Weinstein test, the Eighth Circuit has established a middle ground between the control group test and the test of *Harper & Row*.[55] In addition to narrowing the application of the corporate attorney-client privilege to an extent consistent with its underlying policy,[56] the Eighth Circuit has adopted a test which seems reasonably predictable in its application.[57] The willingness of the Eighth Circuit to accept the Weinstein test suggests that such a test may be adopted in other jurisdictions.[58]

Brent L. Brown

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55. For examples of suggested applications of the Weinstein test, *see* WEINSTEIN, *supra* note 13, ¶ 503(b)[04] at 47.

56. Regarding the strict construction of the privilege, *see* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.) (*en banc*), *cert. denied*, 375 U.S. 929 (1963); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547-48 (D.D.C. 1970); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

57. *See* note 44 *supra*.

58. Although three judges filed dissenting opinions, none specifically challenged the use of the Weinstein test itself. *See* note 47 *supra*.

CRIMINAL LAW—USE OF ALLEGED COCONSPIRATOR DECLARATION AGAINST A DEFENDANT AT A CONSPIRACY TRIAL DOES NOT VIOLATE THE HEARSAY RULE WHERE THE JUDGE DETERMINES THAT A PREPONDERANCE OF INDEPENDENT EVIDENCE SHOWS THE DECLARATION WAS MADE DURING AND IN FURTHERANCE OF THE CONSPIRACY.—*United States v. Bell* (8th Cir. 1978).

Mario Burkhalter accompanied two federal undercover agents to the apartment of Michael Bell where the agents purchased illegal firearms from Bell. The transaction resulted in the joint indictment of Bell and Burkhalter for transferring such firearms in violation of a federal transfer of firearms tax statute, 26 U.S.C. § 5811,[1] and two related offenses, 26 U.S.C. § 5861[2] and 18 U.S.C. § 2.[3] Bell was tried alone and found guilty by a jury. At trial the agents recounted telephone conversations in which Burkhalter arranged for the agents to purchase two sawed-off shotguns from Bell.[4] On appeal, Bell contended that the agents' testimony relative to these telephone conversations was hearsay and therefore improperly admitted into evidence.[5] The government countered Bell's argument by contending that such statements were admissible as declarations of a coconspirator under Federal Rule of Evidence 801(d)(2)(E).[6]

Fashioning new guidelines for the use of alleged coconspirator declara-

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1. 26 U.S.C. § 5811 provides in pertinent part: "There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred. . . . The tax imposed . . . shall be paid by the transferor."

2. 26 U.S.C. § 5861 provides in pertinent part: "It shall be unlawful for any person— . . . (e) to transfer a firearm in violation of the provisions of this chapter; . . ."

3. 18 U.S.C. § 2(a) (1978) provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

4. One agent testified:

> [Burkhalter] inquired as to whether I would be interested in purchasing two sawed off shotguns and discussed the fee that he would receive for lining up the sale. . . . It was agreed that he would receive twenty dollars for each firearm if I were allowed—or if I were introduced to the party that had them for sale. . . . [Burkhalter] said that when he had finally lined the sale up he would contact me again or contact us, my partner and myself.

The other agent testified concerning a second phone conversation: "[Burkhalter] indicated to me that he was in contact with the person that had two sawed off shotguns for sale and wished to sell them to us." United States v. Bell, 573 F.2d 1040, 1045 n.5 (8th Cir. 1978).

5. Bell also contended on appeal that the trial court erred in refusing requested voir dire questions, commenting on the evidence, admitting testimony relative to the purpose of the 1968 Gun Control Act and in omitting instructions on specific intent. The Court of Appeals denied relief on these challenges, finding that there was no constitutional obligation to voir dire the jury on racism; that the testimony on the Gun Control Act was harmless error; that none of the comments by the trial judge affected the substantial rights of Bell; and that specific intent was not required for a violation of 26 U.S.C. § 5861(e). 573 F.2d 1040 (8th Cir. 1978).

6. FED. R. EVID. 801 provides in pertinent part:

> (d) **Statements which are not hearsay.** A statement is not hearsay if—
>
> . . . .
>
> (2) **Admission by 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.

tions at trial, the Eighth Circuit, *held,* declarations admissible.[7] Coconspirator statements are not hearsay and are admissible when the trial judge is satisfied that:

> (A) *it is more likely than not*[8] that the statements were made during the course[9] and in furtherance of[10] an illegal association to which the declarant and defendant were parties; *and*
>
> (B) the prosecution has met the burden of step (A) on evidence *independent* of the statements sought to be admitted.[11]

Procedurally, the following steps are to be followed when the admissibility of alleged coconspirator statements is before the court:[12]

> (1) Upon timely and appropriate objection to testimony recounting an alleged coconspirator's declaration, the court *may conditionally* admit the declaration.
>
> (2) If the declaration is conditionally admitted, the court, on the record, should caution the parties that:

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7. 573 F.2d 1040 (8th Cir. 1978).

