Co-Conspirator Declarations: Constitutional Defects In The Admissions Procedure

I. INTRODUCTION

Under the hearsay rule exception for admissions of a co-conspirator, a prosecutor can introduce the hearsay statements of a declarant against a criminal defendant if he establishes four preliminary facts:

(1) the existence of a conspiracy;
(2) the declarant made the statement while participating in the conspiracy;
(3) the statement furthered the objective of the conspiracy; and
(4) the defendant against whom the statement is offered was a member of the conspiracy at the time the statement was made or at some time thereafter.[1]

The prosecutor must establish these facts by evidence independent of

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[1] FED. R. EVID. 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.

The Federal Rules of Evidence are found in 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975).

CAL. EVID. CODE § 1223 (West 1968) provides:

> 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 objectives 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.

Both the federal and California statutes merely codify the common law hearsay exception for admissions of co-conspirators. *See* E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 267, at 645-46 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]. Although the federal statute defines these statements as non-hearsay and the California statute defines them as hearsay exceptions, the result is the same. The statutes allow the statement to be admitted into evidence only if the prosecutor establishes the preliminary facts.

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the statement itself.[2]

This article examines the use of the co-conspirator exception in criminal trials.[3] After considering the substantive requirements of the exception, the article discusses the procedure under which trial courts admit a co-conspirator's statement.[4] The article then analyzes the constitutional problems inherent in this procedure. Finally, the article proposes the use of a preliminary fact hearing under California Evidence Code section 405 and federal rule of evidence 104(a) to

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[2]*See* CAL. EVID. CODE § 1223(c), set forth in note 1 *supra.* FED. R. EVID. 104 provides in relevant 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.
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> (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.

[3]The co-conspirator exception may also be used in civil cases. *See, e.g.*, United States v. United States Gypsum Co., 333 U.S. 364 (1948). Such use, however, is infrequent and does not raise the same constitutional issues as use of the exception in a criminal trial. Use of the exception in civil trials, therefore, is outside the scope of this article.

[4]A discussion of the rationales is tangential to the focus of this article. There are several rationales for the exception, all of which have been criticized as being unpersuasive and unrealistic. *See* Oakley, *From Hearsay to Eternity: Pendency and the Co-Conspirator Exception in California—Fact, Fiction, and a Novel Approach*, 16 SANTA CLARA L. REV. 1 (1975) [hereinafter cited as Oakley]. It is sufficient to note the two main rationales for the exception.

The traditional rationale for the co-conspirator exception is an agency doctrine. As Learned Hand explained, Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926), *cert. denied*, 273 U.S. 702 (1926):

> Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made "a partnership in crime." What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.

A second rationale for admitting a co-conspirator's statements is necessity. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1166 (1954) [hereinafter cited as Levie]. Because conspiracy is a secret crime and thus difficult to prove, the need to admit a co-conspirator's admissions is great. Although necessity is a dubious rationale for admitting hearsay, *see* 4 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 307-08 (1962), the exception provides two major advantages to the prosecutor. First, it facilitates the conduct of joint trials. Because each defendant's statement (meeting the requirements of the exception) may be used against all other co-conspirator defendants, there is no need for limiting instructions or severance. *See* text accompanying notes 88-100 *infra*. Second, the exception may eliminate the need to grant immunity in return for testimony of those conspirators who invoke the privilege against self-incrimination. The prosecutor will not need such testimony if the co-conspirator exception provides enough incriminating statements to establish the case.

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remedy these problems.[5]

II. SUBSTANTIVE REQUIREMENTS OF THE CO-CONSPIRATOR EXCEPTION

Before the judge admits a co-conspirator's statement against a defendant under the co-conspirator exception, the prosecutor must first establish four preliminary facts: a conspiracy, the declarant's membership, furtherance, and the defendant's membership. This section analyzes each of these preliminary facts.

The prosecutor must first establish the existence of a conspiracy.[6] A conspiracy is an agreement between two or more people to achieve an unlawful object, followed by an overt act in furtherance of the agreement.[7] Courts have established several general rules to determine when a conspiracy begins and ends for purposes of the co-

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[5]Two general points about the exception should be emphasized at the outset. First, the hearsay rule applies only to extrajudicial statements which are offered to prove the truth of the matter asserted. See the statutory definition of hearsay in FED. R. EVID. 801(c); CAL. EVID. CODE § 1200 (West 1968). If the co-conspirator declarant's statement is offered against the defendant merely to prove that the statement was made, the statement is not hearsay. For example, at *D*'s trial for extortion, the prosecutor may introduce co-conspirator *C*'s statement to the victim, *V*, "Pay me or I'll kill you." *C*'s statement is a part of the criminal act itself, and its truth or falsity is irrelevant. People v. Fratianno, 132 Cal. App. 2d 610, 628, 282 P.2d 1002, 1011 (2d Dist. 1955). The prosecutor can offer the statement merely to show that it was made. If *C* says, "Pay me or *D* will kill you," the statement is also a verbal act and is admissible simply to show that it was made. But the statement is hearsay if used to prove the fact of *D*'s participation. The co-conspirator exception allows the jury to consider the statement for the latter purpose. *See* United States v. Littman, 421 F.2d 981, 983 (2d Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); People v. Brawley, 1 Cal. 3d 277, 284, 461 P.2d 361, 364, 82 Cal. Rptr. 161, 164 (1969).

Second, the prosecutor can offer a statement under the co-conspirator exception whether or not the defendant is charged with conspiracy. United States v. Messina, 388 F.2d 393, 395 (2d Cir. 1968), *cert. denied*, 390 U.S. 1026 (1968); People v. Wallace, 13 Cal. App. 3d 608, 617, 91 Cal. Rptr. 643, 649 (3d Dist. 1970). The declarant need not be charged with any crime. People v. Fehrenbach, 102 Cal. 394, 401, 36 P. 678, 680 (1894); *see* People v. Earnest, 53 Cal. App. 3d 734, 126 Cal. Rptr. 107 (3d Dist. 1975). Thus, if defendant *D* was a member of a successful conspiracy to commit murder, the prosecutor at *D*'s trial may offer co-conspirator *C*'s statement whether *D* is charged with conspiracy, murder, or both, and whether or not *C* is charged with either crime. If there is no conspiracy charge, courts in the Ninth Circuit admit these statements under a "joint venture exception," United States v. Ushakow, 474 F.2d 1244 (9th Cir. 1973), or a "concert of action" exception, United States v. Sidman, 470 F.2d 1158, 1171 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973). The result is the same.

[6]*See* note 1 *supra*.

[7]18 U.S.C. § 371 (1971); CAL. PEN. CODE ANN. §§ 182, 184 (West 1970). The word "conspiracy" as used in section 1223 of the California Evidence Code has the same meaning as in section 182 of the Penal Code. People v. Earnest, 53 Cal. App. 3d 734, 745, 126 Cal. Rptr. 107, 114 (3d Dist. 1975).

conspirator exception:[8]

(1) A conspiracy begins with an agreement.[9] The time of the agreement is often difficult to ascertain, however, and the prosecutor usually asks the jury to infer the agreement retroactively from a series of overt acts.[10]

(2) The conspiracy continues until the conspirators achieve their main objective. A robbery, for instance, continues until the robbers divide the money,[11] while a kidnapping continues until the ransom has been delivered.[12] In these situations, however, the prosecutor must show that the declarant and the defendant acted in concert at least through the time the statement was made. Otherwise, the declarant's statement will not be admissible against the defendant.[13]

(3) A conspiracy does not include an implied conspiracy to avoid detection and punishment.[14] Such a conspiracy would have no logical limit; the conspiracy would continue forever.[15]

(4) The conspiracy ends as to a particular conspirator when his involvement with the conspiracy ceases,[16] either through resig-

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[8] The cases in this area are often inconsistent. *Compare, e.g.*, People v. Saling, 7 Cal. 3d 844, 500 P.2d 610, 103 Cal. Rptr. 698 (1972), *with* People v. McFarland, 17 Cal. App. 3d 807, 95 Cal. Rptr. 369 (1st Dist. 1971); *see* Oakley, *supra* note 4.

