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NEW ANSWERS TO AN OLD PROBLEM: THE EXTRAJUDICIAL STATEMENT IN CONSPIRACY-TYPE PROSECUTIONS

by MELVIN B. LEWIS*†

INTRODUCTION

In 1934, Clarence Darrow rendered a memorable admonition:

> If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States.[1]

In 1957, the Supreme Court of the United States, with some asperity, reminded the prosecutorial agencies that it had "repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."[2]

Today, a scant ten years before 1984, and notwithstanding *Bruton*,[3] no lawyer defending a conspiracy case could ask for a more singular advantage than to be permitted to practice under the doctrines with whose unfairness the Supreme Court expressed impatience in 1957. To be governed by the rules which Darrow thought onerous would mark a meaningful advance for the cause of civil liberties.

It would be nothing more than an exercise in supercilious pedantry to cite to criminal defense lawyers the numerous doctrinal perversions which have arisen under the rubric of "conspiracy." A gentle reminder of the existence of the "slight evidence" formula should suffice to evoke rueful shudders of recognition. Routinely, citizens are judged guilty of having conspired with people whom they never imagined to exist, on

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[1] C. DARROW, THE STORY OF MY LIFE, 64 (1934).
[2] Grunewald v. United States, 353 U.S. 391, 404 (1957).
[3] Bruton v. United States, 391 U.S. 123 (1968).

evidence which would have been rejected by Star Chamber, followed by jury instructions which would have been deemed unfair at a Klan meeting.

The defense bar must bear its share of blame for these developments. Law is not made by judges alone. A judicial decision is *always* the product of a group effort. The group consists of the judge(s) and the contending lawyers. Established precedent is almost always a factor but almost never the only factor in the decision. Of equal importance are the skill and bias of the judge; the voice of the public, heard in the courtroom through the press and special interest groups; and the ability, resourcefulness, dedication, and persuasiveness of the lawyers.

In that latter respect, the defense bar has largely failed. Too many crucial cases have been handled by dilettantes, by sincere and capable appointed counsel working outside their fields of specialty, and by lawyers whose efforts reflected the payment of uninspiring fees. On too many occasions, a completely atomistic defense bar, composed of the world's most uncompromising individualists, has presented test cases against a viscerally repugnant factual background which would have challenged the objectivity of a computer. Predictably, in such cases the courts' determinations of the defendant's rights have reflected a preoccupation with his wrongs.

A defense lawyer contributes to the problem every time he approaches a conspiracy case on the assumption that, in the aspect of vicarious declarations, all prosecutions are fundamentally alike; that all statements are governed by the same principles; and that the fundamental wrong is the admission of hearsay, so that the hearsay objection becomes the appropriate response. None of these assumptions is tenable, and each of them is largely responsible for the degenerative effect of conspiracy law upon individual rights.

Against that dismal effort, the prosecutive machinery has mounted a coordinated attack which has moved steadily and implacably forward on every front. Carefully selecting its test cases, its judicial forums and its personnel, it has made intelligent presentations which have been broadly accepted by the courts, the legislatures and the public. Each victory provides a platform from which the next attack is prepared.

Accordingly, the prosecution scores repeated breakthroughs. Spokesmen for individual liberties — and for better or worse, that is what we are — stand by impotent, little more than spectators, as one right after another falls before the snowball advance of "law and order." With each passing year, the job

of the defense lawyer comes more and more to resemble that of the nurse attending the terminal patient, a mere observer lacking the power to heal, but following through the ritual and making the patient as comfortable as possible while he progresses along the inevitable course.

There are many things that can be done to ameliorate the oppressive qualities of the conspiracy doctrine. But just as the doctrine developed gradually, so must the remedial measures.

I propose no panacea. But I do propose a step which I believe will be a meaningful one. It is necessarily something of a departure from present practice. But listen, anyway. That's only fair.

On the other end, proponents of prosecutive theories can always find listeners. Even the Assistant U.S. Attorney in Chicago who came up with the notion that Rule 16[4] requires pre-trial disclosure only of the defendant's *answers* given in response to interrogation, but not of the *questions* which evoked those answers, found someone willing to listen. And now his appreciative audience includes two District Judges.[5]

THE PROBLEM

The following sequence is all too poignant to the criminal defense lawyer.