8. The court later makes it clear that the "more likely than not" standard is a "preponderance of the evidence" standard. United States v. Bell, 573 F.2d at 1044. *See* note 40 *infra.*

9. The "during the course" requirement means that the statement must have been made while the alleged coconspirators were currently engaged in a plan to commit crime. 4 J. WEINSTEIN, EVIDENCE ¶ 801[01] at 801-151 (1975). Statements made after completion or termination of that plan are outside the scope of FED. R. EVID. 801(d)(2)(E). *See* Krulewitch v. United States, 336 U.S. 440, 444 (1949). For a discussion of when a conspiracy may be deemed terminated or complete, *see* C. MCCORMICK, EVIDENCE § 43 at 87 (2d ed. 1972).

10. The "in furtherance" requirement means that the statement by the coconspirator must advance the objects of the conspiracy. WEINSTEIN, *supra* note 9, ¶ 801[01] at 801-143. One purpose of this requirement is to protect the accused against idle chatter of criminal partners and misreported or fabricated evidence. *See* Comment, *The Hearsay Exception for Coconspirators' Declarations,* 25 U. CHI. L. REV. 530, 541 (1958). The United States Supreme Court has staunchly adhered to the "in furtherance" requirement as a prerequisite to admissibility of hearsay declarations. *See, e.g.,* Wong Sun v. United States, 371 U.S. 471, 490 (1963); Krulewitch v. United States, 336 U.S. 440, 443-44 (1949). Nevertheless, some courts so broadly construe the requirement that any statement *related* to the conspiracy meets the "in furtherance" standard. *See, e.g.,* United States v. James, 510 F.2d 546, 549-50 (5th Cir.), *cert. denied,* 423 U.S. 855 (1975); United States v. Weber, 437 F.2d 327, 336 (3d Cir. 1970), *cert. denied,* 402 U.S. 932 (1971). *See also* UNIFORM RULE OF EVIDENCE 63(9)(b) which provides for admissibility of coconspirator declarations if "the statement was *relevant* to the plan [to commit crime] or its subject matter. . . ." (emphasis added); MODEL CODE OF EVIDENCE rule 508(b) which provides for admissibility if "the party and the declarant were participating in a plan to commit a crime . . . and the hearsay declaration was *relevant* to the plan or its subject matter . . . ." (emphasis added). Judge Weinstein denounces broad construction of the "in furtherance" requirement as contrary to the intent of the Federal Rules of Evidence Advisory Committee. WEINSTEIN, *supra* note 9, ¶ 801[01] at 801-146 to 801-147.

11. 573 F.2d at 1044.

12. The court ruled that these procedural steps should take place out of the hearing of the jury. *Id. See* FED. R. EVID. 104(c) which provides that: "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."

(a) the statement is admitted subject to defendant's objection; *and*
(b) the government must prove, by a preponderance of the evidence, that the declaration was made during the course and in furtherance of the conspiracy; *and*
(c) at the conclusion of all evidence, an explicit on-the-record determination of the admissibility of the declaration will be made; *and*
(d) if the court determines that the prosecution has not borne the burden of proving, by a preponderance of the evidence, that the declaration was made during and in furtherance of the alleged conspiracy, the court will, upon appropriate motion, declare a mistrial, unless cautionary jury instructions, requiring the jury to disregard the declarations, will cure any prejudice.

(3) After an on the record determination that a declaration is admissible, the court may submit the case to the jury. In so doing, the court:
(a) should give an appropriate instruction on the credibility and weight to be accorded a coconspirator statement; *and*
(b) should instruct that the prosecution must prove ultimate guilt of defendant beyond a reasonable doubt; *and*
(c) should not charge the jury on the issue of admissibility of the declaration.[13]

United States v. Bell, 573 F.2d 1040 (8th Cir. 1978).

The foundation for analysis of the *Bell* decision begins with an examination of the rationale for the hearsay rule[14] and the theory by which coconspira-

13. 573 F.2d at 1044. It is not clear whether failure to follow any of these procedural steps would result in reversible error. In the present case, Bell complained that the district court did not make the requisite "on the record" determination of admissibility (step 2(c) as outlined above) of Burkhalter's declarations. The court ruled that this failure to make the "on the record" determination was not plain error, but in so doing, it based its conclusion on two considerations which may not be relevant in future cases: an "on-the-record" determination had previously never been required in the circuit; and, appellant Bell had failed to request the determination at trial. However, the court went on to note that because of the "compelling" independent evidence of the conspiracy, the lack of an "on-the-record" determination of admissibility "did not affect any of the substantial rights of appellant." *Id.* at 1045.