[9] *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 986 (1959) [hereinafter cited as *Developments*].

[10] *See, e.g.*, Madsen v. United States, 165 F.2d 507, 511 (10th Cir. 1947).

[11] Murray v. United States, 10 F.2d 409, 411 (7th Cir. 1926), *cert. denied*, 271 U.S. 673 (1926); People v. Wallace, 13 Cal. App. 3d 608, 618, 91 Cal. Rptr. 643, 649 (3d Dist. 1970).

[12] McDonald v. United States, 89 F.2d 128, 133 (8th Cir. 1937), *cert. denied*, 301 U.S. 697 (1937); People v. Wagner, 133 Cal. App. 775, 780, 24 P.2d 927, 929 (4th Dist. 1933). These are the easy cases. Other cases present more difficulty. *See generally* Levie, *supra* note 4, at 1174-75; *Developments*, *supra* note 9, at 960-63; Annot., 4 A.L.R.3d 671 (1965). The courts reach these results by assuming that the conspirators' objective was not to commit the crime so much as to receive payment for their criminal activities. People v. Saling, 7 Cal. 3d 844, 852, 500 P.2d 610, 615, 103 Cal. Rptr. 698, 703 (1972). However, Justice Sullivan, dissenting in *Saling*, argued that the majority confused objective with motive. The objective of the conspiracy, in *Saling* a murder for hire, was the commission of the substantive offense. Although payment of money provided the defendant with a motive to kill, it was not the objective of the conspiracy. Sullivan conceded, however, that in a theft case, division of the proceeds is an objective. 7 Cal. 3d at 856-60, 500 P.2d at 618-21, 103 Cal. Rptr. at 706-09.

[13] People v. Leach, 15 Cal. 3d 419, 436, 541 P.2d 296, 307, 124 Cal. Rptr. 752, 763 (1975).

[14] Krulewitch v. United States, 336 U.S. 440, 444 (1949); People v. Saling, 7 Cal. 3d 844, 853, 500 P.2d 610, 616, 103 Cal. Rptr. 698, 704 (1972). *Contra*, Mares v. United States, 383 F.2d 805, 810 (10th Cir. 1967), *cert. denied*, 394 U.S. 963 (1969); People v. Davis, 210 Cal. App. 2d 721, 735, 26 Cal. Rptr. 903, 911 (3d Dist. 1962) (dictum).

[15] Krulewitch v. United States, 336 U.S. 440, 456 (1949) (Jackson, J. concurring).

[16] *See generally Developments, supra* note 9, at 957-60.

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nation,[17] indictment,[18] arrest,[19] or confession.[20] His statements made thereafter may not be used against his co-conspirators.[21] At least in the Ninth Circuit, however, the statement of an unarrested co-conspirator is admissible against an arrested conspirator if the conspiracy was still in operation at the time of the statement.[22]

The second requirement of the co-conspirator exception is that the declarant must have been a member of the conspiracy at the time he made the statment.[23] To determine whether the declarant was a conspirator at the time of his statement, the rules set forth in the preceding paragraph apply.[24]

The third requirement of the co-conspirator exception is furtherance.[25] The declarant's statement must advance the objectives of the conspiracy. Courts often construe this requirement so broadly that they find any statement that relates to the conspiracy to be in furtherance.[26] This is, in part, because the furtherance requirement is

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[17] Abbate v. United States, 247 F.2d 410, 413 (5th Cir. 1957), *aff'd*, 359 U.S. 187 (1959).

[18] United States v. Groves, 122 F.2d 87, 92 (2d Cir. 1941), *cert. denied*, 314 U.S. 670 (1941).

[19] Cleaver v. United States, 238 F.2d 766, 769 (10th Cir. 1956); People v. Roberts, 40 Cal. 2d 483, 489, 254 P.2d 501, 504 (1953).

[20] Fiswick v. United States, 329 U.S. 211, 217 (1946).

[21] *Id.*

[22] United States v. Payseur, 501 F.2d 966, 973 (9th Cir. 1974).

[23] *See* note 1 *supra*. Statements made during the conspiracy are admissible even if the interval between the time the statements were made and the time the prosecutor brings charges exceeds the statute of limitations for conspiracy. United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); People v. Black, 45 Cal. App. 2d 87, 102, 113 P.2d 746, 755 (2d Dist. 1941), *appeal dismissed*, 315 U.S. 782 (1941), *rehearing denied*, 315 U.S. 828 (1942).

[24] *See* text accompanying notes 8-22 *supra*.

[25] *See* note 1 *supra*. Some states have diluted or eliminated this requirement. Some states require only that the statement relate to the conspiracy. White v. State, 451 S.W.2d 497, 501 (Tex. Crim. App. 1969); KAN. STATS. ANN. § 60-460(i)(2) (1964); MONT. REV. CODE ANN. § 93-401-27(6) (1947); ORE. REV. STAT. § 41-900(6) (1974). THE UNIFORM RULES OF EVIDENCE rule 63(9)(b) (1953 version, superceded 1974) and the MODEL CODE OF EVIDENCE rule 508(b) support this position. Although the present California statute requires furtherance, CAL. EVID. CODE § 1223 (West 1968), the previous statute required only that the statement relate to the conspiracy. CAL. CODE CIV. P. § 1870(6) (West 1955) (repealed by Ch. 299, § 58, [1965] Cal. Stat. 1360). Many California cases, nevertheless, required furtherance. *E.g.*, People v. Smith, 151 Cal. 619, 625, 91 P. 511, 513 (1907). Georgia has gone one step further and has eliminated furtherance as a requirement altogether. GA. CODE ANN. § 38-306 (1974).

[26] MCCORMICK (2d ed.), *supra* note 1, § 267, at 645; *see* United States v. Weber, 437 F.2d 327, 336 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971); People v. Saling, 7 Cal. 3d 844, 852 n.8, 500 P.2d 610, 615 n.8, 103 Cal. Rptr. 698, 703 n.8 (1972). These cases held that statements which merely narrated past events furthered the conspiracy. In *Saling*, a murder for hire conspiracy, the witness testified to a conversation he had with a co-conspirator. When he learned of the

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difficult to apply. A court can determine if a statement furthers the conspiracy only if it knows the terms of the conspiracy. When the statement provides the only evidence of the terms of the conspiracy, the court may have insufficient evidence upon which to base its determination. Thus, the court will simply admit the statement if some connection exists between the statement and the conspiracy.[27]

The exception also requires the defendant to have been a member of the conspiracy at the time the statement was made or at some time thereafter.[28] A defendant who joins the conspiracy after its formation is held responsible for his co-conspirators' statements made before his entrance,[29] even if the late-joiner is unaware of the prior statements.[30] Theoretically, the late-joiner, by his act of joining the conspiracy, has accepted or ratified the prior statements of his co-conspirators.[31] A defendant is responsible for statements made while the defendant is a member in the conspiracy but not for statements made after the defendant's involvement in the conspiracy ends.[32] To determine when the defendant's involvement in the conspiracy has ended, the rules previously set forth apply.[33]

III. PROCEDURE FOR ADMISSION

Each of the four substantive requirements is a preliminary fact which must be shown by evidence independent of the declarant's statement.[34] Courts require this preliminary showing by independent evidence because otherwise the statement could be admitted to prove the preliminary facts, which in turn would justify admission of the

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murder, the witness expressed surprise, since he thought that the conspiracy involved only a rough-up. The declarant responded with details of the conspiracy and the murder. The court found this narration to be in furtherance because it was necessary for the witness to be aware of the conspiracy and murder so that he could "maintain the integrity of their security." *Id.* *See also* Salazar v. United States, 405 F.2d 74 (9th Cir. 1968). In *Salazar*, the co-conspirator declarant told an undercover agent that the person who was the supplier of narcotics was in the declarant's house packaging heroin. The court said that this statement may have furthered the conspiracy because the declarant made the statement to reassure the restless agent and to prevent him from leaving before they concluded the sale. *Id.*

[27] *See* Levie, *supra* note 4, at 1168.

