements that are properly restricted to indicating a declarant's state of mind as hard evidence of the involvement of others in a conspiracy.

Both approaches concededly led the court to a plausible result in the instant case. The Pagano statements, when considered against the background circumstances, evoke an intuitive feeling of credibility and suggest that the conviction in the principal case may well have been proper. The problem is that in our system of procedural safeguards, intuition should not be allowed to support a conviction. *Martorano* has set an unfortunate precedent. Its procedures represent a unique version of the coconspirators exception, a version stripped of its most effective means of assuring the reliability of pivotal hearsay statements—the independent evidence requirement.

*Paul R. McCary*

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52. See note 44 *supra*.

53. *Martorano* was sentenced to ten years imprisonment and fined \$10,000.00. Brief for Defendant-Appellant, *supra* note 1, at 3.