14. A layman's definition of hearsay might be phrased as "a statement by an individual which he or she heard someone else say." Though that definition is essentially correct, it must be qualified to the extent that such a statement only becomes hearsay when it is submitted for the truth of the matter asserted. The reason for this is best explained as follows:

> W, a witness, reports on the stand that D, a declarant, has stated that X was driving a stolen car 60 miles an hour at a given time and place. If the proponent is trying with this evidence to prove those facts about X's conduct we are vitally interested in the credibility of D, his opportunity and capacity to observe, his powers of memory, the accuracy of his reporting, and his tendency to lie or tell the truth. The want of oath, confrontation and opportunity to cross-examine D may greatly diminish the value of his testimony; the "hearsay dangers" are present. But the same evidence of D's declaration may be offered for quite different purposes, as for example, to show that D at the time he spoke, was conscious, or was able to speak English, . . . Where offered for these purposes . . . the evidence of an out-of-court statement by D [does not need the traditional safeguards for credibility]. We are interested only in the question, did D speak these words, and for that we have the testimony of W . . .

tor declarations have been excepted from the rule. The exclusion of hearsay testimony at trial is based upon a general policy of preserving the integrity of three traditional trial processes: the oath, the opportunity of the trier of fact to observe the witnesses and the cross examination of witnesses.[15] The "coconspirator exception" to the hearsay rule is based on principles of agency law. The conspirators, as "partners in crime," are each said to be an agent for the other. Therefore, the acts and declarations of one are held to be the acts and declarations of all.[16] However, just as the agent binds his principal only when he acts within the scope of his authority, an alleged coconspirator's statement is admissible only when made during the course, and in furtherance of the alleged conspiracy.[17] Once these conditions are met, however, the agency relationship of coconspirators is established and the declarations of one become admissible against the other. In effect, the declaration of one coconspirator is treated as the admission of the other. Federal Rule of Evidence 801(d)(2)(E),[18] essentially a codification of the agency theory of the "coconspirator exception" to the hearsay rule,[19] specifically characterizes "excepted" coconspirator declarations as admissions.[20] Of course, once a dec-

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McCormick, *supra* note 9, § 246 at 585. Thus, McCormick's general definition of hearsay is:

> testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.

Id. at 584.

The "hearsay rule" is, of course, the general common law rule which excludes the use of hearsay testimony at a trial. *See* Fed. R. Evid. 802 which sets forth the rule that "[h]earsay is not admissible except as provided by these rules. . . ." For a succinct historical accounting of the rule, see McCormick, *supra* note 9, § 244 at 579. *See also* Maguire, *The Hearsay System: Around and Through the Thicket*, 14 Vand. L. Rev. 741 (1961); Fed. R. Evid., Art. VIII, note (1975) (The Hearsay Problem).

15. The criticism of hearsay based on the "oath" consideration is that the declarant makes the statement outside of the courtroom without having been administered the "oath to tell the truth" that is required of all witnesses at trial. The criticism that hearsay denies the jury an opportunity to observe the declarant in person is directed at two concerns: first, the consequent inability of the jury to consider the demeanor of the declarant; and two, the greater likelihood of inaccurate reporting of the declarant's statement. The third and most significant criticism of hearsay evidence is that the denial of opportunity to cross-examine the declarant deprives the accused of his sixth amendment right to confront the witnesses against him. *See* McCormick, *supra* note 9, § 245 at 582. *See also* Fed. R. Evid., Art. VIII, note (1975) (The Hearsay Problem).

16. Anderson v. United States, 417 U.S. 211, 218-19 n.6 (1974). *See generally* 4 J. Wigmore, Evidence §§ 1077-79 (Chadbourne rev. 1972). *But cf.* Levie, *Hearsay and Conspiracy*, 52 Mich. L. Rev. 1159, 1163-66 (1954) (to deny that such a declaration is still not hearsay in nature is "naive").

17. Anderson v. United States, 417 U.S. at 218-19 n.6. *See also* Annot., 4 A.L.R.3d 671 (1965).

18. *See* note 6 *supra*.

19. The Advisory Committee Notes to Fed. R. Evid. 801(d)(2)(E) point out, however, that the agency theory of conspiracy "is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." The purpose of creating a specific "coconspirator exception" distinct from the agency theory of the "coconspirator exception" was to prevent the admissibility of declarations not made during and in furtherance of a conspiracy. The agency theory could conceivably permit broader admissibility of coconspirator declarations.

20. Since the Federal Rules of Evidencee treat admissions as nonhearsay, coconspirator

laration can justifiably be characterized as an admission, there are no obstacles to its admissibility in evidence.[21]

In its effort to promulgate a fair and workable procedure for the determination of the admissibility of coconspirator declarations, the Eighth Circuit in *Bell* addressed five recurring questions on the admissibility issue: (1) whether admissibility is to be determined by the judge or the jury; (2) whether the determination of admissibility must be based on evidence independent of the statement sought to be admitted; (3) what the prosecution's burden of proof is in establishing the requisites of admissibility; (4) whether the out-of-court declarations can be conditionally admitted; and (5) what protections are to be afforded a defendant once out-of-court declarations have been improperly admitted into evidence.