The client is on trial for conspiracy to violate the narcotics laws. An addict takes the stand as a prosecution witness and testifies that he went to a third person to obtain heroin. He had a conversation with the seller. The prosecutor asks the witness to relate that conversation. The defense lawyer objects that the conversation is inadmissible hearsay. The objection may take the form of a claim that the evidence has not properly linked the client to the transaction. The trial judge overrules the objection, perhaps on the basis of a promise by the prosecutor to provide the necessary linkage by subsequent testimony.

The witness proceeds to testify that the seller told him he would have to get the heroin from the client; that the seller left, and returned shortly, saying that he had obtained the heroin from the client, and mentioning certain financial demands by the client; and that the witness and the seller then discussed the greedy propensities of the client and his shadowy, unnamed associates.

At this point, the client has A PROBLEM. And the problem is compounded by the fact that a reviewing court will almost certainly say that the evidence was properly admitted.

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[4] FED. R. CRIM. P. 16.

[5] See United States v. Capra, 72 CR 907 (7th Cir. 1972); United States v. Rivers, 73 CR 627 (7th Cir. 1973).

If the defense lawyer is particularly eloquent and persuasive in his objection, he may win a concession, particularly in a multiple-defendant case: the judge may admit the evidence subject to later connection with the client. In that case, although he does not know it yet, the client has AN EVEN WORSE PROBLEM. For inevitably, the time will come when the judge will instruct the jury that the prosecution evidence has connected the client with the conversation, so that the conversation is now properly to be considered against him, subject to some incomprehensible philosophical propositions. The reader need only look at the instruction given in *United States v. Allegretti*[6] to get an idea of the extent of the client's difficulty. A not-guilty verdict is not even a theoretical possibility in any trial in which such an instruction is given. For all practical purposes, the instruction advises the jury that the defendant is guilty.

And the client, through counsel, asked for it. He made the wrong objection.

His only consolation is that everybody does it.

THE SOLUTION

Obviously, there is no single answer to the many problems caused by the basic unfairness of the conspiracy-type prosecution. But there is one obvious step that we should all take as quickly as possible, to rectify past shortcomings which have

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[6] 340 F.2d 254 (7th Cir. 1964).

In the discussion of conspiracy cases, it is often difficult to distinguish between satire and scholarship. In the middle of the trial, the *Allegretti* jury received the following instruction (340 F.2d 243, 245) which was approved by the Seventh Circuit *en banc* (340 F.2d 254, 256):

> Ladies and gentlemen, will you please give me your attention:
>
> From time to time objections have been made by defendants to testimony as to acts, conversations, and statements, had or made by one or more of the defendants, but out of the presence of the other defendants. Whenever such objections have been made, I have reserved my ruling thereon, upon the Government's avowal to connect up such testimony.
>
> I now rule that *the Government* has sustained its avowed burden, and *has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement and the several defendants.* (emphasis supplied) [by the court].
>
> At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.
>
> I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against such other defendants who were not then present, as well as against those defendants who are shown by the testimony to have been then present and participating in such arguments, statements, and conversations.
>
> Now, of course, this ruling is in regard only to the matters which the Court reserved from time to time. . . .

contributed significantly to the expansion of the so-called "co-conspirator exception to the hearsay rule."

In short, we must recognize the severe limitations of the hearsay objection, and stop using it as a matter of instinct. There are relatively few situations in which it is helpful, and many in which it is harmful.

Object to the third-party statement on the *proper* ground — which is seldom hearsay — if an objection is necessary and appropriate. If not, *make no objection whatever.*

Wonderful things will happen to you.

The prosecution may still win the case, but at least you won't lose it.

And the odds against you are reduced substantially.

THE RATIONALE

The foregoing advice will sound like heresy to many experienced lawyers. In conspiracy-type prosecutions involving vicarious accountability, the stock objection of lack of connection with the client, which effectively translates to the hearsay objection, is second nature to the defense lawyer.

But in most cases, it is a move which either accomplishes nothing, or which has a destructive effect on the defense position.

