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Sixth Amendment--The Co-Conspirator Exemption to the Hearsay Rule: The Confrontation Clause and Preliminary Factual Determinations Relevant to Federal Rule of Evidence 801(d)(2)(E)

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SIXTH AMENDMENT—THE CO-CONSPIRATOR EXEMPTION TO THE HEARSAY RULE: THE CONFRONTATION CLAUSE AND PRELIMINARY FACTUAL DETERMINATIONS RELEVANT TO FEDERAL RULE OF EVIDENCE 801(d)(2)(E)

Bourjaily v. United States, 107 S. Ct. 2775 (1987).

I. INTRODUCTION

In *Bourjaily v. United States*,[1] the Supreme Court ruled on three issues relating to the co-conspirator exemption to the hearsay rule codified in Federal Rule of Evidence 801(d)(2)(E)[2] and the admissibility of out-of-court co-conspirator hearsay statements. The Court held, first, that under Federal Rule of Evidence 104(a),[3] preliminary facts relevant to Rule 801(d)(2)(E) must be proven by a preponderance of the evidence. Second, the Court held that when a court makes preliminary factual determinations under Rule 801(d)(2)(E), it can look to the hearsay statements sought to be admitted, rather than only to independent evidence. This portion of the Court's holding effectively overruled the "bootstrapping rule" set out in *Glasser v. United States*[4] and opened the door to the admission of virtually all out-of-court hearsay statements made by unavailable co-conspirators. Third, the Court held that a defendant's rights under the confrontation clause of the sixth amendment[5] are not violated

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1 107 S. Ct. 2775 (1987).

2 Rule 801(d)(2)(E) states, in pertinent part: "A statement *is not* hearsay if . . . the statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E)(emphasis added).

3 Rule 104(a) governs the judicial determination of preliminary questions concerning admissibility of evidence and provides: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." FED. R. EVID. 104(a). The rule does not explicitly set out a standard of proof necessary for these admissibility determinations.

4 315 U.S. 60 (1942). See *infra* note 32 for a discussion of the "bootstrapping rule."

5 The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecu-

by admitting into evidence an unavailable co-conspirator's hearsay statements without inquiring into the reliability of such statements.

This Note examines the majority's reasoning with respect to the confrontation clause issue and argues that the Court improperly relied on language in *Ohio v. Roberts*[6] to sidestep the requirement of the confrontation clause that a co-conspirator's statement be supported by an "indicia of reliability."[7] Because a co-conspirator's statements are presumptively unreliable and because the co-conspirator exemption from the hearsay rule is based on the theory of agency and not on underlying guarantees of trustworthiness as are other hearsay exceptions,[8] this Note asserts that the sixth amendment requires an independent inquiry into the statement's reliability. A logical extension of this argument is that independent evidence should establish the existence of conspiracy and a defendant's participation therein before a co-conspirator's out-of-court declarations can be admitted. Thus, this Note concludes, first, that the Court's holding that a court may look to a co-conspirator's hearsay statements themselves to determine the admissibility of those statements is in error and, second, that the policies behind both Rules 104(a) and 801(d)(2)(E) still can be satisfied by maintaining the independent evidence requirement as it existed at common law.

II. Factual Background and Procedural History of *Bourjaily*

In May 1984, Clarence Greathouse, an informant working for the Federal Bureau of Investigation (FBI), arranged to sell cocaine to Angelo Lonardo.[9] As part of the arrangement, Lonardo agreed to find other individuals to distribute the drug.[10] As the sale date drew near, Lonardo and Greathouse had a telephone conversation which was recorded by the FBI.[11] During the conversation, Lonardo stated that he had a "gentleman friend" with questions regarding the cocaine.[12] In a subsequent recorded telephone call, Greathouse spoke to the "friend" about the quality and price of the drug.[13] Greathouse and Lonardo spoke again and agreed that the

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tions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

6 448 U.S. 56 (1980). See *infra* notes 48-53 and accompanying text for a discussion of the *Roberts* holding.

7 *Roberts*, 448 U.S. at 65.

8 *See infra* notes 99-103 and accompanying text.

9 *Bourjaily*, 107 S. Ct. at 2778.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

sale would take place in a pre-designated hotel parking lot.[14] Greathouse proceeded with the transaction as planned, and FBI agents arrested Lonardo and William John Bourjaily after Lonardo had placed one kilogram of cocaine in Bourjaily's car.[15]

The United States government charged Bourjaily with violation of federal statutes for conspiring to distribute cocaine and also for possession of cocaine with intent to distribute.[16] At trial, the government introduced, over Bourjaily's objection, Lonardo's telephone statements regarding his "friend's" participation in the drug deal.[17] The United States District Court for the Northern District of Ohio found that, considering both the events in the hotel parking lot and Lonardo's statements over the phone, the government had established by a preponderance of the evidence that a conspiracy involving Lonardo and Bourjaily existed.[18] The court also found that Lonardo's statements over the telephone were made "in the course and in furtherance of the conspiracy," and, thus, the statements satisfied the requirements of Rule 801(d)(2)(E) and therefore were not hearsay.[19] The court convicted Bourjaily on both counts and sentenced him to fifteen years imprisonment.[20]

The United States Court of Appeals for the Sixth Circuit agreed with the district court's analysis and conclusion that Lonardo's out-of-court statements were admissible under the Federal Rules of Evidence and affirmed the district court's decision.[21] The court of appeals additionally rejected Bourjaily's claim that his inability to cross-examine Lonardo violated his constitutional rights under the confrontation clause of the sixth amendment.[22]

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14 *Id.* Under the scheme, Lonardo would transfer the cocaine from Greathouse's car to that of the "friend," who would be waiting in the parking lot. *Id.*

15 *Id.* A search of Bourjaily's car by the FBI agents also revealed over $20,000 in cash. *Id.*

16 *Id.* Bourjaily was charged with violating two statutes: 21 U.S.C. § 846 (1982), which states that "[a]ny person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy," *id.*; and 21 U.S.C. § 841 (1982), which states that "[e]xcept as authorized by this title, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id.*

17 107 S. Ct. at 2778.

18 *Id.*

19 See *supra* note 2 for relevant text of Rule 801(d)(2)(E).

20 107 S. Ct. at 2778.

21 United States v. Bourjaily, 781 F.2d 539 (6th Cir. 1986).

22 *Id.* at 543. See *supra* note 5 for relevant language of the sixth amendment.