The answers to two of these questions remain unchanged by *Bell.* First, the court affirmed a longstanding Eighth Circuit requirement that admissibility of coconspirator declarations be determined on evidence *independent*[22] of the declaration sought to be admitted.[23] Also, the court sustained the longstanding Eighth Circuit practice of "conditionally" admitting coconspir-

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declarations are considered nonhearsay rather than an "exception" to the hearsay rule under FED. R. EVID. 801(d) (2). *See* note 6 *supra.*

21. The Advisory Committee Notes to FED. R. EVID. 801(2) emphasize the trustworthy nature of an admission: "[t]he freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness . . . when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility." Admissions are also justified as admissible on other grounds. *See* E. MORGAN, BASIC PROBLEMS OF EVIDENCE at 265 (1962) (admissible as exception to the hearsay rule); Strahorn, *The Hearsay Rule and Admissions,* 85 U. PA. L. REV. 564, 573-85 (1937) (admissible as conduct offered as circumstantial evidence); MCCORMICK, *supra* note 9, § 262 at 629 (admissible under the theory of the adversary system, *i.e.*, similar to the role of admissions in pleadings).

22. Without the requirement that the conspiracy be proven on evidence independent of the declaration sought to be admitted, the declaration would effectively "lift itself by its own bootstraps to the level of competent evidence." Glasser v. United States, 315 U.S. 60, 74-75 (1942). *But cf.* United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied,* 98 S. Ct. 1484 (1978) (new rules of evidence are said to overrule *Glasser* to the extent that it holds no consideration can be given to hearsay at all in ruling on admissibility, even though *Glasser* remains valid as a warning to trial judges that little weight should be given to hearsay).

FED. R. EVID. 104(a) arguably permits the trial judge to consider the declaration sought to be admitted. In ruling on preliminary questions of admissibility, the trial judge is "not bound by the rules of evidence except those with respect to privileges." FED. R. EVID. 104(a). *See generally* 1 WEINSTEIN, *supra* note 9, ¶ 104[04] at 104-44. The *Bell* court retains the independent evidence requirement despite the language of FED. R. EVID. 104(a). *Compare* United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978). For a general discussion of the independent evidence requirement, *see* Bergman, *The Coconspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence,* 5 HOFSTRA L. REV. 99 (1976).

23. 573 F.2d at 1044. The "independent" evidence requirement has been a longstanding Eighth Circuit rule. *See* United States v. Lambros, 564 F.2d 26, 29-30 (8th Cir. 1977), *cert. denied,* 98 S. Ct. 1262 (1978); United States v. Scholle, 553 F.2d 1109, 1117 (8th Cir. 1977), *cert. denied,* 434 U.S. 940 (1978); United States v. Rich, 518 F.2d 980, 984 (8th Cir. 1975), *cert. denied,* 427 U.S. 907 (1976); Rizzo v. United States, 304 F.2d 810, 826 (8th Cir. 1962). *But see* United States v. Martorano, 557 F.2d at 12 (no independent evidence requirement) *and* United States v. Petrozziello, 548 F.2d 20, 22-23 (1st Cir. 1977) (no independent evidence requirement).

ator declarations *prior to* the prosecution having proven the requisites of admissibility.[24] However, in addressing the three remaining questions relevant to the application of the coconspirator "exception" to the hearsay rule, the *Bell* court instituted substantive changes.

First, the "conditional" admission procedure was buffered with protective guidelines for assuring that a defendant is not prejudiced by this procedure. *Bell* now requires that any prejudice incurred by a defendant as a result of the conditional admission procedure[25] be cured by either cautionary jury instruction or the declaration of a mistrial.[26] Prior to *Bell*, the cure for the prejudicial effects resulting from the wrongful admission of out-of-court coconspirator declarations apparently has been acquittal.[27]

Second, the *Bell* court resolved the issue of whether the judge or jury should have the burden of determining questions of admissibility by placing sole responsibility for that determination with the judge.[28] Prior to *Bell*, Eighth Circuit decisions differed with respect to who should determine questions of admissibility; some left this determination with the judge,[29] others with the jury.[30] The *Bell* court has now ruled that new Federal Rule of Evidence 104[31] definitively assigns the trial judge the task of determining questions of the admissibility of alleged coconspirator declarations.[32]

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24. 573 F.2d at 1044. The Eighth Circuit has long adhered to this procedure. United States v. Lambros, 564 F.2d at 30; United States v. Graham, 548 F.2d 1302, 1308 (8th Cir. 1977); Brinlee v. United States, 496 F.2d 351, 354 (8th Cir. 1974), *cert. denied*, 419 U.S. 878 (1974); United States v. Reed, 446 F.2d 1226, 1231 (8th Cir. 1971); Rizzo v. United States, 304 F.2d at 826.