[28] *See* note 1 *supra*.

[29] United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948); People v. Griffin, 98 Cal. App. 2d 1, 44, 219 P.2d 519, 545 (3d Dist. 1950). But one who joins a conspiracy after its formation may not be convicted of a substantive offense committed by any of the other conspirators before he joined. People v. Weiss, 50 Cal. 2d 535, 566, 327 P.2d 527, 545 (1958).

[30] United States v. Knight, 416 F.2d 1181, 1184 (9th Cir. 1969).

[31] Levie, *supra* note 4, at 1172.

[32] *But see* text accompanying note 22 *supra*.

[33] *See* text accompanying notes 8-22 *supra*.

[34] *See* note 2 *supra*.

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statement. In other words, "the hearsay would lift itself by its own bootstraps to the level of competent evidence."[35] For example, at *D*'s trial for extortion and conspiracy, the prosecutor seeks to admit alleged co-conspirator *C*'s statement to the victim, *V*, that, "If you don't pay, *D* will be around to rough you up." *C* said this, knowing that *D* had a tough, ruthless reputation, and that *V* was more likely to pay if he thought *D* was in a conspiracy with *C*. In fact, *D* had no involvement at all with *C*, and *C*'s statement was a self-serving lie. Without the requirement that *D* be shown to be a party to an extortion conspiracy by independent evidence, *C*'s statement could be used to prove that *D* was a conspirator which in turn would justify admission of *C*'s statement as evidence of *D*'s membership in the conspiracy. Courts require independent evidence of the four preliminary facts to prevent such bootstrapping. The prosecutor makes this preliminary showing under California Evidence Code section 403[36] and federal rule of evidence 104.[37] This section examines the procedure under which the prosecutor makes the preliminary showing: the preliminary determination made by the judge; the rule which allows the judge to vary the order of proof, admitting a co-conspirator's statement subject to a subsequent showing of the preliminary facts; and the preliminary determination made by the jury.

A. FINDINGS BY THE JUDGE

Before admitting a statement under the co-conspirator exception, the judge must determine whether the preliminary facts have been established.[38] The judge does not hear any evidence from the defendant, but determines only whether the prosecutor has established

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

[36] CAL. EVID. CODE § 403 (West 1968) provides in relevant part:

> The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence to sustain a finding of the preliminary fact, when:
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> (1) The relevance of the proffered evidence depends on the existence of the preliminary fact . . . .

[37] *See* FED. R. EVID. 104 set forth in note 2 *supra*. The federal statute does not specify whether the judge determines the existence of the preliminary facts under rule 104(a) or 104(b). If the federal statute treats the admission of a co-conspirator's statements as a question of relevance, as California does, CAL. EVID. CODE § 403, ASSEMBLY JUDICIARY COMM. COMMENT (West 1968), rule 104(b) should apply. Two judges, however, have argued that the admission of a co-conspirator's statements is a question of competence, not relevance. 1 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[05] [hereinafter cited as WEINSTEIN]: Kaus, *All Power to the Jury—California's Democratic Evidence Code*, 4 LOYOLA U.L. REV. (L.A.) 233 (1971) [hereinafter cited as Kaus]. *See generally* Laughlin, *Preliminary Questions of Fact: A New Theory*, 31 WASH. & LEE L. REV. 285 (1974).

[38] *See* note 2 *supra*.

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each of the four preliminary facts.[39] For this purpose, however, the prosecutor need introduce only prima facie evidence of each preliminary fact.[40] Prima facie evidence is that amount of evidence which is adequate to support, but does not compel, a conclusion based upon it.[41] Once the judge finds a prima facie showing, even if he doubts the credibility of that showing,[42] he admits the statement. The prosecutor can establish a prima facie showing of the preliminary facts by the uncorroborated testimony of a co-conspirator,[43] by the defendant conspirator's own admission,[44] or by circumstantial evidence.[45] He does not have to show that the alleged conspirators met and came to an agreement, or even that there was any direct association between them.[46] The existence of the conspiracy and the defendant's and declarant's membership may be inferred merely from conduct of the alleged conspirators in mutually carrying out a common illegal purpose.[47] Moreover, in federal courts at least, once a conspiracy is shown, only slight evidence is needed to connect the defendant to it.[48]

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[39] CAL. EVID. CODE § 403, ASSEMBLY JUDICIARY COMM. COMMENT (West 1968).

[40] *Id; see* United States v. Nixon, 418 U.S. 683, 701 n.14 (1974); United States v. Spanos, 462 F.2d 1012, 1014 (9th Cir. 1972); People v. Brawley, 1 Cal. 3d 277, 290, 461 P.2d 361, 368, 82 Cal. Rptr. 161, 168 (1969); Annot., 46 A.L.R. 3d 1148 (1972).

[41] Garland and Snow, *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L.C. & P.S. 1, 8 (1972) [hereinafter cited as Garland and Snow]. *See* People v. Wheeler, 23 Cal. App. 3d 290, 306, 100 Cal. Rptr. 198, 208 (2d Dist. 1971):

> The law is well established that the quantum of evidence necessary to constitute prima facie proof of conspiracy is less than even a preponderance of the evidence. A prima facie showing is made "where the evidence and the reasonable inferences that may be drawn therefrom point to the probability of collaboration between the conspirators."

[42] Kaus, *supra* note 37, at 234; *see* People v. Earnest, 53 Cal. App. 3d 734, 742, 126 Cal. Rptr. 107, 112 (3d Dist. 1975).

[43] People v. Buckley, 202 Cal. App. 2d 142, 148, 20 Cal. Rptr. 659, 663 (2d Dist. 1962).

[44] This is also true in a joint trial. At the joint conspiracy trial of *A* and *B*, for example, *A*'s own admission can be used against him to establish a prima facie showing so that *B*'s statement could be used against *A* under the co-conspirator exception. People v. Leach, 15 Cal. 3d 419, 434, 541 P.2d 296, 306, 124 Cal. Rptr. 752, 762 (1975).

[45] People v. Morales, 263 Cal. App. 2d 368, 375, 69 Cal. Rptr. 402, 407 (4th Dist. 1968).

[46] *Id.*

[47] *Id.*

[48] United States v. Nunez, 483 F.2d 453, 460 (9th Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *cf.* People v. Neighbors, 218 Cal. App. 2d 593, 32 Cal. Rptr. 473 (2d Dist. 1963).

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B. ORDER OF PROOF

The hearsay statement and the independent evidence are often so intertwined that it is difficult to insist on independent proof before admitting the statement.[49] Trial courts therefore are allowed to vary the order of proof.[50] They can admit the statement subject to subsequent independent proof of the preliminary facts. If the judge later determines that the prosecutor has failed to make a prima facie showing of the preliminary facts, he instructs the jury not to consider the statement.[51]

C. FINDINGS BY THE JURY

If the prosecutor makes a prima facie showing of the four preliminary facts and the judge admits the statement, California and federal courts differ on whether the jury must also make a preliminary fact determination before considering a co-conspirator's admission. In California the court may, and at the defendant's request must, instruct the jury to disregard the statements unless it finds that the prosecutor has established the preliminary facts.[52] Neither the sta-

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[49] For example, in a joint trial, one defendant's own admission may constitute independent evidence as to him, but be hearsay against another defendant until the preliminary facts have been established as to that defendant. *See* People v. Leach, 15 Cal. 3d 419, 434, 541 P.2d 296, 306, 124 Cal. Rptr. 752, 762 (1975).

[50] United States v. Knight, 416 F.2d 1181, 1185 (9th Cir. 1969); People v. Morales, 263 Cal. App. 2d 368, 374, 69 Cal. Rptr. 402, 406 (4th Dist. 1968), *cert. denied*, 393 U.S. 1104 (1969); FED. R. EVID. 104(b); CAL. EVID. CODE § 1223 (West 1968).