With your indulgence, let us revert momentarily to the basic principle underlying the admissibility of vicarious declarations. They are admitted because, in theory, they are statements effectively made by the client himself through the mouth of his agent, the actual declarant. That agency is established when it is shown that the client joined with the declarant in a plan to commit a crime, or that he solicited or aided the declarant in such an endeavor. For convenience, we will use the generic term "conspiracy" to cover all these situations.

The hearsay objection urges that the statement of the declarant is inadmissible against the client, because the client was not present when it was uttered. But that objection has no validity whatever *if* the client authorized the declarant to make the statement.

The law says that the client did exactly that if the prosecution can present *any* evidence tending to indicate that the client conspired with the declarant to commit a crime and if the making of the declarant's statement tended to further the criminal venture. In most cases, that is nothing but a fiction. Perhaps some day, we will be able to replace it with honesty. If the "agency" concepts of criminal law were applied in the realm of commerce, a taxicab company would be liable for its

employees' golf-cart accidents. But in the present state of the law, no knowledgeable lawyer would challenge PROPOSITION I except on grounds of understatement.

PROPOSITION I

The prosecution almost always has a prima facie case of conspiracy.

As a practical proposition, a prosecutor will not indict if he has nothing more to offer against a defendant than a vicarious declaration by an accomplice.

If you encounter such a case, the hearsay objection to the vicarious declaration would serve a real purpose. But how many such cases have you found, or even heard of?

If the prosecutor has anything more than that — and he always does — it becomes a prima facie case of conspiracy against your client, which makes the hearsay objection inappropriate.

How many cases have you heard of in which a significant vicarious declaration was excluded as hearsay?

And how many cases have come to your attention, in which there has been a mistrial or a reversal because of the evidentiary introduction of a vicarious declaration in violation of the hearsay rule as such? True, such reversals have occurred in a few cases involving admission of mere narrative statements not furthering the alleged conspiracy. But I can find no reversal predicated on a purely evidentiary error caused by failure to connect the client to the declarant. Exclusion of the evidence on hearsay grounds would necessarily mean that no connection had been shown between the criminal declarant and the client. Thus, if the declarant were a conspirator — as he must be if his statement is to qualify under the co-conspirator rule — exclusion of the evidence for lack of connection would be tantamount to a finding that the client is not a conspirator, and compels a directed acquittal or reversal for lack of evidence, rather than mere exclusion of evidence or remand because of an evidentiary error.

The objection that the client has not been shown to be connected with the criminal declarant is nothing more than a hearsay objection. The hearsay objection almost never works in these cases. The new proposed Federal Rules of Evidence[7] reflect a judicial tendency to weaken the hearsay rule even further.

[7] Proposed *Federal Rules of Evidence*; H. R. 5463, 93d Cong., 1st Sess. (Nov. 15, 1973).

Yet, the defense bar persists in its hearsay or "lack of connection" objection to vicarious declarations in conspiracy-type cases, almost as a knee-jerk reaction.

Because it is legally unsound in most cases, a hearsay objection normally will not help the client and will frequently harm him under the *Allegretti* doctrine.[8] If there is any evidence in the record — and there always is, sooner or later — from which the jury could conclude that your client is a conspirator, then the prosecutor is legally entitled to introduce the evidence *over a hearsay objection.* He has introduced evidence that the declarant was the conspiratorial agent of your client and that becomes a foundation for introduction of the statement, which, under the prosecution's theory, the client himself made through his agent, the declarant.

In most cases, the hearsay "lack of connection" objection attacks the prosecution at its strongest point. Accordingly it invites, and frequently achieves, disaster.

It takes considerable detachment to recognize the existence of evidence sufficient to make a prima facie showing of the client's participation in a conspiracy with the declarant. One reason for the difficulty is the bizarre state of the law of conspiracy, which can sometimes appear to create criminality out of thin air.

The lawyer who sincerely believes that a prima facie case of conspiracy cannot be made as to his client may properly adhere to the hearsay type of objection to the vicarious statement. Hopefully, he will see fit to refine that approach by employing the special objecting techniques and by invoking the *Dutton*[9] doctrine discussed at a later point in this article.

But the lawyer who recognizes the existence of a prima facie case against his client which does not depend solely upon the third-party declaration for its existence, would do well to abandon the hearsay objection and commence an analysis of his case and of the third-party statement offered against him.