25. The prejudice the court referred to results when the government fails to prove that the conditionally admitted statements were made during and in furtherance of a conspiracy joined by the defendant. 573 F.2d at 1044.

26. *Id.*

27. United States v. Frol, 518 F.2d 1134 (8th Cir. 1975).

28. 573 F.2d at 1043.

29. United States v. Lambros, 564 F.2d at 30; United States v. Scholle, 553 F.2d at 1117; Rizzo v. United States, 304 F.2d at 826.

30. At least two Eighth Circuit cases left the determination of admissibility of coconspirator declarations to the jury: United States v. Rich, 518 F.2d at 984; United States v. Reed, 446 F.2d at 1231.

31. FED. R. EVID. 104 states in pertinent 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 on 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. 573 F.2d at 1043. *Accord*, United States v. Enright, 579 F.2d at 984; United States v. Petrozziello, 548 F.2d at 22-23; *contra*, United States v. Ochoa, 564 F.2d 1155, 1157 n.2 (5th Cir. 1977). *But cf.* Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigation: Putting the Conspiracy Back into the Coconspirator Rule*, 5 HOFSTRA L. REV. 77 (1976) (Kessler argues that the preliminary fact questions of the coconspirator rule are conditional relevancy questions to be dealt with under FED. R. EVID. 104(b)). Judge Weinstein agrees that FED. R. EVID. 104(b) may govern the admissibility of coconspirator declarations. *See* 1 WEINSTEIN, *supra* note 9, ¶ 104[05] at 104-39, 104-43.

The significance of this ruling lies not so much in a resolute balancing of the merits of having the judge or jury determine questions of admissibility,[33] as it does in the consequent effect which such a ruling has on the burden of proof the government must now carry in establishing the prerequisites of admissibility. Relying upon the ruling in *Petrozziello v. United States*,[34] the *Bell* court effected a further change by holding that the judge's exclusive role under Federal Rule of Evidence 104 had altered the amount of independent proof of conspiracy necessary before alleged coconspirator declarations will be admitted into evidence.[35] The *Petrozziello* court reasoned that basing a determination of the admissibility of coconspirator declarations upon *prima facie*[36] evidence, as the courts have traditionally done, does not comport with the requirement in Federal Rule of Evidence 104 that the judge "determine" questions of admissibility.[37] The *Petrozziello* court thus believed that a "higher standard" was "implicit" in the judge's new role.[38] However, the court did not believe it was necessary to require the prosecution to prove conspiracy beyond a reasonable doubt before allowing the alleged coconspirator declaration into evidence, basing such a belief on the theory that the "judge is ruling on admissibility, not guilt or innocence. . . ."[39] Consequently, the *Petrozziello* court ruled that the prosecution must prove the

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Even before the enactment of FED. R. EVID. 104, several circuits had committed preliminary questions of admissibility of alleged coconspirator declarations to the judge. *See* United States v. Rosenstein, 474 F.2d 705, 712 (2d Cir. 1973); United States v. Pisciotta, 469 F.2d 329, 332-33 (10th Cir. 1972); United States v. Bey, 437 F.2d 188, 192 (3d Cir. 1971); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

33. The *Bell* court did not even discuss the merits of having the judge or jury determine admissibility of alleged coconspirator declarations. However, for a discussion of the merits of who should decide questions of admissibility, see United States v. Ragland, 375 F.2d 471, 479 (2d Cir.), *cert. denied*, 390 U.S. 925 (1967), where the argument is made that the judge should be responsible for determining admissibility. Citing from United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951), the court stated: "It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied [that a conspiracy existed]; . . . Upon that hypothesis the declarations would merely serve to confirm what the jury had already decided." Of course, this argument is not applicable where there are different burdens of proof for determining the question of admissibility and the question of guilt or innocence. However, under that circumstance, the jury is presented with the cryptic task of applying two different standards of proof to two different, though related, issues. Thus, it would still seem that questions of admissibility are best decided by the trial judge. *See generally Advisory Committee Notes*, FED. R. EVID. 104(a), 104(b); Kessler, *supra* note 32.

34. 548 F.2d 20 (1st Cir. 1977).

35. 573 F.2d at 1043-44.

36. A prima facie case is the establishment of facts sufficient to justify a verdict in favor of the party presenting the evidence, *i.e.*, a case that will suffice unless rebutted or overcome by other evidence. *See* 4 WIGMORE, *supra* note 16, § 2494 at 293-94.

37. United States v. Petrozziello, 548 F.2d at 23. The court's apparent rationale is that finding unrebutted facts "sufficient" to support a ruling is not the same as making a "conclusive" determination about the facts of a case.