III. The Supreme Court Opinions

A. THE MAJORITY OPINION

Writing for the majority,[23] Chief Justice Rehnquist addressed three basic issues connected with Rule 801(d)(2)(E) and the admissibility of co-conspirators' statements. The opinion first examined the admissibility of co-conspirator declarations and the standard of proof necessary under Rule 104(a) in determining disputed preliminary factual questions relevant to Rule 801(d)(2)(E).[24] Second, the Court dealt with the issue of the proper conjunctive interpretation of Rules 801(d)(2)(E) and 104(a) in light of two pre-Federal Rules of Evidence Supreme Court decisions.[25] Third, the majority confronted the question of whether, by admitting an unavailable co-conspirator's out-of-court statements without inquiring into the reliability of those statements, a defendant's rights under the confrontation clause of the sixth amendment were violated.[26]

1. The Standard of Proof Question

Chief Justice Rehnquist began his analysis by stating that the questions of whether a conspiracy existed and whether a defendant participated therein were preliminary questions of fact which, under Rule 104(a), are subject to resolution by the court.[27] The Chief Justice, on the basis of prior decisions concerning admissibility determinations relating to preliminary factual questions,[28] concluded that the evidentiary standard for such admissions must be established by a preponderance of the evidence.[29] Chief Justice Rehnquist noted that the burden of proof for preliminary factual questions was unre-

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[23] Justice White, Justice Powell, Justice Stevens, Justice O'Connor and Justice Scalia joined in the majority opinion.

[24] For the text of Rule 801(d)(2)(E), see *supra* note 2. For the text of Rule 104(a), see *supra* note 3. In this case, the preliminary factual questions to be decided before Lonardo's telephone statements could be admitted were whether a conspiracy existed and whether the defendant was part of that conspiracy. *Bourjaily*, 107 S. Ct. at 2778.

[25] United States v. Nixon, 418 U.S. 683 (1973); Glasser v. United States, 315 U.S. 60 (1942). For a discussion of these decisions, see *infra* note 32.

[26] *Bourjaily*, 107 S. Ct. at 2782-83.

[27] *Id.* at 2778.

[28] In support of the traditional use of the preponderance of the evidence standard, Chief Justice Rehnquist cited Colorado v. Connelly, 107 S. Ct. 515 (1986)(preliminary fact that custodial confessant waived rights must be proved by preponderance of the evidence); Nix v. Williams, 467 U.S. 431 (1984)(inevitable discovery of illegally seized evidence must be proved to have been more likely than not); United States v. Matlock, 415 U.S. 164 (1974)(voluntariness of consent to search must be shown by preponderance of the evidence); Lego v. Twomey, 404 U.S. 477 (1972)(voluntariness of confession must be shown by preponderance of the evidence).

[29] *Bourjaily*, 107 S. Ct. at 2779. The preponderance of the evidence standard of proof requires that the trial court must find it "more likely than not that the technical issues

lated to the evidentiary standard on substantive issues in criminal and civil cases.[30] Therefore, the Court held that if preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the proponent of the evidence must prove them by a preponderance of the evidence.[31]

2. *Conjunctive Interpretation of Rule 801(d)(2)(E), Rule 104(a), and the "bootstrapping rule"*

Chief Justice Rehnquist next addressed Bourjaily's contention that the trial court may only look to independent evidence, apart from the statements sought to be admitted, in determining the preliminary factual questions relevant to Rule 801(d)(2)(E). The majority concluded that Rule 104(a) superceded the "bootstrapping rule" as set forth in *Glasser v. United States* and reaffirmed in *United States v. Nixon*.[32] Chief Justice Rehnquist rejected Bourjaily's contention that preliminary questions of fact under Rule 801(d)(2)(E) could not include examination of the actual statements sought to be admitted.[33] Instead, the majority interpreted *Glasser* as holding that a court must only have some independent proof of conspiracy and that it was permissible for a court to examine the hearsay statements in conjunction with other independent evidence to determine

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and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." *Id.*

30 *Id.* at 2779. *See In re* Winship, 397 U.S. 358 (1970)(in criminal cases, prosecution must prove all elements of case beyond a reasonable doubt). On substantive issues, a proponent of evidence must prove his case on the merits beyond a reasonable doubt, which is a much stricter standard. *Id. See also* Colorado v. Connelly, 107 S. Ct. at 522 (1986). In a footnote to the opinion, the majority also declined to decide related issues of the standard of proof for questions of conditional relevancy under Rule 104(b). *Bourjaily*, 107 S. Ct. at 2779 n.1.

31 107 S. Ct. at 2779 (footnote omitted).

32 The "bootstrapping rule" states that in order to admit out-of-court declarations of a co-conspirator, there must be "proof *aliunde* that [the defendant] is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Glasser*, 315 U.S. at 74-75 (emphasis in original)(citations omitted). *Aliunde* means "from another source, from elsewhere, from outside." BLACK'S LAW DICTIONARY 68 (5th ed. 1979). In other words, there must be proof independent of the hearsay statements sought to be admitted.

In *Glasser*, the defendant contended that conflicting loyalties led his attorney not to object to statements made by one of Glasser's co-conspirators. The Court rejected the government's argument that any objection to the statements would have been moot because they were in fact admissible. The Court then formulated the "bootstrapping rule." *Glasser*, 315 U.S. at 75. In *Nixon*, the Court, in dicta, mentioned and reaffirmed the independent evidence requirement set out in *Glasser*. *Nixon*, 418 U.S. at 701. The Court stated that "[d]eclarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." *Id.* at 701 (footnote omitted).

33 *Bourjaily*, 107 S. Ct. at 2780.

whether a conspiracy had been shown by a preponderance of the evidence.[34]

Although the majority conceded that the courts of appeals had accepted overwhelmingly Bourjaily's interpretation of *Glasser*—that a court may not look to the statements themselves for evidentiary value—the majority dismissed this interpretation by determining that the Federal Rules of Evidence now govern those evidentiary questions.[35] The majority, therefore, held that the "plain meaning" of Rule 104(a) indicated that the preliminary fact-finding requirements relevant to Rule 801(d)(2)(E) did not mirror the common law precedent which required only independent evidence of conspiracy.[36] Rather, a judge could look to the hearsay statements themselves to make determinations on their admissibility.[37] The majority concluded that Rule 104(a) allowed a judge to consider all relevant evidence, legislative history of the Federal Rules of Evidence notwithstanding.[38] In reaching the conclusion that Rule 104(a) effectively overruled *Glasser*, the majority rejected Bourjaily's claim that Congress intended to leave the "bootstrapping rule" intact.[39]

Chief Justice Rehnquist also replied to Bourjaily's theory that this interpretation of the co-conspirator exemption to the hearsay rule would open the door to admissions of unreliable hearsay statements "without any credible proof of the conspiracy."[40] The Chief Justice argued that out-of-court statements were only "*presumed* unreliable" and that the presumption could be rebutted by appropriate proof.[41] The Chief Justice also asserted that "a piece of

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[34] *Id.* Chief Justice Rehnquist did not explain what "some proof *aliunde*" meant. *See id.*

[35] *Id.* Chief Justice Rehnquist stated that "[t]he question thus presented is whether any aspect of *Glasser*'s bootstrapping rule remains viable after the enactment of the Federal Rules of Evidence." *Id.* At a later point in the opinion, the Chief Justice answered the question in the negative, stating that "[t]o the extent that *Glasser* meant that courts could not look to the hearsay statements themselves for any purpose, it has clearly been superceded by Rule 104(a)." *Id.* at 2782.