[51] United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); People v. Neighbors, 218 Cal. App. 2d 593, 596, 32 Cal. Rptr. 473, 475 (2d Dist. 1963). CAL. EVID. CODE § 403 (West 1968) provides in relevant part:

> (c) If the court admits the proffered evidence under this section, the court: . . .
>
> (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

The Federal Rules of Evidence do not provide for a jury instruction in this situation. *See* notes 56-61 and accompanying text *infra.*

[52] CAL. EVID. CODE § 403 (West 1968) provides in relevant part:

> (c) If the court admits the proffered evidence under this section, the court:
>
> (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

The appropriate jury instruction is CAL. JURY INSTRUCTIONS CRIMINAL 6.24 (West Supp. 1974) which provides:

> Any evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you shall first determine from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed and unless you shall further determine that the statement was made while the person making the

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tute nor any California case specifies whether the jury makes this determination at the prima facie level, the preponderance level, or the reasonable doubt level.[53] The statute provides only that the jury must "determine" that the preliminary facts exist.[54] California cases state only that the prosecutor must establish the preliminary facts "to the satisfaction of the jury."[55] Aside from the question of what standard is used, neither the statute nor the cases explains precisely what a jury finding is. Does the jury as a whole make a decision on whether it will consider the evidence, voting to determine whether the prosecutor has established the preliminary facts? Must this vote be unanimous in criminal cases? Or does each juror decide for himself the existence of the preliminary facts? These questions are unanswered.

The preliminary draft of the Federal Rules of Evidence provided for a jury determination similar to that under the California statute.[56] The draft ultimately enacted deleted the provisions.[57] Thus, the federal courts are free to continue their previous procedure. In several circuits, including the Ninth Circuit, the jury makes no preliminary

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> statement was participating in the conspiracy and before or during the time that the person against whom it was offered was participating in the conspiracy and, finally, that such statement was made in furtherance of the objective of the conspiracy.
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> The word "statement" as used in this instruction includes any oral or written verbal expression or the nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

If a court reads this instruction, it must define the word "conspiracy" for the jury. People v. Earnest, 53 Cal. App. 3d 734, 745, 126 Cal. Rptr. 107, 114 (3d Dist. 1975). For this purpose, a conspiracy is "an agreement between two or more persons (with specific intent) to achieve an unlawful objective, coupled with an overt act by one of the conspirators in furtherance thereof." *Id.*

[53] *See id.* 4 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 490 n.32 (1962), states that the jury makes the determination at the prima facie level, *citing* People v. Talbott, 65 Cal. App. 2d 654, 151 P.2d 317 (2d Dist. 1944), for this proposition. *Talbott*, however, merely said that the judge makes the determination at the prima facie level, and that the prosecutor must prove the preliminary facts to "the satisfaction of the jury." 65 Cal. App. 2d at 663, 151 P.2d at 322. Later cases have merely repeated this language. *See, e.g.*, People v. Brawley, 1 Cal. 3d 277, 287, 461 P.2d 361, 366, 82 Cal. Rptr. 161, 166 (1969), *cert. denied*, 400 U.S. 993 (1971); People v. Steccone, 36 Cal. 2d 234, 238, 223 P.2d 17, 19-20 (1950).

[54] *See* note 52 *supra*.

[55] *See* note 53 *supra*.

[56] PROPOSED FED. R. EVID. 1-04(b) (Preliminary draft 1969), 46 F.R.D. 186-87, provided:

> If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled. If under all the evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.

[57] *See* FED. R. EVID. 104(b) set forth in note 2 *supra*.

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fact determination.[58] In *Carbo v. United States*,[59] the Ninth Circuit reasoned that if the jury must make a preliminary determination at the reasonable doubt standard, there would be no need for the exception in a conspiracy trial. The trial court would, in effect, instruct the jury not to consider the statement against the defendant unless it first found the defendant guilty. The court did not believe that asking the jury to make the preliminary determination at a lower level of proof was a viable solution. The jury is already concerned with the reasonable doubt standard required for a determination of guilt. It would be impossible, the court reasoned, for the jury to distinguish the preliminary fact evidence from the other evidence of guilt and apply to the preliminary fact evidence some lower standard of proof. Moreover, if the trial court instructed the jury to make the preliminary fact determination at a lower level, this could confuse the jury and cause them to apply a lower standard to the issue of guilt. Despite this reasoning, however, several other circuits instruct the jury to disregard the co-conspirator's statement unless the jury determines that the preliminary facts have been proven. Some courts instruct the jury to make the determination at the reasonable doubt level,[60] while one court requires the jury to be "satisfied" that the preliminary facts are shown.[61]

IV. CONSTITUTIONAL DEFECTS IN THE PROCEDURE

Recent constitutional cases indicate that the procedure under which California and some federal courts admit co-conspirators' statements may violate the sixth amendment's confrontation clause. The confrontation clause provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[62] The United States Supreme Court in several cases has attempted to define the relationship between this clause and the hearsay rule.[63] The cases are inconsistent,[64] but two points seem

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[58] United States v. Rosenstein, 474 F.2d 705, 712 (2d Cir. 1973); United States v. Pisciotta, 469 F.2d 329, 332 (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), *rehearing denied*, 377 U.S. 1010 (1964).

[59] 314 F.2d at 736-37.

[60] United States v. Rizzo, 418 F.2d 71, 82 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970); National Dairy Products Corporation v. United States, 350 F.2d 321, 337 (8th Cir. 1965), *vacated on other grounds*, 384 U.S. 883 (1966).

[61] United States v. Hoffa, 349 F.2d 20, 41 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966), *rehearing denied*, 386 U.S. 940 (1967).

[62] U.S. CONST. amend. VI. Pointer v. Texas, 380 U.S. 400, 403 (1965), made the sixth amendment binding on the states.

[63] *See, e.g.*, Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

[64] Natali, *Green, Dutton and Chambers: Three Cases in Search of a Theory*, 7

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clear. First, a confrontation clause question arises only if the hearsay declarant does not testify at the defendant's trial.[65] And second, in a jury trial, admission against a criminal defendant of a co-conspirator's statement violates the confrontation clause if the prosecutor fails to make a prima facie showing of the preliminary facts.[66] Another line of cases indicates that even if the prosecutor makes a prima facie showing of the preliminary facts, the admission of statements under the exception may violate the confrontation clause unless the statements are independently reliable.[67] Thus, the jury should never hear a co-conspirator's statements which do not satisfy the requirements of the exception; and, in addition, the jury should not hear a co-conspirator's statements which satisfy the requirements of the exception but are unreliable.

These constitutional cases raise questions about each of the three procedural components of the co-conspirator exception. First, if the jury determines whether a statement falls within the exception, the jury must theoretically determine from evidence other than the statement whether the preliminary facts were established. If the jury determines that the preliminary facts were not established, it must theoretically disregard the statement when it determines the guilt issue. Can the jury ignore the statement in its determinations, and, if not, is the procedure unconstitutional? Should the jury ever be allowed to make a preliminary determination? Second, if the trial court varies the order of proof, admitting a statement conditionally, there is a danger that the prosecutor will not subsequently present prima facie evidence of the preliminary facts. If he does not, the jury has heard inadmissible hearsay in violation of the confrontation clause. This may be grounds for a mistrial or an appellate reversal. Given the costs of appellate review and a new trial and the possibility that the defendant may be incarcerated in the interim, should trial courts ever be allowed to vary the order of proof? Finally, assuming that the judge and not the jury must determine admissibility, and assuming that the judge cannot vary the order of proof, what stan-

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RUTGERS CAMDEN L.J. 43, 54 (1975), states that "we can expect, at best, a case by case approach to the confrontation clause quagmire and, at worst, constitutional confusion."

[65] California v. Green, 399 U.S. 149, 157-62 (1970); Nelson v. O'Neil, 402 U.S. 622, 629-30 (1971).

[66] *See* text accompanying notes 93-100 *infra*. The admission against a criminal defendant of certain other forms of hearsay, however, does not necessarily violate the confrontation clause. In California v. Green, 399 U.S. 149, 165 (1970), and Mattox v. United States, 156 U.S. 237, 243 (1895), for example, the United States Supreme Court held that the admission of the former testimony of a witness unavailable at trial did not violate the confrontation clause if the witness had been previously cross-examined at the preliminary hearing or at a former trial.