38. *Id.*

39. *Id.*

prerequisites of admissibility by a "preponderance of the evidence"[40] before the out-of-court declarations can be given weight in deciding the ultimate issue of guilt.[41] The Eighth Circuit adopted this rule in the *Bell* decision.[42]

At least two of the changes instituted by *Bell*, as well as one of the procedures left unchanged, do not auger well for the interests of the accused. Specifically, the court is to be criticized for condoning a "preponderance of the evidence" standard of proof for ruling on admissibility, and for acquiescing in the procedure which conditionally admits the out-of-court declarations before the prosecution has carried its burden of proof. Moreover, the approval of cautionary jury instructions as a protective device against abuses of the conditional admission procedure is arguably both naive and unconstitutional.

Criticism of the *Bell* court's adoption of the "preponderance of the evidence" standard for ruling on questions of admissibility of alleged coconpsirator declarations begins with an analysis of the United States Supreme Court case, *Lego v. Twomey*.[43] In *Lego*, the Supreme Court ruled that the admissibility of a confession could properly be determined on the basis of a preponderance of the evidence standard.[44] This is the ultimate source of authority for the *Bell* rule that admissibility of coconspirator declarations is to be determined by a preponderance of the evidence standard.[45] The majority in *Lego* made two points in upholding the "preponderance" standard: first, the court opined that there is no evidence which suggests that admissibility rulings based on a "preponderance" standard have been unreliable; and second, the court noted that, while exclusionary rules are aimed at deterring lawless conduct, placing a greater burden on the prosecution in admissibility hearings is not a productive deterrent when weighed against the public interest in placing probative evidence before the jury.[46]

This majority ruling in *Lego* is, however, subject to criticism. As Justice Brennan noted in his dissent in *Lego*, potential unreliability of the admissibility ruling is always at issue in the sense that the criminal law should never be uncertain in making any determination which could, as a practical matter, result in a conviction. In Justice Brennan's words:

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40. A "preponderance" of the evidence is the greater weight of the evidence on either side. 30 Am. Jur. 2d, *Evidence* § 1164 (1967). *See* 4 Wigmore, *supra* note 16, § 2498 at 325-27.

41. United States v. Petrozziello, 548 F.2d at 23. *Accord*, United States v. Enright, 579 F.2d at 985.

42. 573 F.2d at 1044.

43. 404 U.S. 477 (1972).

44. 404 U.S. at 487 (4-3 decision). *Accord*, Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974); United States v. Johnson, 495 F.2d 378, 383 (4th Cir. 1974). Several state courts have rejected *Lego* and have adopted the reasonable doubt standard for determining voluntariness of a confession: People v. Jimenez, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978); State v. Collins, 297 A.2d 620, 627 (Me. 1972); State v. Phinney, ___ N.H. ___, ___, 370 A.2d 1153, 1154 (1977).

45. Although the *Bell* court cites to *Petrozziello* as authority for the use of a preponderance of the evidence standard in ruling on admissibility, the *Petrozziello* court relied solely on *Lego* in approving the preponderance standard. United States v. Petrozziello, 548 F.2d at 23.

46. Lego v. Twomey, 404 U.S. at 488.

> We permit proof by a preponderance of the evidence in civil litigation because 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. . . .' We do not take that view in criminal cases. . . . [t]he 'reasonable-doubt standard' is a prime instrument for reducing the risk of convictions resting on factual error.[47]

Justice Brennan's argument is that the practical effect of a lesser burden of proof is the same for both the determination of guilt or innocence and the determination of admissibility, and that, as a result, there is no cogent reason why differing standards of proof should be applied to each determination. In Justice Brennan's words:

> permitting a lower standard of proof [for the determination of admissibility] will necessarily result in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard. The converse is also true. . . . The standard of proof required for a criminal conviction presents a similar situation, yet we have held that guilt must be established by proof beyond a reasonable doubt (citations omitted). . . . [t]he same considerations that demand the reasonable-doubt standard when guilt or innocence is at stake also demand that standard when the question is the admissibility of an allegedly involuntary confession.[48]

Justice Brennan's argument is equally applicable where the admissibility of an alleged coconspirator declaration is at issue, where one accepts the hypothesis that such a declaration could be as damaging as a confession.[49]

The *Lego* majority's second argument, that imposing a greater burden of proof on the prosecution is not a productive deterrent to lawless conduct, is founded on the questionable assumption that exclusionary rules are designed primarily to deter lawless conduct. The more proper analysis is that exclusionary rules are designed to give efficacy to fundamental rights.[50] If guarantees of fundamental rights are to have meaning, admission of evidence which denies those rights cannot be allowed in a court of law. It is generally argued that the admission into evidence of an alleged coconspirator declaration does not abridge a defendant's sixth amendment right to confront the witnesses against him, where it has been established that said declaration was made during and in furtherance of a conspiracy.[51] Where that requisite factual determination is based on a standard of proof which can conceivably leave a reasonable doubt in one's mind, a court impinges upon a constitu-

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47. *Id.* at 493-94 (Brennan, J., dissenting).

48. *Id.* at 493.