[36] *Id.* at 2780.

[37] *Id.*

[38] *Id.*

[39] *Id.* at n.2. In reference to the Advisory Committee's Note which states that "[a]n item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted into evidence," FED. R. EVID. 104(a) advisory committee's note, Chief Justice Rehnquist asserted that "[w]e think this language makes plain the drafters' intent to abolish any kind of bootstrapping rule." *Bourjaily*, 107 S. Ct. at 2780 n.2.

[40] 107 S. Ct. at 2781.

[41] *Id.* (emphasis in original). The Chief Justice did not address the issue of what would be sufficient proof. However, he cited Federal Rule of Evidence 803 (24) as an example of the rebuttable presumption. *Id.* Rule 803 lists the hearsay exceptions in which the availability of the declarant is immaterial. Specifically, Rule 803(24) provides: "The following are not excluded by the hearsay rule, even though the declarant is avail-

evidence, unreliable in isolation, may become quite probative when corroborated by other evidence."[42] As a result, the majority concluded that it would not be necessary to have an absolute bar to the consideration of hearsay declarations in the determination of preliminary issues of fact, stating that "there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area."[43] Additionally, Chief Justice Rehnquist pointed out that even if a party was unsuccessful in excluding a co-conspirator's statements, he would have an opportunity at trial to attack their probative value as they related to the substantive issues of the case.[44] Therefore, the Court held that a court may examine co-conspirator hearsay statements sought to be admitted in the making of its preliminary factual determinations relevant to Rule 801(d)(2)(E) and that, consequently, the lower court was not in error in admitting Lonardo's out-of-court statements against Bourjaily.[45]

3. The Confrontation Clause Issue

The majority also rejected the argument that the admission of co-conspirators' statements violated a defendant's right to cross-examine witnesses against him under the confrontation clause of the sixth amendment.[46] The majority agreed with the court of appeals' holding that the requirements under the confrontation clause were equivalent to those of the Federal Rules of Evidence.[47] In turn, the Court narrowed the holding of *Ohio v. Roberts*,[48] in which the Court held that the confrontation clause required the prosecution to show the unavailability of the declarant and the "indicia of reliability" sur-

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able as a witness: . . . A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness. . . ." FED. R. EVID. 803(24).

42 *Bourjaily*, 107 S. Ct. at 2781.

43 *Id.*

44 *Id.* As an example, the majority cited Federal Rule of Evidence 806, which allows attack on the credibility of an out-of-court declarant. *See id.* The majority did, however, make a point that it was not ruling on whether courts could rely solely on the statements themselves to determine the existence of conspiracy. Rather, the Court decided only the narrow issue of whether a court may examine the hearsay statements at all in preliminary factual determinations under Rule 104(a). 107 S. Ct. at 2781-82.

45 *Id.* at 2782.

46 *Id.* For the text of the confrontation clause, see *supra* note 5. Since Lonardo had exercised his right not to testify under the fifth amendment, Bourjaily was unable to cross-examine him. *Bourjaily*, 107 S. Ct. at 2782.

47 107 S. Ct. at 2782.

48 448 U.S. 56 (1980)(case involved the prior recorded testimony of a witness who was unproduced at trial).

rounding the declarants statement.[49] In the recent case of *United States v. Inadi*,[50] the Court ruled that a showing of unavailability of a co-conspirator was not required under the confrontation clause as a condition which must be met prior to the admission of out-of-court statements by that co-conspirator.[51] The *Bourjaily* majority also held that an "indicia of reliability" was not mandated by the Constitution.[52]

The majority, relying on language in *Roberts* which said that no independent inquiry into reliability was required if the evidence fell "within a firmly rooted hearsay exception," concluded that co-conspirator statements were also included by the *Roberts* decision.[53] Citing cases dating back to 1827, Chief Justice Rehnquist declared that the precedents "demonstrate that the coconspirator exception to the hearsay rule is steeped in our jurisprudence" and that it has "a long tradition of being outside the compass of the general hearsay exclusion."[54] Thus, the Court held that the confrontation clause did not require an independent inquiry into the reliability of statements which satisfied Rule 801(d)(2)(E).[55]

B. THE CONCURRING OPINION

In a concurring opinion, Justice Stevens provided his own interpretation of the "bootstrapping rule" set out in *Glasser v. United States*.[56] Justice Stevens agreed with the majority's ultimate conclusion that the "plain meaning" of Rule 104(a) allowed a judge to examine any evidence, including hearsay statements sought to be admitted, in determining preliminary questions of fact.[57] However, Justice Stevens stated that the *Glasser* rule had always been one

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[49] *Id.* at 66.

[50] 475 U.S. 387 (1986)(case presented the Court with an opportunity to decide the first prong of the *Ohio v. Roberts* rule, the availability aspect, as it concerned Rule 801(d)(2)(E)). Bourjaily's case presented the Court with the opportunity to rule on the second requirement of *Roberts*, the reliability aspect, in relation to an out-of-court co-conspirator's statements.

[51] *Id.* at 395.

[52] *Bourjaily*, 107 S. Ct. at 2783.

[53] *Id. Roberts*, 448 U.S. at 66.

[54] *Bourjaily*, 107 S. Ct. at 2783. The Court cites United States v. Gooding, 25 U.S 460 (12 Wheat. 1827), which was the first case adopting the agency theory of conspiracy in the United States. *Id.* The Court also cited *Glasser*, *Nixon*, and Delaney v. United States, 263 U.S. 586, 590 (1924). In *Delaney*, the Court held that on a prosecution for conspiracy, testimony of one conspirator as to what a deceased co-conspirator had told him during the conspiracy was admissible against a third party at the discretion of the trial judge. *Id.*

[55] *Bourjaily*, 107 S. Ct. at 2783 (footnote omitted).

[56] 315 U.S. 60.