[67] *See* text accompanying notes 107-20 *infra*.

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dard of proof should the judge apply? If reliability is a distinct requirement of admission, does a prima facie finding of the preliminary facts by the judge ensure reliability? Or should the judge be required to find the establishment of each preliminary fact at the preponderance level to ensure reliability? This section will analyze each of these questions.

A. FINDINGS BY THE JURY

The procedure in California[68] and some federal courts[69] by which the jury determines whether the prosecution has established the preliminary facts resembles the old New York procedure by which the jury determined the voluntariness of a confession. Under the New York procedure,[70] the trial judge made a preliminary determination, excluding the confession if in no circumstances it could be deemed voluntary. But if the evidence presented a fair question on the issue of voluntariness, the judge admitted the confession and left to the jury the ultimate determination of voluntariness. The jury could consider the confession itself to determine the voluntariness question, but the trial judge instructed the jury to disregard the confession on the guilt issue if the jury found the confession to be coerced. In *Jackson v. Denno*,[71] the United States Supreme Court held that this procedure violated the defendant's right to due process, for several reasons:

(1) The jury returned only a general verdict of guilty or not guilty, and there was nothing to show how the jury resolved the voluntariness issue, or if they decided the issue at all.[72]

(2) The confession may have served as a makeweight in a compromise verdict, some jurors accepting the confession to overcome lingering doubts of guilt, others rejecting the confession but finding their doubts satisfied by other evidence, and others, or perhaps all, never resolving the voluntariness issue but returning an unanalytical and impressionistic verdict based on everything they had heard.[73]

(3) Since the jury was given both evidence on the issue of voluntariness and evidence on the issue of guilt, the jury may have found that the confession was voluntary because they thought it was true.[74]

(4) Even if the jury found the confession to have been involuntary

[68] *See* text accompanying notes 52-55 *supra.*
[69] *See* text accompanying notes 56-60 *supra.*
[70] *See* Jackson v. Denno, 378 U.S. 368, 377-78 (1964).
[71] 378 U.S. 368 (1964).
[72] *Id.* at 379-80.
[73] *Id.* at 380.
[74] *Id.* at 382-83.

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> and theoretically disregarded it, the jury may have subconsciously resolved doubts on the question of guilt by resort to the confession.[75]

For these reasons, the Court held that the old New York procedure was an inadequate substitute for a full and reliable determination of voluntariness by the trial judge.[76]

Jury determination of whether the prosecutor has established the preliminary facts necessary to admit a co-conspirator's statement raises many of the same concerns as the old New York confession procedure.[77] If the prosecutor makes a prima facie showing of the preliminary facts, the jury can hear a co-conspirator's statements.[78] These statements probably inculpate the defendant or the prosecutor would not have offered them. The judge instructs the jury to disregard the statements and to determine from other independent evidence whether the prosecutor has established the preliminary facts.[79] The judge also instructs the jury that if it determines that the preliminary facts were not established, it should not consider the statements on the issue of guilt.[80] But, realistically, can the jury disregard the statements in determining (1) whether the prosecutor has established the preliminary facts, and (2) if the prosecutor has not, whether the defendant is guilty? Each of the prejudices inherent in the old New York confession procedure is inherent in the procedure used in California and some federal courts to admit a co-conspirator's statements:

(1) The jury returns only a general verdict on the guilt issue, and the appellate court will be unable to determine if the jury resolved the preliminary fact issue. Even if the jury made a preliminary fact determination, the appellate court will not know how it made the determination. The jury may have reached an ultimate determination of guilt by a bootstrap operation in which it first, subconsciously perhaps, improperly considered the statements themselves in determining the preliminary facts and then used the statements to determine guilt.

(2) The jury may use the statements as makeweights in a compromise verdict. Some jurors may reject the co-conspirator's statements because, for instance, they did not further the con-

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[75] *Id.* at 388.

[76] *Id.* at 391. This determination can be made by the trial judge, another judge, or another jury, as long as it is not made by the convicting jury. *Id.* at 391 n.19. But it will be easier, less disruptive, and take less time if the determination is made by the trial judge.

[77] This argument has been made by Kaus, *supra* note 37, at 248-51.

[78] *See* text accompanying notes 38-48 *supra.*

[79] *See* text accompanying notes 52-61 *supra.*

[80] *See* CAL. JURY INSTRUCTIONS CRIMINAL 6.24 (West Supp. 1974) set forth in note 52 *supra.*

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spiracy, but find the defendant's guilt established by other evidence. Other jurors may use the statements to overcome lingering doubts about guilt, even though they think that the statements did not, for example, further the conspiracy. Others may never resolve the preliminary fact issue, but return an unanalytical and impressionistic verdict based on all they heard.

(3) The jury may use the co-conspirator's statements because they think the defendant is guilty. During their deliberations, the jury may decide that (a) the independent evidence is insufficient to establish guilt, but that (b) the co-conspirator's statements in addition to the independent evidence do establish guilt. If the jury thinks that the defendant is guilty, this creates pressure to determine that the preliminary facts were shown if the defendant will otherwise go free. This in turn deprives the defendant of a full and reliable determination that the preliminary facts were established.

(4) Even if the jury finds that the preliminary facts were not established, and theoretically disregards any co-conspirator's statements, the jury may subconsciously resolve any doubts on the issue of guilt by resorting to the statements.

(5) In addition, these problems are compounded by the fact that there are no guidelines defining the nature of the jury determination.[81] California law does not specify whether the determination must be made by a unanimous jury, or even whether the determination must be made by the jury as a whole, and it does not specify at what level the determination is made. The existence of so many uncertainties in itself suggests that the procedure is a sham.

(6) Finally, if the court does instruct the jury to make its preliminary fact determination at a level below the reasonable doubt standard, this may confuse the jury on the various standards of proof and cause them to apply a lower standard on the issue of guilt.[82]

Therefore, the procedure in California and some federal courts, under which the jury determines whether the prosecutor has established the preliminary facts, possesses many of the same potential prejudices as the old New York confession procedure declared unconstitutional in *Jackson v. Denno*.

Although the two procedures are similar, different types of statements are involved. In *Jackson v. Denno*, the jury heard the defendant's confession. The Court had previously held that a criminal

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[81] *See* text accompanying notes 53-55 *supra*.

[82] *See* text accompanying note 59 *supra*.

conviction based upon an involuntary confession violates the defendant's right to due process.[83] Thus, apart from any question of procedure, the statement itself presented a constitutional issue in *Jackson*. The stated issue in the case, however, was whether the old New York procedure ensured that the jury would not use a constitutionally prohibited coerced confession in determining the defendant's guilt.[84] The Court held that it did not.

In a case involving the co-conspirator exception, the jury will hear a co-conspirator's statement, not a confession. But the admission against a criminal defendant of a co-conspirator's statement which does not satisfy the requirements of the exception violates the sixth amendment's confrontation clause if the declarant does not testify.[85] Thus, apart from any question of procedure, a co-conspirator's statement itself presents a constitutional issue.[86] By analogy

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[83]Jackson v. Denno, 378 U.S. at 376. One week before its decision in *Jackson*, the Court had held that the fifth amendment applies to the states. Malloy v. Hogan, 378 U.S. 1 (1964). The Court did not mention *Malloy* in its opinion in *Jackson* but relied upon earlier decisions which had held that a conviction in a state court based upon an involuntary confession violates the fourteenth amendment's due process clause. Justice Black, concurring and dissenting in *Jackson*, relied upon *Malloy* to find that Jackson's confession was coerced in violation of the fifth and fourteenth amendments. 378 U.S. at 408-09 (Black, J., concurring and dissenting).

[84]Jackson v. Denno, 378 U.S. at 377.