49. For a specific advocacy of use of the reasonable doubt standard in determining admissibility of coconspirator declarations, see 1 WEINSTEIN, *supra* note 9, ¶ 104[05] at 104-44. *But see* United States v. Nixon, 418 U.S. 683, 701 n.14 (1974) (reasonable doubt standard not applied in determining admissibility of coconspirator statement).

50. United States v. Calandra, 414 U.S. 338, 356 (1974); *see also* Weeks v. United States, 232 U.S. 383, 391-94 (1914).

51. Bruton v. United States, 391 U.S. 123, 127-28 (1968).

tional right of the accused. The ponderous question which the *Bell* court has avoided is whether admission of coconspirator declarations is an affront to the sixth amendment confrontation right when the existence of a conspiracy is not proven beyond a reasonable doubt.

Another aspect of the *Bell* decision subject to criticism is the acceptance of the procedure whereby an alleged coconspirator declaration is "conditionally" admitted into evidence prior to the government having demonstrated the prerequisites of admissibility, *i.e.*, that the declaration was made during and in furtherance of a conspiracy in which the defendants have joined.[52] The hazard of this procedure is that the statement, once admitted, will unalterably color a juror's reasoning regardless of the court's final ruling on the admissibility of the statement. This is a risk that is senseless to incur.[53] The hazard that conditionally admitted declarations may prejudice the reasoning of a juror is readily avoided when the judge requires the government to prove conspiracy prior to admitting the alleged coconspirator declaration. The Eighth Circuit has always left this option open to the trial judge,[54] but has never made it obligatory.

Undoubtedly, the Eighth Circuit in *Bell* believed that it had overcome any deficiency in the conditional admission procedure by making the mistrial and cautionary jury instructions available protections for the defendant when alleged coconspirator declarations have been improperly admitted. However, this is yet another weakness of the *Bell* opinion.

It is a palpably absurd notion that a limiting instruction to the jury to disregard inculpatory evidence is an efficacious or meaningful method of protecting the rights of the accused.[55] More importantly, the use of jury instructions, as contemplated in *Bell*, contravenes the teaching of *Bruton v. United States*,[56] where the United States Supreme Court held that the use of inadmissible hearsay statements against a criminal defendant at a joint trial deprives that individual of his sixth amendment right to confront the witnesses against him. Furthermore, the court also emphasized that instructions informing the jury to disregard the inadmissible hearsay statements are an unacceptable substitute for the constitutional right of cross-examination.[57] Even though the *Bruton* Court acknowledged that there are instances when the use of limiting instructions is not unreasonable, it stressed that under

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52. 573 F.2d at 1043.

53. McCormick, *supra* note 9, § 58 at 135.

54. *See, e.g.*, United States v. Jackson, 549 F.2d 517, 533 (8th Cir.), *cert. denied*, 424 U.S. 971 (1977). *See also* United States v. Petrozziello, 548 F.2d at 23 n.3.

55. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). "Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay." United States v. Gottfried, 165 F.2d 360, 367 (2d Cir. 1948). The limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond . . . their powers." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

56. 391 U.S. 123 (1968).

57. *Id.* at 137.

some contexts the consequences of the failure of a jury to heed limiting instructions is so vital to the defendant "that the practical and human limitations of the jury system cannot be ignored."[58] Such a context is presented where the "incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial."[59] The Court went on to note that the credibility of such statements is inevitably suspect and that the unreliability of this evidence is "intolerably compounded when the alleged accomplice . . . does not testify and [the statements therefore] cannot be tested by cross-examination."[60] The situation described certainly would proscribe the use of cautionary jury instructions in many of the contexts in which the procedures outlined in *Bell* would arise. It is indeed difficult to view the cautionary jury instruction as a realistic, or constitutionally permissible "protection" for the criminal codefendant whose case has been colored by impermissible hearsay evidence.

The above criticisms of the *Bell* decision need not be shouldered entirely by the Eighth Circuit. The difficult task which the Eighth Circuit faced in *Bell* was to devise an equitable procedure for regulating the use of alleged coconspirator declarations at trial. That task was made especially difficult by a failure of the judiciary to resolve an issue that is central to a determination of whether alleged coconspirator declarations may properly be used in our criminal procedural system; *i.e.*, the determination of the effect the use of coconspirator declarations has on the sixth amendment right of the accused to confront the witnesses against him.