[57] *Bourjaily*, 107 S. Ct. at 2783 (Stevens, J., concurring).

which did not require proof entirely by independent evidence before out-of-court declarations could be admitted.[58] He argued that this interpretation of *Glasser*, which would require only some, but not complete, proof *aliunde*, was consistent with the language of Rule 104(a). Therefore, Justice Stevens concluded that "[i]f . . . the drafters of Rule 104(a) understood the *Glasser* rule as I do, they had no reason to indicate that it would be affected by the new Rule."[59]

B. THE DISSENTING OPINION

Justice Blackmun, in the dissenting opinion,[60] disagreed with the majority on three points. First, Justice Blackmun did not agree that the Federal Rules of Evidence superceded the common law rule which required that preliminary questions be determined by independent evidence before a non-testifying co-conspirator's statements could be admitted.[61] Second, the dissent disagreed with the majority's conclusion that allowing a co-conspirator's statements to be considered in determining the preliminary question of the existence of a conspiracy would remedy problems of the statement's unreliability.[62] Third, Justice Blackmun asserted that the majority's reliance on the "firmly rooted hearsay exception" rationale which removed the requirement that a co-conspirator's statements be supported by an independent "indicia of reliability" was misplaced and, therefore, was in violation of the demands of the confrontation clause of the sixth amendment.[63]

1. The Federal Rules, the Common Law, and Conflict

Justice Blackmun's dissent focused first on the apparent conflict between the common law and the Federal Rules of Evidence. Justice Blackmun primarily contended that the plain meaning of Rule 104(a), which allows a court to consider any information in making preliminary factual determinations, should not be read without considering its legislative history and its interrelationship with Rule 801(d)(2)(E).[64] He agreed that the plain meaning of Rule 104(a)

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58 *Id.* (Stevens, J., concurring). Justice Stevens stated that "I have never been persuaded . . . that this interpretation of the *Glasser* rule is correct." *Id.* (Stevens, J., concurring). Justice Stevens subsequently discussed the more prevalent interpretation of the common law rule requiring independent evidence. *Id.* at 2783-84 (Stevens, J., concurring).

59 *Id.* at 2784 (Stevens, J., concurring)(footnote omitted).

60 Justice Marshall and Justice Brennan joined in the dissent.

61 *Bourjaily*, 107 S. Ct. at 2784 (Blackmun, J., dissenting).

62 *Id.* (Blackmun, J., dissenting).

63 *Id.* (Blackmun, J., dissenting).

64 *Id.* at 2785 (Blackmun, J., dissenting).

could not be ignored, but he asserted that an examination of the Rule's legislative history showed that Congress did not intend to change the independent evidence requirement.[65] Justice Blackmun deemed the Court's rigid approach to interpreting Rule 104(a) an "easy solution" to a difficult problem.[66]

The dissent then gave a brief history of the co-conspirator hearsay exemption which was codified in Rule 801(d)(2)(E).[67] Justice Blackmun noted that the exemption stemmed from principles of agency law, the concept being that all conspirators were agents of each other.[68] Under the approach, the dissent noted that a co-conspirator's statements had to be made " 'in furtherance of' " the conspiracy, " 'during the course of' " the conspiracy, and had to be supported by independent evidence.[69] Justice Blackmun cited the *Restatement of Agency* to demonstrate that the independent evidence requirement of the co-conspirator exemption directly corresponded to the agency concept in that "an agent's statement alone [could not] be used to prove the existence of an agency relationship."[70] On the basis of this history, Justice Blackmun concluded that the co-conspirator hearsay exemption differed from other common law hearsay exceptions because it was not based upon any particular guarantees of reliability or trustworthiness which would ensure the truthfulness of the admitted statement.[71] Instead, the dissent posited that the co-conspirator exemption stemmed from an " 'adversary system' " rationale; because statements made during the

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65 *Id.* (Blackmun, J., dissenting). Justice Blackmun stated that "[a]n examination of the legislative history of Rule 801(d)(2)(E) reveals that neither the drafters nor Congress intended to transform this requirement in any way." *Id.* (Blackmun, J., dissenting).

66 *Id.* (Blackmun, J., dissenting).

67 *Id.* (Blackmun, J., dissenting). For language of Rule 801(d)(2)(E), see *supra* note 2.

68 *Bourjaily*, 107 S. Ct. at 2785 (Blackmun, J., dissenting).

69 *Id.* at 2786 (Blackmun, J., dissenting)(citing Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1161 (1954)). The first requirement arose from the rationale that an agent's words could be attributed to his principal only as long as the agent was acting within the scope of his employment. *Id.* (Blackmun, J., dissenting). The second requirement accompanied the "in furtherance" feature in that a principal was only bound by his agent's words if an employment or business relationship was in existence in accordance with which the agent spoke or acted. *Id.* (Blackmun, J., dissenting).

70 *Id.* (Blackmun, J., dissenting). Section 285 of the RESTATEMENT (SECOND) OF AGENCY states that

> [e]vidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent.

RESTATEMENT (SECOND) OF AGENCY § 285 (1957).

71 *Bourjaily*, 107 S. Ct. at 2786 (Blackmun, J., dissenting).

conspiracy were really " 'vicarious admissions,' "[72] a party could not be deprived of the right to cross-examine himself or someone authorized to speak for him.[73] Additionally, the dissent noted that the co-conspirator exemption had a necessity justification because of the need for evidence in conspiracy prosecutions, thus permitting a lesser concern for reliability.[74]

Although Justice Blackmun recognized that the common law co-conspirator exemption had some guarantees of trustworthiness,[75] he argued that the independent evidence requirement was understood to contribute to the reliability issue.[76] Therefore, Justice Blackmun concluded that the Federal Rules of Evidence did not alter the common law hearsay exemption. By citing the language of Rule 801(d)(2)(E)[77] and certain Advisory Committee notes, the dissent asserted that Congress intended to retain the agency rationale and therefore did not intend to expand the scope of the common law rule in any way.[78] Justice Blackmun reasoned that the drafters of the Rules balanced the prosecutorial need for evidence against the defendant's need for protection from unreliable statements, which is a protection the independent evidence requirement provided.[79]

Justice Blackmun then considered Rules 801(d)(2)(E) and 104(a) together in an attempt to reconcile the apparent conflict in the language of both rules. Conceding that it would be difficult to

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72 *Id.* (Blackmun, J., dissenting)(citing MCCORMICK ON EVIDENCE § 267, at 787-88 (E. Cleary ed. 1984)).

73 *Id.* (Blackmun, J., dissenting)(citing MCCORMICK ON EVIDENCE § 262, at 775 (E. Cleary ed. 1984)).

74 *Id.* (Blackmun, J., dissenting)(footnote omitted).

75 *Id.* at 2787 (Blackmun, J., dissenting)(citing R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 395 (2nd ed. 1982)(conspirators are likely to know who the members of the conpiracy are and what they are doing)).

76 *Id.* (Blackmun, J., dissenting). Justice Blackmun stated that "[the independent evidence requirement] goes not so much to the reliability of the statement itself, as to the reliability of the process of admitting it: a statement cannot be introduced *until* independent evidence shows the defendent to be a member of an existing conspiracy." *Id.* (Blackmun, J., dissenting)(citing R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 395)(emphasis in original).