[85]*See* text accompanying notes 93-100 *infra*. This constitutional proposition was established by Bruton v. United States, 391 U.S. 123 (1968). *Bruton* applies when the trial judge determines that the prosecutor has not established the preliminary facts. In such a situation, the judge's instruction to the jury to disregard the statement is not constitutionally sufficient. Because the trial judge himself has made the determination, he can grant a mistrial. Because his determination is on the record, an appellate court can reverse a conviction if the trial judge does not grant a mistrial. But *Bruton* does not provide any protection in a *Jackson v. Denno* situation, which also involves limiting instructions. In the *Jackson* situation, the trial judge has determined that the prosecutor established the preliminary facts to a prima facie level. He admits the statement, instructing the jury to disregard the statement and determine from other independent evidence whether the prosecutor has established the preliminary facts. He also instructs the jury that, if they determine that the preliminary facts were not established, they should not consider the statement on the guilt issue. The constitutional issue arises from the jury's inability to follow the instructions and disregard the statement in making these two determinations. But since the jury's determination of the preliminary fact question remains a secret, neither the trial court nor the appellate court will know if the jury improperly considered a statement on either of these two jury determinations. Thus, there can be no constitutional protection on a case by case basis. The only remedy is to eliminate the procedure altogether.

[86]This may be important if the Court does not construe *Jackson* broadly. *Jackson* can be interpreted in several ways: (1) It can be read narrowly to apply only when a confession is involved. Under this narrow construction, *Jackson* would not apply generally to statements admitted under the co-conspirator exception. (2) *Jackson* can be construed to apply whenever the statement itself, apart from any question of procedure, presents a constitutional issue. Thus, *Jackson* applies when a co-conspirator's statement is involved. Since, under this interpretation, *Jackson* could not be read more broadly than the constitutional

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to the confession procedure, the co-conspirator exception procedure used in California and some federal courts does not ensure that the jury will not improperly use a co-conspirator's statement in determining whether the prosecutor has established the preliminary facts and whether the defendant is guilty. This raises a constitutional issue under the confrontation clause.[87] Given this constitutional defect, the judge, not the jury, should make the preliminary determination.

B. ORDER OF PROOF

Under the co-conspirator exception, the trial court can conditionally admit a co-conspirator's statement subject to a subsequent prima facie showing of the preliminary facts.[88] If, after admission, the court determines that the prosecutor has not prima facie established the preliminary facts, the judge will instruct the jury to disregard the hearsay statements.[89] Even with such instructions, however, admission of the statements may violate the confrontation clause.

In *Delli Paoli v. United States*,[90] the trial court admitted at a joint trial a co-defendant's post-conspiracy confession which implicated the defendant. The confession, made after the termination of the conspiracy, did not satisfy the requirements of the co-conspirator exception and was hearsay inadmissible against the defendant. The co-defendant did not testify.[91] The trial court instructed the jury to use the confession only against the confessor and not against the

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issue presented by the statement itself, and since a co-conspirator's statement raises a constitutional issue under the confrontation clause, *Jackson* would apply only if the declarant did not testify. *See* text accompanying note 65 *supra*. (3) *Jackson* can be interpreted as a procedural due process case which applies to any procedural determination similar to the old New York confession procedure, but only when the use of that procedure results in severe prejudice to a party. Because of the prejudice to a criminal defendant caused by the admission of a co-conspirator's statement, this construction would apply to a co-conspirator exception case. Under this interpretation, based upon the fourteenth amendment's due process clause, *Jackson* would apply whether the declarant testified or not. (4) *Jackson* can be read even more broadly as a procedural due process case to strike down any jury determination analogous to the one found unconstitutional in *Jackson*. Thus, a jury determination of whether the declarant was the agent of a party for purposes of admitting the agent's statement against the party would be unconstitutional. This interpretation seems unlikely, since it would eliminate jury determinations in too wide a variety of situations. The analogy in the text assumes that *Jackson* applies at least to the second interpretation.

[87] Kaus, *supra* note 37, at 246. *See generally* McCORMICK (2d ed.), *supra* note 1, § 252, at 604-07; Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

[88] *See* text accompanying notes 49-51 *supra*.

[89] *See* note 51 *supra*.

[90] 352 U.S. 232 (1957).

[91] Brief for the United States at 15, Delli Paoli v. United States, 352 U.S. 232 (1957).

defendant. The United States Supreme Court held that this procedure did not violate the defendant's sixth amendment right to confront the witnesses against him since the jury could reasonably be expected to follow limiting instructions.[92]

Eleven years later, in *Bruton v. United States*,[93] the Court expressly overruled *Delli Paoli.*[94] *Bruton*, like *Delli Paoli*, involved the admission at a joint trial of a co-defendant's post-conspiracy confession which implicated the defendant. The confession was inadmissible hearsay against the defendant, since it was made after the termination of the conspiracy and did not satisfy the requirements of the co-conspirator exception. Again, the co-defendant declarant did not testify. The Court held that, even though limiting instructions were given, admission of this statement violated the defendant's sixth amendment right to confront the witnesses against him:[95]

> [A]s was recognized in *Jackson v. Denno*, . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

Although *Bruton* involved a confession at a joint trial, courts have extended *Bruton* to apply to the co-conspirator exception,[96] even if there is no joint trial.[97] Thus, if a court conditionally admits a co-

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[92] The Court stated, 352 U.S. at 242:

> Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.

[93] 391 U.S. 123 (1968). *Bruton* binds state as well as federal courts as a result of Pointer v. Texas, 380 U.S. 400 (1965), which made the sixth amendment applicable to the states. Roberts v. Russell, 392 U.S. 293 (1968), made *Bruton* retroactive without limitation.

[94] 391 U.S. at 126.

[95] 391 U.S. at 135-36 (footnotes omitted). The California Supreme Court had previously reached the same result on statutory grounds. People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

[96] United States v. DeCicco, 435 F.2d 478, 485 (2d Cir. 1970); United States v. Lyon, 397 F.2d 505, 510 (7th Cir. 1968), *cert. denied*, 393 U.S. 846 (1968).

[97] *Cf.* Goodwin v. Page, 418 F.2d 867 (10th Cir. 1969); Annot., 29 L. Ed. 2d

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conspirator's statement and the prosecutor does not subsequently present prima facie evidence of each of the preliminary facts, admission of the statement is unconstitutional if the declarant did not testify, even if the trial court instructs the jury not to use the statement against the defendant.[98] If admission of the statement caused error, the defendant can obtain a mistrial to insure that he is not unfairly prejudiced.[99] But even though of a constitutional dimension, such error is grounds for reversal only if harmful.[100]

Even with the *Bruton* constitutional protections of a mistrial or reversal, allowing the trial court to vary the order of proof may still cause practical problems. If the judge conditionally admits a co-conspirator's statement and the prosecutor does not subsequently present prima facie evidence of the preliminary facts, the judge could grant a mistrial. This would cure the constitutional error, but it might result in new charges followed by a new trial. This would be expensive and time consuming for all parties. More importantly, if the defendant is incarcerated in the interim and is eventually found innocent, the procedure would result in the defendant's having spent unnecessary time in jail. On the other hand, if the judge denies the defendant's motion for a mistrial on the ground that his instructions to the jury corrected any error,[101] the jury, nevertheless, may ignore the judge's instructions and use the statement to convict the defendant. If, on appeal, the appellate court finds the error harmless and upholds the conviction, no special harm would have resulted. However, if the conviction is reversed on *Bruton* grounds, the defendant may face a new trial, which again would be expensive and time consuming, and again might result in unnecessary time spent in jail. Given these practical problems, the preliminary fact determination should always be made before admission of a co-conspirator's statement.

931, 934 n.4 (1972). No *Bruton* problem exists if the co-conspirator declarant is tried prior to the defendant, because the declarant cannot thereafter assert his fifth amendment right not to testify against himself if called at the defendant's trial. However, if the defendant is tried before the declarant, the situation is the same as if the two are tried jointly, since the declarant can assert his fifth amendment right if he has not yet been tried.

[98] United States v. DeCicco, 435 F.2d 478, 485 (2d Cir. 1970); United States v. Lyon, 397 F.2d 505, 510 (7th Cir. 1968), *cert. denied*, 393 U.S. 846 (1968).

[99] United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

[100] Harrington v. California, 395 U.S. 250, 254 (1969); United States v. Fischetti, 450 F.2d 34, 41 (5th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); People v. Leach, 15 Cal. 3d 419, 447, 541 P.2d 296, 315, 124 Cal. Rptr. 752, 771 (1975).