Which brings us to . . . .

PROPOSITION II

If the third party's statement does not identify your client, don't worry about it.

All vicarious declarations are not alike. There are those which identify your client, and those which do not.

If the statement does not identify your client, you normally

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[8] See text accompanying note 6 *supra.*

[9] Dutton v. Evans, 400 U.S. 74 (1970). For a more in depth discussion of *Dutton* see text accompanying note 15 *infra.*

have no ground or reason for objection. Not even a post-arrest confession by a co-defendant (which is not even arguably a statement in furtherance of the conspiracy) is properly objectionable, if it is edited in such manner as to eliminate all reference to your client.

There is a mammoth difference between the third-party who says "I got a delivery of good stuff today" and the one who says "I got a delivery of good stuff from your client today." The latter makes an accusation against your client; the former does not. The first statement has a built-in safeguard against prosecutive abuse: The jury could not possibly hold your client responsible for that statement without satisfactory extrinsic evidence of his guilt. The second statement, on the other hand, may cause the jury to believe your client to be guilty on the basis of raw hearsay.

Of course, there are occasions when objection should be made to the non-identifying statement. But those occasions arise only when you could tenably object to the statement if your own client had made it. Examples are references to unrelated crimes or other inherently prejudicial and irrelevant matter.

Otherwise, you have not been hurt unfairly. Don't worry about it. You have no legal basis of objection, so don't say something that will weaken the force of your objection to the truly improper evidence.

With that point out of the way, it becomes possible to state Proposition III in a meaningful and accurate context.

PROPOSITION III

In terms of conspiratorial attribution or third-party statements, there are only two types of prosecutions, and only two types of statements.

For purposes of this explanation, I assume that the prosecution is attempting to introduce evidence of an accusatory statement made in furtherance of an alleged conspiratorial objective, and not a mere narrative. I also assume that the declarant has been or will be shown, by some evidence, to occupy a relationship with the client in which the law will assume criminal agency — and not, for example, a casual buyer-seller relationship.

Assuming that the lawyer is faced with a technically reasonable claim of criminal agency as the basis for introduction of the statement, then, for this purpose, there are only two basic

types of conspiracy prosecutions, and only two basic types of accusatory third-party statements.

Please remember that we speak of conspiracy prosecutions and conspiratorial declarations, *not* of conspiracies. There is only one type of conspiracy: An agreement to commit a crime. A major key to the intelligent defense of conspiracy prosecutions is the clear understanding that a conspiracy is an act, not a group.[10]

The two types of conspiracy prosecutions are:

Type 1: Those in which the declarant is *not* among the co-defendants on trial with your client. Of course, all prosecutions of a single defendant will fall within this category; but so will many multiple prosecutions.

Type 2: Those in which the declarant *is* a co-defendant on trial with the client.

The two types of accusatory statements with which we must be concerned are:

Type A: The statement is made in furtherance of the alleged conspiracy-type relationship, but is *not* pleaded or referred to within the indictment itself.

Type B: The statement *is* pleaded within the indictment, either as an overt act in pursuance of the conspiracy or as a substantive crime in itself — *e.g.*, an act of fraud or extortion — related to the conspiratorial objective.

And now to a consideration of the proper objections. Not surprisingly, the recommendation depends on whether the case is Type 1 or Type 2, and on whether the accusatory statement is Type A or Type B.

PROPOSITION IV

There are four available alternatives in objecting to the vicarious declaration. You can get a lot of mileage out of making the proper choice.

As we are all aware, a general objection says nothing of legal moment, and normally furnishes no basis for a claim of error if the objection is overruled.[11]

There are basically four choices for the lawyer confronted with a vicarious declaration. These are:

(1) *The Hearsay Objection:* We have already considered this tactic earlier in this discussion. It is the technical basis for exclusion of the mere narrative statement which does not further the conspiracy, since such a statement is not made by the declarant as agent for the client. Also, since evidence admitted without restriction can be considered for any purpose, a third-

[10] *See, Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 934-35 (1958-59).