77 Specifically, Justice Blackmun cites the requirements that a co-conspirator's statements be made " 'by a coconspirator of a party during the course and in furtherance of the conspiracy.' " *Bourjaily*, 107 S. Ct. at 2787 (Blackmun, J., dissenting)(quoting FED. R. EVID. 801 (d)(2)(E)).

78 *Id.* (Blackmun, J., dissenting). See the Advisory Committee's note pertaining to Rule 801(d)(2)(E), which states that "[w]hile the broadened view of agency . . . might suggest wider admissibility of statements of co-conspirators, the agency theory is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." FED. R. EVID. 801(d)(2)(E) advisory committee's note.

79 *Bourjaily*, 107 S. Ct. at 2789 (Blackmun, J., dissenting).

arrive at a resolution which would satisfy the demands of both rules, he asserted that the purposes of both could be satisfied by retaining the independent evidence requirement for preliminary factual determinations.[80] As further support for the dissent's view, Justice Blackmun demonstrated that in the decade since the Federal Rules of Evidence were enacted, the courts of appeals had, almost uniformly, not found a conflict between the two Rules, nor had they interpreted Rule 104(a) to eliminate the independent evidence requirement as set forth in Rule 801(d)(2)(E).[81]

2. *Reliability Safeguard Lost*

The dissent's second disagreement with the Court's holding stemmed from the majority's contention that a co-conspirator's statement loses its unreliability when it is considered together with other evidence of conspiracy.[82] Justice Blackmun disagreed with the Court that a trial judge would be able to evaluate a declarant's statements for their evidentiary worth and detect any remaining unreliability.[83] The dissent objected to the assertion that a defendant could still protect himself by attacking the probative value of the statement after the statement was admitted under Rule 806.[84]

The dissent argued that because of the presumptive unreliability of co-conspirator statements, the Advisory Committee expressly retained the agency rationale for the hearsay exemption providing safeguards against unreliability, including the independent evidence requirement.[85] Consequently, Justice Blackmun reasoned that by allowing a statement to be considered along with other evidence in a determination of the statement's admissibility, the statement itself would most likely control the interpretation of whatever other evidence existed.[86] The dissent expressed concern that a co-conspira-

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80 *Id.* (Blackmun, J., dissenting). In light of the plain meaning of Rule 104(a), which gives great freedom to the trial court, and the apparent codification in Rule 801(d)(2)(E) of the common law co-conspirator exception, Justice Blackmun agreed with Saltzburg and Redden. *Id.* (Blackmun, J., dissenting)(referring to S.SALTZBURG & R.REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 735 (4th ed. 1986)). "One relevant preliminary factual question for Rule 104(a) analysis [should] be the following: 'Whether a conspiracy that included the declarant and the defendant against whom a statement is offered has been demonstrated to exist on the basis of evidence *independent of the declarant's hearsay statements*.'" *Id.* (Blackmun, J., dissenting)(quoting S.SALTZBURG & R.REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 735 (4th ed. 1986))(emphasis added).

81 *Id.* at 2789 & n.9 (Blackmun, J., dissenting).

82 *Id.* at 2790 (Blackmun, J., dissenting).

83 *Id.* (Blackmun, J., dissenting)(citation omitted).

84 *Id.* (Blackmun, J., dissenting). For a discussion of Rule 806, see *supra* note 44.

85 *Bourjaily*, 107 S. Ct. at 2790 (Blackmun, J., dissenting).

86 *Id.* (Blackmun, J., dissenting).

tor's statements would be relied upon heavily in cases in which the prosecution had inadequate independent evidence of the existence of conspiracy, thereby recreating the "bootstrapping" problem alleviated by the *Glasser* Court.[87] However, Justice Blackmun agreed with the Court's reservation of the question of whether a co-conspirator's statement alone could establish the existence of a conspiracy.[88]

3. The Confrontation Clause Problem

Justice Blackmun also disagreed with the Court's reliance on *Ohio v. Roberts*[89] in its determination that no independent indicia of reliability of a co-conspirator's statements were needed because the admissibility of such statements fell within "a firmly rooted hearsay exception."[90] He argued that Rule 801(d)(2)(E) was not a "firmly rooted hearsay exception" because traditional hearsay exceptions normally satisfied the reliability concerns of the confrontation clause.[91] Because the co-conspirator exemption had an agency-based rationale and not a reliability basis, the dissent argued that the central concern of the confrontation clause could not be satisfied.[92] Justice Blackmun posited that the "firmly rooted" language dealt with courts' experience in the use of an exception and whether, in past experience, the exception had proven to promote accuracy in the fact-finding process.[93] Justice Blackmun stated that the majority's analysis was inconsistent and contended that if the term "firmly rooted" indicated an underlying "indicia of reliability," the removal of one of the indicia of the co-conspirator exemption, namely, the independent evidence requirement, would undermine the firmly rooted status of the exemption.[94] Thus, the dissent ar-

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87 *Id.* at 2790-91 (Blackmun, J., dissenting). Justice Blackmun stated: "Thus, the Court removes one reliability safeguard from an exemption, even though the situation in which a co-conspirator's statement will be used to resolve the preliminary factual questions is that in which the court will rely *most* on the statement." *Id.* (Blackmun, J., dissenting)(emphasis in original). See *supra* note 32 for the definition of the "bootstrapping rule."

88 *Id.* at 2791 (Blackmun, J., dissenting).

89 448 U.S. 56 (1980).

90 *Bourjaily*, 107 S. Ct. at 2791 (Blackmun, J., dissenting)(citations omitted). In *Roberts*, the Court stated that in confrontation clause issues, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66.

91 *Bourjaily*, 107 S. Ct. at 2791 (Blackmun, J., dissenting).

92 *Id.* (Blackmun, J., dissenting). In *Roberts*, the concern was stated as being "the accuracy in the fact-finding process that cross-examination normally serves." 448 U.S. at 66.

93 *Bourjaily*, 107 S. Ct. at 2792 (Blackmun, J., dissenting)(citations omitted).

94 *Id.* (Blackmun, J., dissenting).

gued that the Court's reliance on the language in *Roberts* was misplaced in that it could not alter the traditional co-conspirator exemption and simultaneously avoid confrontation clause concerns.[95] Justice Blackmun stated that the pertinent language in *Roberts* followed the text quoted by the Court: " 'In other cases [where there is no firmly rooted hearsay exception], the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.' "[96]

IV. ANALYSIS

A close examination of the majority opinion in *Bourjaily*, particularly the confrontation clause analysis, creates the impression that the resolution of the conflict between the common law, Federal Rules 104(a) and 801(d)(2)(E), and the sixth amendment, is superficial. The Court concluded that under Rule 104(a), a co-conspirator's statements could be examined in making preliminary factual determinations pertaining to Rule 801(d)(2)(E) without first establishing the fact that a conspiracy existed by evidence independent of the statements sought to be admitted.[97] The Court also determined that the co-conspirator exemption from the hearsay rule was a "firmly rooted hearsay exception" which, under *Roberts*,[98] did not constitutionally mandate an inquiry into the statement's reliability.[99] Even conceding that the language of Rule 104(a) supports the holding in *Bourjaily*, the confrontation clause issue provides a stumbling block to the majority's analysis and reveals the largest flaw in the opinion's reasoning. Chief Justice Rehnquist incorrectly relied on the "firmly rooted hearsay exception" language. By categorizing the exemption as "firmly rooted," the majority conveniently sidestepped the demand of the confrontation clause that a co-conspirator's statement be supported by an "indicia of reliability."