[101] *See* United States v. Cassino, 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); United States *ex rel.* Nelson v. Follette, 430 F.2d 1055, 1059 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971).

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C. FINDING BY THE JUDGE

Assuming that the judge, not the jury, should make the preliminary fact determination,[102] and assuming that this determination should be made before the co-conspirator's statement is admitted into evidence,[103] there remains the question of whether the Constitution imposes additional requirements upon the co-conspirator exception.

1. *THE DUTTON RELIABILITY REQUIREMENT*

Bruton v. United States involved a post-conspiracy confession to the police.[104] The confession was hearsay evidence which did not meet the requirements of the co-conspirator exception.[105] The Court noted:[106]

> There is not before us, therefore, any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.

In *Dutton v. Evans*,[107] the United States Supreme Court faced the question left open by *Bruton:* whether a statement admissible under the co-conspirator exception can violate a defendant's confrontation right if the declarant does not testify.[108] In *Dutton*, the defendant Evans was charged with the murder of three Georgia police officers. One of his co-conspirators, Williams, had been separately tried and convicted for the same murders. At Evans' trial, the prosecutor called as a witness Shaw, a cellmate of Williams, who testified that Williams had told him, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[109] The trial court admitted this statement, over objection, under Georgia's co-conspirator exception.[110] Williams did not testify.

Evans contended that the admission of Williams' statement had violated his right of confrontation, but a four judge plurality[111] and

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[102] *See* text accompanying notes 68-87 *supra.*

[103] *See* text accompanying notes 88-101 *supra.*

[104] 391 U.S. at 124.

[105] *Id.* at 128 n.3.

[106] *Id.*

[107] 400 U.S. 74 (1970).

[108] Several courts had already decided that *Bruton* did not apply when the statement was admitted under the co-conspirator exception. Campbell v. United States, 415 F.2d 356, 357 (6th Cir. 1969); People v. Brawley, 1 Cal. 3d 277, 291, 461 P.2d 361, 369, 82 Cal. Rptr. 161, 169 (1969).

[109] 400 U.S. at 77.

[110] A Georgia court admitted the statement under Georgia's co-conspirator exception, which requires only that the statement be made during the pendency of the conspiracy. The declarant made the statement after his arraignment. The Georgia courts admit statements made during the concealment phase of the conspiracy. Evans v. State, 222 Ga. 392, 402, 150 S.E.2d 240, 248 (1966).

[111] Justice Stewart wrote the opinion which has been criticized for its "careless-

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Justice Harlan, concurring, disagreed and affirmed the conviction. The plurality opinion mentioned three factors which compensated Evans for lack of opportunity to confront Williams: the reliability of the testimony[112] and the fact that the testimony was not "crucial" or "devastating."[113] The plurality found Williams' statement to be reliable because it was spontaneous and against his penal interest. The opinion did not define the terms "crucial" and "devastating," but it may have meant that admission of the statement was error harmless beyond a reasonable doubt.[114] Or the plurality may have used the terms to articulate a new standard for error arising under the confrontation clause, such error being harmless unless it was "crucial" or "devastating."[115] A more likely possibility is that the plurality weighed these factors and the reliability of the statement to determine if there was a constitutional violation: the more crucial a statement is to the prosecution's case, or the more devastating admission of the statement is to the defendant, the greater the standard of reliability required for admission of the statement.[116] Although the plurality did not articulate this as a specific confrontation clause test for the admission of a co-conspirator's statements, this test sums up the plurality's concerns. The plurality focused on three factors: reliability; the "crucial" nature of the statement, or its necessity to the proceedings; and the "devastating" nature of the statement, or its prejudice to the defendant. The plurality tested the circumstances of the case against these concerns and held that admission of the statement did not violate the confrontation clause.

Justice Harlan, concurring in *Dutton*, explicitly adopted this analysis. He would test the constitutionality of a hearsay exception under the due process clause,[117] weighing the reliability of the hearsay evi-

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ness—or, perhaps better, looseness." *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 198 (1971) [hereinafter cited as *The Supreme Court, 1970 Term*].

[112] 400 U.S. at 88-89.

[113] *Id.* at 87.

[114] This was the view of two concurring justices. 400 U.S. at 90-93 (Blackmun, J., and Burger, C.J., concurring). Twenty witnesses testified for the prosecution, including an eyewitness to the murders. 400 U.S. at 87.

[115] Several commentators have suggested this possibility. *See, e.g.*, Younger, *Confrontation and Hearsay: A Look Backward, a Peek Forward*, 1 HOFSTRA L. REV. 32, 40 (1973); *The Supreme Court, 1970 Term, supra* note 111, at 198. The Court had previously held that before error under the confrontation clause can be held harmless, it must be harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 254 (1969). In *Dutton*, the plurality may have meant that there was error, that it was not harmless beyond a reasonable doubt, but that it was of insufficient magnitude to overturn the conviction of such a guilty defendant.

[116] This possibility is suggested in *The Supreme Court, 1970 Term, supra* note 111, at 197.

[117] 400 U.S. at 97 (Harlan, J., concurring). Justice Harlan adopted Wigmore's view that the confrontation clause merely guarantees a procedural right. It

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dence and the necessity for the evidence against the danger that the evidence would prejudice the defendant.[118] Thus, under Harlan's view, and arguably under the plurality opinion, a court should not admit an unreliable co-conspirator's statement if admission of that statement will prejudice the defendant. This conclusion is bolstered by the dissent. Four justices argued that a co-conspirator's hearsay statement is so inherently prejudicial that it should not be introduced at all unless there is an opportunity to cross-examine the declarant, even if the statement satisfies the requirements of the exception.[119] Essentially, the dissenters have done their balancing, and they have determined that a co-conspirator's statement will almost always be prejudicial, that reliability can be ensured only by cross-examination of the declarant, and that, regardless of any issue of necessity, these statements should be excluded in all cases if the declarant does not testify.

Both Congress and the California legislature have expressed a similar concern by enacting federal rule of evidence 403 and California Evidence Code section 352. These statutes give the trial judge discretion to exclude evidence if its probative value is outweighed by its prejudicial effect. Assuming that probative value means some combination of reliability and necessity, this is the standard articulated by Justice Harlan and, arguably, the other members of the Court. Thus, a trial court, under these statutes, should exclude a co-conspirator's unreliable hearsay statement if admission of that statement will prejudice the defendant, even if the statement is otherwise admissible under the exception. *Dutton* arguably makes the admission of such a statement unconstitutional.[120] Even if it does not, the trial judge should give effect to the legislatures' concern by excluding these statements.

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guarantees the defendant the right to cross-examine the witness testifying at trial, not the right to cross-examine the declarant of the hearsay statement which the witness repeats in court. Several commentators also urge a due process test for the admission of hearsay. *See* Note, *The Confrontation Test for Hearsay Exceptions: An Uncertain Standard*, 59 CAL. L. REV. 580, 592-96 (1971); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1438 (1966); Note, 22 MERCER L. REV. 791, 794-95 (1971).

[118] 400 U.S. at 99 (Harlan, J., concurring).

[119] 400 U.S. at 110 (Marshall, J., dissenting).

[120] The Second Circuit has held that the confrontation clause imposes a reliability requirement upon the co-conspirator exception in addition to the other requirements. If the declarant's statement is not independently reliable and the declarant does not testify, admission of the statement violates the defendant's confrontation right, even if the statement is otherwise within the exception. United States v. Puco, 476 F.2d 1099, 1107 (2d Cir. 1973), *cert. denied*, 414 U.S. 844 (1973). Two other circuits have mechanically applied a reliability requirement to uphold the admission of a statement under the exception. *See* United States v. Adams, 446 F.2d 681, 683-84 (9th Cir. 1971), *cert. denied*, 404 U.S. 943 (1971); United States v. Weber, 437 F.2d 327, 340 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971).