[11] *See, e.g.*, proposed *Federal Rules of Evidence*, *supra* note 7, Rule 103(a)(1).

party statement accusing the client constitutes substantive evidence of the client's guilt. For that reason, the objection must be made if the lawyer is reasonably confident that there is no extrinsic evidence of his client's guilt. Failure to make the hearsay objection under those circumstances can result in a valid conviction on incompetent evidence. Therefore, the defense lawyer may have no choice but to object on hearsay grounds, even at the expense of possibly causing an *Allegretti*-type remark or instruction by the judge.

Two techniques available at the *limine*-motion stage can be helpful to the defense lawyer in this situation:

(1) Your Honor, from time to time it will be necessary that I object to evidence of vicarious declarations on the grounds that, in my opinion, the declarant has not been shown by competent evidence to have entered into a relationship with my client which would justify the invocation of the co-conspirator exception to the hearsay rule. That is rather a lengthy formula to recite in the presence of the jury; it may tend to interrupt the proceedings unduly, and to distract the questioner, the witness and the jury. Accordingly, in such situations, I shall simply say "Objection 'A', your Honor." The Court and counsel will be aware of the meaning of that objection, and this statement will establish that meaning for the record. If the objection is overruled I herewith consent that such ruling will be understood to imply the words "subject to later connection" if such connection is necessary.

(2) (Same prelude as (1) above, down through "distract the questioner, the witness and the jury." Then proceed as follows:) I am confident that the prosecutor would not attempt to introduce any such statement unless he held the bona fide belief that he will be able to connect it properly to my client by competent testimony. I am reluctant to press repeated objections which will require conditional rulings by the court, and perhaps be misunderstood as reflecting adversely upon the good faith of the prosecutor. Accordingly, I request that I be permitted to make, and do herewith make a standing objection to all such third-party declarations, which the court can rule upon at the close of the prosecution's case.

Either of these methods will preclude the *Allegretti* disaster. While (2) gives more flexible record protection than (1), the hostile or "record thief" judge will be unwilling to go along with it. However, he would be hard-pressed to find a reason to refuse to permit the procedure outlined in (1). If he does so refuse, make a proper record at the time showing that you are attempting to prevent the prejudice which would result from his holding, in the presence of the jury, that the prosecution has made out a connecting case against your client. That clear challenge may make him reluctant to employ the *Allegretti* instruction. It will also make reversal more likely if he does so, since the record

will clearly show that the *Allegretti* instruction would have been unnecessary if your proposal had been accepted.

In a few cases, there may be special tactical considerations which will cause you to force the issue and to insist that the third-party statement be excluded until the prosecution first presents evidence of a criminal connection between the declarant and the client. In that situation, it is probably wise to make the point in *limine* prior to trial, since the order of proof is discretionary with the judge and very few judges are willing to force a prosecutor to revise his evidentiary plan after he already has his witness on the stand. Moreover, even if you succeed with an objection made while the witness is on the stand, if the prosecutor later presents some "connection" evidence, the dramatic impact on the jury of the reappearance of the witness to deliver the testimony previously excluded, will impart to the "connection" evidence a greater dignity than its intrinsic value may warrant.

Such a case proves once again that the hearsay objection frequently does a great deal of harm. The hearsay objection is appropriate *only* if the defense lawyer is reasonably confident that the prosecution has no evidence outside the third-party statement itself which tends to connect his client with the declarant, or if the statement is mere narrative. In all other cases, the hearsay objection is a poor last in usefulness among the possible defense moves.

(2) *The Materiality-Relevancy Objection:* This is generally the most desirable and tenable of the objections. Traditionally, the tests of admissibility of evidence have been competency, materiality and relevancy. Competency means compliance with all exclusionary rules of evidence, such as hearsay, secondary evidence and "dead man" exclusions. Materiality means having some relationship to the pleaded factual issues in the case. Relevancy is the tendency to make a contested fact more or less probable. Thus, if the value of stolen property were in issue, the purchase price of that property thirty years ago would be competent and material, but would not be relevant, since the price thirty years ago does not tend to show the value today. Rule 401 of the Proposed Federal Rules of Evidence,[12] in both the Supreme Court and the congressional versions, uses the term "relevant" to encompass the traditional concepts of both materiality and relevancy, and many modern authorities tend to follow this approach. In other jurisdictions, however, the distinction should be borne in mind, and there is no harm in basing the objection on both materiality and relevancy.