The key inconsistency was the Court's use of the word "exception" instead of "exemption," the latter of which was what the Federal Rules deemed co-conspirator statements.[100] It was through this

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95 *Id.* (Blackmun, J., dissenting).

96 *Id.* (Blackmun, J., dissenting)(quoting *Roberts*, 448 U.S. at 66). Justice Blackmun also suggested that the confrontation clause might require a particularized reliability analysis in cases in which the prosecution is trying to use co-conspirator statements for the bulk of its case before such statements could be admitted. *Id.* at 2792 n.11 (Blackmun, J., dissenting).

97 *Id.* at 2782 (Blackmun, J., dissenting).

98 Ohio v. Roberts, 448 U.S. 56 at 65 (1980).

99 *Bourjaily*, 107 S. Ct. at 2783.

100 See FED. R. EVID. 801(d) advisory committee's note, which states that "[s]everal types of statements which would otherwise literally fall within the definition [of hearsay]

seemingly minor word substitution that the majority was able to arrive logically at its conclusion under the sixth amendment. The error is apparent when one considers the exception/exemption substitution that the majority used in its analysis of the constitutional issue. Reliability becomes the key factor. The fact is that the co-conspirator exemption from the realm of hearsay was not codified under Rules 803 and 804.[101] Rather, it was codified as non-hearsay. It is significant that the drafters of the Rules specifically labeled a co-conspirator's statements as an exemption. The word distinction is crucial to an understanding of the Rules and their underlying theories. The Advisory Committee noted that evidence falling under a hearsay exception is admissible because of its underlying guarantees of trustworthiness.[102] The co-conspirator exemption, however, does not fall into that category of sufficient reliability, even though, technically, co-conspirator statements are hearsay.[103] This is because the co-conspirator exemption is based on the agency theory and not on any underlying indicia of reliability, as are the other hearsay exceptions.[104] The Advisory Committee pointed out in the note discussing Rule 801(d)(2)(E) that the basis for the Rule

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are expressly excluded from it." *Id.* The co-conspirator exemption is listed under FED. R. EVID. 801(d)(2)(E).

101 Rule 803 sets out the list of exceptions to the hearsay rule, which are admissible even though the declarant is available as a witness. FED. R. EVID. 803. The Advisory Committee's note states that the rationale behind the hearsay exceptions is that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." *Id.* at advisory committee's note. Rule 804 also sets out exceptions to the hearsay rule. FED. R. EVID. 804. For the Rule 804 exceptions, however, it is first necessary to show that the declarant is unavailable. *Id.* The Advisory Committee's note to Rule 804 states that the rule proceeds on the theory that "hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard." *Id.* at advisory committee's note. The notes suggest that the hearsay rule is one of preference for in-court testimony, but, if hearsay is of a particular quality, it "is preferred over complete loss of the evidence of the declarant." *Id.* at advisory committee's note. Neither Rule 803 nor Rule 804 is applicable without a preliminary showing of the declarant's first-hand knowledge. *See* FED. R. EVID. 602. Rule 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. . . ." *Id.*

102 *See supra* text accompanying note 91.

103 "Hearsay" is defined in Rule 801 as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801. Thus, a non-testifying conspirator's out-of-court statement used against a fellow conspirator at trial or other judicial proceeding to prove the existence of a conspiracy would fall under the technical definition of hearsay. *But see Fed. R. Evid.* 801 (d)(2)(E) (co-conspirators' statements are a hearsay exemption).

104 *Bourjaily*, 107 S. Ct. at 2785 (Blackmun, J., dissenting). Agency theory is one of vicarious liability in which a principal is held to be responsible for the acts and words of

was still the agency theory.[105] Thus, Rule 801(d)(2)(E) was enacted for different reasons than Rules 803 and 804, in which the reliability of certain types of evidence would be sufficient if cross-examination were not possible. It follows that labeling Rule 801(d)(2)(E) as *not hearsay* was an intentional differentiation between two types of hearsay evidence which have different rationales and sets of considerations.

Realizing this distinction invalidates the majority's use of the word "exception" in reference to Rule 801(d)(2)(E) and the Court's reliance upon the "firmly rooted exception" language in *Roberts*.[106] The dissent correctly analyzed *Roberts* as basing the "firmly rooted" requirement on reliability. Because the confrontation clause was concerned with "accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence,"[107] hearsay statements were admissible only if they bore "adequate indicia of reliability."[108] If the co-conspirator exemption was not based upon underlying reliability, the Court could not then decide that a co-conspirator's statements would become a "firmly-rooted hearsay exception." In turn, such statements would not acquire reliability that they did not possess, and an independent inquiry into the statements' trustworthiness would be required.[109]

Consequently, Justice Rehnquist's assertion that the court of appeals correctly held that the requirements for admission under Rule 801(d)(2)(E) and under the confrontation clause were identi-

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his agent while the agent is acting within the scope of his employment. The RESTATEMENT (SECOND) OF AGENCY states that

> [e]vidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or . . . within the apparent authority or other power of the agent.

RESTATEMENT (SECOND) OF AGENCY § 285 (1957).

105 The Advisory Committee's note states that "[w]hile the broadened view of agency . . . might suggest wider admissiblity of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." FED. R. EVID. 801(d)(2)(E) advisory committee's note (citations omitted).

106 448 U.S. at 66 (1980).

107 *Id.* at 65.

108 *Id.* at 66 (citations omitted). It would be safe to suggest that the implication of this statement is that the exceptions set forth in Rule 803 could pass constitutional muster because they were based on guarantees of trustworthiness.