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2. *JUDGE DETERMINATION AT A PREPONDERANCE LEVEL NECESSARY FOR RELIABILITY*

Under *Dutton*, or at least under the federal and California statutes, the preliminary determination should ensure that statements admitted under the co-conspirator exception are reliable. A determination by the judge that the prosecutor has established the preliminary facts can itself ensure reliability if the preliminary facts are proven to a sufficient level. The prosecutor must establish, first, that a conspiracy existed and, second, that the declarant made the statement during the conspiracy.[121] These requirements prevent the admission of statements made before the conspiracy began or after the conspiracy's termination. Such statements are less reliable than statements made during the conspiracy.[122] Preconspiracy statements are mere predictions and as such lack sufficient probative value to be admitted. Since there has been no agreement about parties or terms of the conspiracy, the statements are less likely to be accurate. Similarly, post-termination statements are untrustworthy since they are more likely to be consciously and exclusively self-serving. While working toward a common goal, conspirators will view their interests similarly. But after the conspiracy ends, each member's interest begins to diverge. If a conspirator feels safe, he may exaggerate the scope of the conspiracy or his role in it to impress a listener. If the conspirator fears apprehension or conviction, he may try to avoid responsibility and shift blame to others besides himself.

The third requirement, furtherance,[123] prevents the admission of statements which satisfy the first two requirements but which are still unreliable. Furtherance, for instance, prevents the admission of a co-conspirator's exaggerated bragging or a pre-termination statement given to the police out of fear of imminent apprehension.[124] The final requirement, the showing of the defendant's membership in the conspiracy,[125] should further protect the defendant from unreliable statements. If the defendant is, in fact, a member of the conspiracy, he will be aware of the conspiratorial plans, and he will be acquainted with the declarant. He will likely be able to identify inaccurate portions of the declarant's statement and convince the jury of that inaccuracy.[126]

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[121] *See* note 1 *supra*.

[122] *See* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1386 (1972) [hereinafter cited as Davenport]; Levie, *supra* note 4, at 1172.

[123] *See* note 1 *supra*.

[124] Davenport, *supra* note 122, at 1387.

[125] *See* note 1 *supra*.

[126] Oakley, *supra* note 4, at 49. This logic depends upon courts construing narrowly the object and the duration of the conspiracy. *Id.* at 45-51. *See* Park v. Huff, 506 F.2d 849 (5th Cir. 1975), *cert. denied*, 96 S.Ct. 38 (1975).

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The degree of protection that these requirements provide, however, depends upon the level at which the prosecutor must establish the preliminary facts. If the judge makes the preliminary fact determination at the prima facie level,[127] any guarantee of reliability that the requirements provide is diluted by the low standard of proof. The co-conspirator exception will substantially ensure reliability only if the judge makes the preliminary determination at the preponderance level.[128] The preponderance standard requires that evidence in support of a proposition be of greater weight or more convincing than that offered in opposition.[129] The judge would have to weigh the evidence to determine whether evidence establishing each of the preliminary facts is more convincing than evidence to the contrary.[130] This standard would provide a more reliable determination of the existence of the preliminary facts, and thus the protections that each of those substantive facts provides the defendant would not be procedurally diluted.

Unreliable hearsay could possibly still be admitted, even if the judge makes a preliminary fact determination at the preponderance level.[131] But short of eliminating the exception, or reformulating it significantly,[132] there seems to be no other way to substantially guarantee reliability.[133]

V. A PROPOSAL

There are several problems with the existing procedure under which California and some federal courts admit a co-conspirator's statement. First, the court admits a co-conspirator's statement and instructs the jury to disregard the statement and determine from other independent evidence whether the prosecutor has established the preliminary facts. The judge also instructs the jury to disregard the statement on the guilt issue if the jury determines that the preliminary facts were not established. But the jury may be incapable of

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[127] *See* text accompanying notes 41-48 *supra*.

[128] Several commentators think that the judge should make the preliminary fact determination in co-conspirator exception cases at a level higher than the prima facie standard. 1 WEINSTEIN, *supra* note 37, at ¶ 104[05], argues that the judge should admit the statement only if the evidence, hearsay and non-hearsay, establishes the facts beyond a reasonable doubt. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 303-04 (1975), says the judge should make the determination at the preponderance level.

[129] Garland and Snow, *supra* note 41, at 8.

[130] *Id.*

[131] *See* Davenport, *supra* note 122, at 1386-91.

[132] *See id.* at 1391-1405.

[133] To protect the defendant in those situations when unreliable evidence is admissible under this proposal, the trial court should exclude the evidence under California Evidence Code section 352 and federal rule of evidence 403. *See* text accompanying note 120 *supra*.

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following the instructions, and it may improperly consider a co-conspirator's statement in determining whether the prosecutor has established the preliminary facts and whether the defendant is guilty.[134] Second, the trial judge may vary the order of proof, conditionally admitting a co-conspirator's statement subject to a later showing of the preliminary facts. If the prosecutor does not subsequently establish the preliminary facts to a prima facie level, the judge instructs the jury to disregard completely the co-conspirator's statement. This instruction places equally unrealistic demands upon the jury. Even though *Bruton* provides the constitutional protections of a mistrial or an appellate reversal, each of these might result in a new trial. This would be expensive, time consuming, and it might result in the defendant spending unnecessary time in jail.[135] And third, allowing the judge to admit a co-conspirator's statement upon a mere prima facie showing denies the defendant a full and reliable determination that the preliminary facts were indeed established. This dilutes the protection against unreliable statements which the exception's substantive requirements provide.[136]

All these problems could be resolved by changing the procedure under which a co-conspirator's statements are admitted. Instead of admitting a co-conspirator's statements under California Evidence Code section 403 and federal rule of evidence 104(b), a trial court should admit the statements under California Evidence Code section 405[137] and federal rule of evidence 104(a).[138] This simple change would cure the problems inherent in the present procedure. The court would not admit the statements until the prosecutor had persuaded the judge by independent evidence that all four preliminary facts were established. The judge would hold a hearing out of the presence of the jury, and the prosecutor would bear the burden of proving each of the four requirements by a preponderance of the evidence.[139] Only after he had been convinced by such proof would the

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[134] *See* text accompanying notes 68-87 *supra*.

[135] *See* text accompanying note 101 *supra*.

[136] *See* text accompanying notes 121-26 *supra*.

[137] CAL. EVID. CODE § 405 (West 1968) provides in relevant part:

> When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

[138] *See* FED. R. EVID. 104(a) set forth in note 2 *supra*.

[139] This is the procedure for determining the voluntariness of a confession. Lego v. Twomey, 404 U.S. 477, 489 (1972); People v. Hutchings, 31 Cal. App. 3d 16, 18-21, 106 Cal. Rptr. 905, 906-07 (1st Dist. 1973); *cf.* People v. Coleman, 13 Cal. 3d 867, 891, 533 P.2d 1024, 1043, 120 Cal. Rptr. 384, 403 (1975).

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judge admit the statements. If the judge did admit the statements, he would not inform the jury of his findings, and he would not instruct the jury whether they should use the statements against the defendant.[140]

This procedure would eliminate the problems that arise under the present procedure.[141] The jury would not make any determination of whether the preliminary facts exist. The judge could not vary the order of proof. And the judge would not admit a co-conspirator's statement until he had determined that each of the preliminary facts had been established by a preponderance of the evidence. This determination by the judge would more sufficiently ensure that statements admitted under the exception are reliable. In sum, admitting a co-conspirator's statement under the proposed procedure would protect the defendant's constitutional rights which, arguably, are being violated by the admission of statements under the present procedure.

R. Chrisman Gibson

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[140] *See* CAL. EVID. CODE § 405, ASSEMBLY JUDICIARY COMM. COMMENT (West 1968).

[141] To the extent this proposal is constitutionally mandated, it is required only when the declarant does not testify. *See* text accompanying note 65 *supra.* But because the declarant will usually exercise his privilege against self-incrimination and be unavailable, and because, in any case, the legislature has expressed its concern that unreliable, prejudicial statements not be admitted, *see* text accompanying note 120 *supra*, this proposal should be used in all co-conspirator exception cases.

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