The United States Supreme Court has spoken once on the question, but its "resolution" of the issue is unclear and indecisive. The clash between the confrontation right and the coconspirator "exception" to the hearsay rule came before the Supreme Court in *Dutton v. Evans*.[61] In *Dutton*, a plurality[62] of the Supreme Court reasoned that the admission into evidence of an alleged coconspirator declaration does not deny a criminal defendant the sixth amendment right of confrontation when such declaration bears sufficient indicia of reliability.[63] The pivotal concurring opinion of Justice Harlan reasoned that any application of the coconspirator exception to the hearsay rule must be tested by the due process standard of the fifth and fourteenth amendments.[64] Four justices in dissent[65] took the position that an incriminatory out-of-court statement of an alleged accomplice "is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-

58. *Id.* at 135.
59. *Id.* at 135-36.
60. *Id.* at 136.
61. 400 U.S. 74 (1970).
62. Justice Stewart announced the decision in an opinion joined by Chief Justice Burger and Justices White and Blackmun. Justice Blackmun wrote a concurring opinion joined by the Chief Justice. Justice Harlan wrote a separate opinion concurring in the result.
63. Dutton v. Evans, 400 U.S. at 90-92.
64. *Id.* at 96-97 (Harlan, J., concurring).
65. Justice Marshall wrote a dissenting opinion which was joined by Justices Black, Douglas and Brennan.

examine the declarant . . . ."[66]

It is well-established that the confrontation clause of the sixth amendment is not strictly construed[67] and that there are exceptions to that right.[68] The problem, as one may glean from the *Dutton* case, is that there is no standard by which permissible exceptions to the confrontation right can be determined.[69] The question that needs to be answered is whether the coconspirator "exception" to the hearsay rule should be a recognized exception to the sixth amendment confrontation right. An analysis of the *Dutton* opinion seems to indicate that four justices answered this question yes, as long as there are indicia of reliability surrounding the statement,[70] one justice answered yes, if, on the facts of the case, admission of the statement does not deny due process[71] and four justices answered no.[72] The issue is far from settled.

The issue of whether the coconspirator "exception" should be a recognized exception to the sixth amendment confrontation right could be resolved by a simple rule. That rule would require the state to produce the declarant as a witness under all circumstances where it is possible to do so. Such a rule would protect the interests that the sixth amendment right of confrontation seeks to preserve, yet would not make the right so absolute as to rule out all use of probative evidence. The above rule raises the question as to whether there is ever good reason for denying the accused the right to confront the witnesses against him when it is within the power of the state to produce those witnesses. The fair answer to that question is certainly not.

A far worse rule to adopt would be the view of the plurality in *Dutton* who would admit out-of-court declarations of alleged coconspirators if the declarations bore indicia of reliability.[73] Use of this *Dutton* plurality rule could effectively write the sixth amendment confrontation clause out of the Constitution for those accused of conspiracy. Mr. Justice Marshall makes a cogent argument in dissent to the *Dutton* plurality rule when he states that "the Confrontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come [into evidence] no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination."[74]

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66. Dutton v. Evans, 400 U.S. at 110 (Marshall, J., dissenting).

67. *See* Barber v. Page, 390 U.S. 719, 722 (1968); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Dowdell v. United States, 221 U.S. 325, 330 (1911); Motes v. United States, 178 U.S. 458, 471-72 (1900).

68. Recognized exceptions to the sixth amendment confrontation right include dying declarations, Mattox v. United States, 146 U.S. 140, 151 (1892) and testimony of a deceased witness, Mattox v. United States, 156 U.S. 237, 241-42 (1895).

69. 40 CIN. L. REV. 402 (1971).

70. *See* 400 U.S. at 90-92.

71. *See* 400 U.S. at 96-97 (Harlan, J., concurring).

72. *See* 400 U.S. at 110 (Marshall, J., dissenting).

73. The Eighth Circuit adopted the *Dutton* plurality position in United States v. Kelley, 526 F.2d 615, 620 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976).

74. Dutton v. Evans, 400 U.S. at 110 (Marshall, J., dissenting).

Until the relationship between the sixth amendment and the coconspirator exception to the hearsay rule is made clear, fair and workable procedures regulating the use of alleged coconspirator declarations will remain elusive. In the interim the courts should strive to develop procedures which steadfastly avoid impinging on the sixth amendment right of the accused to confront the witnesses against him. The Eighth Circuit has failed to accomplish such a goal in its *Bell* decision. "Conditionally" admitting alleged coconspirator declarations, allowing those statements to be admitted as competent evidence on a "preponderance" showing of conspiracy, and making limiting jury instructions a permissible "protective" measure against any prejudice the defendant might suffer from these procedures all evince a paucity of concern for the sixth amendment right of the accused to confront the witnesses against him. Absent the requisite facts of conspiracy, the out-of-court statements of an alleged coconspirator are inadmissible as violative of the sixth amendment confrontation right. The question is whether that right is made secure when it hinges upon evidence conditionally admitted, and then unconditionally accepted after the government has established by a "preponderance" of the evidence the existence of one of the most vague and easily proven of all crimes[75] (the so-called "darling of the modern prosecutor's nursery"[76])—a conspiracy. The Eighth Circuit apparently views such a procedure as providing adequate sixth amendment confrontation protection, and its decision should leave little doubt as for whom the bell tolls.

John Philip Messina

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75. W. LaFave & A. Scott, Criminal Law § 61 at 455 (1972).
76. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).