109 *Bourjaily*, 107 S. Ct. at 2792 (Blackmun, J., dissenting). The majority "cannot transform the exemption, . . . *and* then avoid Confrontation Clause concerns by conjuring up the 'firmly rooted hearsay exception' as some benign genie who will extricate the Court from its inconsistent analysis." *Id.* (emphasis in original).

cal[110] was also in error. Authorities discussing the hearsay rule and the confrontation clause have stated emphatically that the hearsay rule does not exactly codify the confrontation clause.[111] This idea also is evident in the Federal Rules of Evidence. The Advisory Committee's note introducing the hearsay rule generally expresses the accepted belief that the confrontation clause extends beyond the scope of and is separate from the hearsay rule.[112] Thus, even though the confrontation clause and the hearsay rule were "generally designed to protect similar values,"[113] the clause and the rule do not have identical standards as the majority posited; therefore, Rule 801(d)(2)(E) is even further removed from meeting the standards of the confrontation clause by virtue of its non-hearsay status. It follows that if Rules 803 and 804, which are reliability-based exceptions to the hearsay rule, can still be subject to the stricter standards of the confrontation clause, statements falling under Rule 801(d)(2)(E) should merit even closer scrutiny. If the purpose of the confrontation clause is to preference face-to-face accusation and therefore establish a "rule of necessity"[114] in which only hearsay marked as trustworthy can substitute for cross-examination, then the co-conspirator exemption cannot fit neatly under that reliability umbrella. For constitutional purposes, an independent inquiry into a co-conspirator statement's trustworthiness would be in order.[115] Even though the independent evidence requirement that a conspiracy be established prior to admitting a co-conspirator's statements

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110 *Id.* at 2782.

111 In California v. Green, the Court stated that "it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." 399 U.S. 149, 155 (1969). *See also* Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay,* 53 FORDHAM L. REV. 1291, 1294 (1985). "In most cases, the Confrontation Clause affords the criminal defendant greater protection than the hearsay rule was intended to offer." *Id.* (footnote omitted).

112 FED. R. EVID. 801 advisory committee's note, introductory note: The Hearsay Problem. The Advisory Committee's note states that "under the recent cases the impact of the [confrontation] clause clearly extends beyond the confines of the hearsay rule." *Id.* The note continues:

> [i]n recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them . . . the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.

Id. The note suggests, then, that even the reliability-based hearsay exceptions could be subject to constitutional scrutiny. *See id.*

113 *Green,* 399 U.S. at 155.

114 *Roberts,* 448 U.S. at 65.

115 See Dutton v. Evans, 400 U.S. 74, 88-89 (1970), for one possible reliability factor analysis of out-of-court hearsay statements.

does not go to the reliability of the statement itself, the dissent is intuitively correct in its assertion that by taking away the independent evidence requirement under Rule 801(d)(2)(E), one of the few safeguards against unreliability that the exemption possesses is lost.[116] As a result, the "bootstrapping" problem is recreated. It is realistic to believe that by opening the door to the "bootstrapping" possibility by allowing co-conspirators' statements to be considered in their own admissibility determinations, a judge will likely give more weight to the hearsay statements, will bolster otherwise weak independent evidence, and, thus, will admit the statements at trial. In turn, such admissions will most likely lead to convictions.

The confrontation clause analysis in *Bourjaily* directly conflicts with the Court's holding as to the conjunctive interpretation of Rules 104(a) and 801(d)(2)(E).[117] Ultimately, the Constitution should take precedence over evidentiary rules. It is necessary for a defendant to be able to confront witnesses against him. Thus, public policy supports a conjunctive interpretation of both Rules as allowing a judge to consider any relevant evidence in the making of preliminary factual determinations prior to the admission of a co-conspirator's statements related to Rule 801(d)(2)(E); however, this process should not apply to the hearsay statements sought to be admitted. The co-conspirator's statements should first be subject to a reliability test or, alternatively, independent evidence should be required to establish the existence of the conspiracy so that the statements themselves are not the basis for a conspiracy conviction once they are presented to the jury.

Though the Court's holding seems to be supported by the plain language of Rule 104(a) and by the fact that Congress enacted the Federal Rules of Evidence subsequent to the "bootstrapping rule" decision set out in *Glasser*,[118] the holding in *Bourjaily* is inconsistent. The majority reasoned that regardless of the rule laid down by those cases, the Federal Rules superceded the common law.[119] The ma-

116 *See Bourjaily*, 107 S. Ct. at 2792 (Blackmun, J., dissenting).

117 The Court's interpretation removed the independent evidence of conspiracy, which at common law was required before a co-conspirator's statement could be admitted. *Id.* at 2782.

118 315 U.S. 60. See *supra* note 32, which sets out the bootstrapping rule. Congress enacted the Federal Rules of Evidence in 1975, and *Glasser* was decided in 1941. The decision reaffirming the bootstrapping rule, United States v. Nixon, 418 U.S. 683, was decided in 1973.

119 *Bourjaily*, 107 S. Ct. at 2780. The majority agreed that the *Glasser* and *Nixon* decisions could be interpreted as requiring a showing of independent evidence of a conspiracy before a co-conspirator's statements could be admitted and acknowledged that the courts of appeals have generally interpreted those decisions as holding such. *Id.* Chief Justice Rehnquist wrote that

jority, however, too broadly interpreted Rule 104(a) and its accompanying Advisory Committee's note, in stating that the language was clear that the drafters intended to abolish the "bootstrapping rule" through Rule 104(a).[120] It is not a plausible reading of the Advisory Committee's note to Rule 104(a) that the drafters intended to specifically abolish the "bootstrapping rule" as it related to Rule 801(d)(2)(E). The drafters simply set up a general rule dealing with preliminary issues that would be triggered by the other, more specific rules, not only Rule 801(d)(2)(E).[121] The purpose of Rule 104(a) is to allow a judge to efficiently resolve preliminary matters without being constrained by exclusionary principles.[122] The dissent correctly asserted that each Rule cannot be read in isolation, because the Rules are all interrelated and must be interpreted in the context of each other.[123] When one has two Rules to interpret and apply simultaneously, as in *Bourjaily*, the policies behind each one

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> [r]ead in the light most favorable to petitioner, *Glasser* could mean that a court should not consider hearsay statements at all in determining preliminary facts under Rule 801(d)(2)(E). . . . The Courts of Appeals have widely adopted [this] view and held that in determining the preliminary facts relevant to co-conspirators' out-of-court statements, a court may not look at the hearsay statements themselves for their evidentiary value.

Id.

Chief Justice Rehnquist also posed the theory that no conflict actually existed between *Glasser* and the Federal Rules if one interpreted *Glasser* less stringently. The Chief Justice stated that "*Glasser*, however, could also mean that a court must have *some* proof *aliunde*, but may look at the hearsay statements themselves in light of this independent evidence to determine whether a conspiracy has been shown by a preponderance of the evidence." *Id.* (emphasis in original). The latter interpretation goes against the plain language of the "bootstrapping rule" because "proof *aliunde*" literally means evidence "from another source; from elsewhere, from outside." BLACK'S LAW DICTIONARY 68 (5th ed. 1979).

120 In citing the Advisory Committee, Chief Justice Rehnquist asserted that "this language makes plain the drafters' intent to abolish any kind of bootstrapping rule. Silence is at best ambiguous, and we decline the invitation to rely on speculation to import ambiguity into what is otherwise a clear rule." *Bourjaily*, 107 S. Ct. at 2781 n.2.

121 *See generally* FED. R. EVID. 104 advisory committee's note.

122 The Advisory Committee queried that " '[s]hould the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other *reliable hearsay*.' " FED. R. EVID. 104 advisory committee's note (quoting MCCORMICK ON EVIDENCE § 53 n.8, at 123)(emphasis added). It is interesting to note that this quote specifically mentions reliability in its example of what relevant evidence a judge should view. This quote from the Advisory Committee's note supports the interpretation that co-conspirators' statements should not be viewed by a judge, even though relevant, because of inherent unreliability of the statements. *See id.*

123 *Bourjaily*, 107 S. Ct. at 2785 (Blackmun, J., dissenting). The dissent cited Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 908 (1978)("the answers to all questions that may arise under the Rules may not be found in specific terms in the Rules"). 107 S. Ct. at 2785. (Blackmun, J., dissenting).

have to be considered and dealt with. It was unreasonable for the Court to separate Rule 104(a) from the language of Rule 801(d)(2)(E), the latter of which codified the common law and specifically retained the underlying agency rationale.

At common law, the co-conspirator exception to the hearsay rule had generally been supported by a theory similar to that of agency. A conspiracy was viewed as a relationship of mutual agency with statements made by one conspirator treated as vicarious admissions of the other conspirators.[124] By definition, a conspiracy means that two or more persons agreed to do an illegal act or to do a legal act in an illegal manner.[125] Because the conspiracy was a common undertaking, all of the conspirators were theoretically "agents" of each other, so that acts and statements of one could be attributed to the other.[126]

Another rationale underlying the co-conspirator exception is the necessity theory.[127] Because conspiracies are necessarily secretive operations, which, for the most part, are geared towards the commission of some of the worst types of crimes, the co-conspirator exemption was created to give prosecutors greater freedom in prosecuting conspirators.[128] Also, without admitting into evidence the co-conspirators' out-of-court statements, conspiracies would be difficult to prove at trial.[129]

Nevertheless, the exception consisted of three elements which had to be met before co-conspirator hearsay statements were admitted. Each element reflected an agency basis.[130] A co-conspirator's statement had to be made "during the course or *pendency*" and "in *furtherance* of" the conspiracy's objective, and, before a statement could be admitted, it had to be supported by evidence independent of the conspiracy and of the defendant's participation therein.[131]

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124 Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972). Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. . . ." RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

125 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 427 (1980).

126 *Id.*

127 Davenport, *supra* note 124, at 1384-85.

128 D. LOUISELL & C. MUELLER, *supra* note 125. In light of the necessity rationale behind the co-conspirator exemption from the realm of hearsay of Rule 801(d)(2)(E) and Rule 104(a)'s efficiency basis, the two rules are compatible in that both serve to expedite the trial process.

129 Note, *supra* note 111, at 1291.

130 *Bourjaily*, 107 S. Ct. at 2786 (Blackmun, J., dissenting).

131 Davenport, *supra* note 124, at 1385 (emphases in original). The "during the course" requirement arose from the agency idea that the agent's words could only be attributed to his principal if the agent was acting while in a business or employment

Rule 801(d)(2)(E), which codified the common law, specifically retained the agency basis. The existence of the agency basis is evident in the Rule's language: "a statement is not hearsay if . . . [it] is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."[132] By implication, a preliminary fact to be determined before the Rule would become applicable is whether a conspiracy existed and whether the defendant participated in that conspiracy. Although the independent evidence requirement was not explicitly set forth in the Rule, it is a most plausible interpretation, in light of the non-reliability basis for the Rule, that the conspiracy would first have to be established before a hearsay statement could be considered.[133] In fact, the Advisory Committee expressly asserted that the co-conspirator exemption under Rule 801(d)(2)(E) should not "serve as a basis for admissibility beyond that already established,"[134] thus giving support to the conclusion that under the Rule, the common law requirements for admissibility, including the independent evidence requirement, were intended to be left intact.

This interpretation of the co-conspirator exemption under Rule 801(d)(2)(E) does not conflict with that of Rule 104(a). A judge is still able to hear all other relevant evidence to determine the existence of a conspiracy. Indeed, one authority mentions that because the amount of independent evidence required to establish the fact of conspiracy is so slight, a prosecutor would still be able to get the statements into evidence the majority of the time.[135] Yet, even if there is a great public desire to convict conspirators, this desire cannot allow a defendant's confrontation rights to be affected by allowing unreliable out-of-court hearsay statements to be used to determine the statements' admissibility. In light of the confrontation clause, the independent evidence requirement, which is an in-

relationship with his prinicipal. *Bourjaily*, 107 S. Ct. at 2786 (Blackmun, J., dissenting)(citations omitted). The "in furtherance" requirement is considered a qualification of the pendency requirement in which "a statement cannot strictly be in furtherance of a conspiracy without being made during the conspiracy's pendency." Davenport *supra* note 124, at 1387. Thus, the agency rationale behind this requirement was that an agent's acts or words could be attributed to his principal if the agent was acting within the scope of his employment. The final component, the independent evidence requirement, was based on the agency principle that "an agent's statement cannot be used alone to prove the existence of the agency relationship." *Bourjaily*, 107 S. Ct. at 2786 (Blackmun, J., dissenting).

132 FED. R. EVID. 801 (d)(2)(E).

133 *See supra* notes 101-05 and accompanying text.

134 *See* FED. R. EVID. 801(d)(2)(E) advisory committee's note.

135 Davenport, *supra* note 124, at 1388.

herent protective safeguard for a defendant, should not be pushed aside on expediency grounds.

V. CONCLUSION

The sixth amendment provides that a defendant is entitled to confront witnesses against him. When an adverse witness is unavailable to testify and the prosecution tries to admit co-conspirator hearsay statements to prove the existence of the conspiracy, the confrontation clause demands that the statements be subject to an independent inquiry as to their reliability. Because out-of-court co-conspirator statements have never been admitted on a reliability basis, but rather on an agency theory, the Supreme Court in *Bourjaily* made a grave error in holding that the co-conspirator exemption from the realm of hearsay evidence was such a "firmly rooted hearsay exception" that an inquiry into the trustworthiness of the co-conspirators' hearsay declarations was not required. The independent evidence requirement as maintained in the Federal Rules of Evidence constitutes one safeguard against unreliability that the co-conspirator exemption possessed. The removal of that requirement by the *Bourjaily* Court directly conflicts with the demands of the confrontation clause and counters the intent of the drafters of the Rules in their retaining of the agency basis for the co-conspirator exemption. The "plain meaning" of Rule 104(a) notwithstanding, maintaining the independent evidence requirement under Rule 801(d)(2)(E) is necessary to protect a defendant's rights under the sixth amendment if he is not able to cross-examine an adverse witness.

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