(3) *The Bruton Objection:* In many cases in which the

[12] Note 7 *supra*, Rule 401.

declarant is a co-defendant with the client, this is the best choice — but only if the statement is pure narrative, not furthering the common plan. If you haven't heard of *Bruton v. United States*,[13] welcome back from Neptune. As subsequently discussed in this article, *Bruton* holds that it is error to admit, even under a limiting instruction, an extrajudicial confession or admission by a co-defendant which does not promote the criminal plan and which inculpates the client.

(4) *No Objection at all:* Frequently, this makes more basic sense than any of the other alternatives. A corollary move is the offer to stipulate. Viscerally, that move is repugnant to most defense lawyers; but as I will try to show, there are times when the maneuver becomes positively brilliant.

(5) *The Dutton Objection:* This one is unique because it is *not* an alternative, but may be combined *in a proper case* with any of the other objections and because it represents the exploitation of a doctrine which facially destroys rather than buttresses constitutional guarantees.

The *Dutton* story starts with *California v. Green*,[14] which held that certain pre-trial statements inconsistent with trial testimony may be introduced as substantive evidence. The court held that the Sixth Amendment Confrontation Clause does not assure the right to exclude hearsay.

From that springboard bounced *Dutton v. Evans*,[15] which may be the most lightly reasoned decision in judicial history. The Court held that the application of a Georgia statute permitting the introduction of an *ex parte* accusation made after the arrest of all suspects was not a constitutional violation, since breach of the traditional hearsay rule is not necessarily a violation of the Confrontation Clause. The specific accusation admitted in *Dutton* was held to be constitutionally acceptable because the accusation bore "indicia of reliability"; because it was equivocal; because it was not "crucial or devastating"; because it "carried on its face a warning to the jury against giving the statement undue weight"; and because there was "serious doubt . . . on whether the conversation . . . ever took place."[16] Restated, it was admissible because it was reliable and because it was clearly unreliable. The conspirators were still engaged, at the time of the statement, in "concealing their identity." Therefore, the disclosure was made in furtherance of the concealment.

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[13] 391 U.S. 123 (1968).
[14] 399 U.S. 149 (1970).
[15] 400 U.S. 74 (1970).
[16] *Id.* at 87-89.

I am *not* making that up. Read it for yourself.

Dutton was the type of opinion we have come to expect in vicarious-liability cases. But it has produced some interesting and unanticipated results.

In *United States v. Adams*,[17] the Ninth Circuit affirmed a conspiracy conviction over a claim that the admission of a co-conspirator's statement violated the defendant's right of confrontation — in short, a hearsay objection. But this was not a routine conspiracy decision. The *Adams* court found extrinsic evidence of a conspiratorial relationship between the declarant and the defendant, and held that any error would have been harmless in any event, because of the overwhelming evidence against Adams. But it went further, pointing out that the hearsay declaration had not been "crucial or devastating." And the court stated:

> While the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same source, the Supreme Court has never equated the two. It follows that *application of a recognized hearsay rule exception does not necessarily evidence compliance with the Confrontation Clause.* See *Dutton v. Evans.* . . .[18]

In 1973, the Second Circuit was faced with a similar situation in *United States v. Puco*.[19] It affirmed the conviction, but this time the *government* petitioned for rehearing because the *Puco* court had ruled, in line with the *Adams* doctrine, that *Dutton* requires a case-by-case analysis of each statement admitted under the co-conspirator hearsay exception to determine its reliability and fairness. Each case stands on its own and co-conspirator declarations cannot be admitted without "indicia of reliability." On petition for rehearing, a divided court adhered to that view.

And thus, improbably, and at least for the present time, *Dutton* has become a source of possible solace to the defendant accused by hearsay. As viewed by two circuits, *Dutton* authorizes *exclusion* of hearsay accusations, even though technically justified by the co-conspirator exception to the hearsay rule, if the hearsay declaration is not shown to be reliable, or if admission of the evidence would be basically unfair.

That may not have been what the *Dutton* plurality had in mind, but from the face of their opinion, it is simply impossible to delineate *Dutton's* boundaries with any certainty.

Don't run this into the ground. The doctrine is still too new and untried, and can break under serious stress. But

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[17] 446 F.2d 681 (9th Cir. 1971).

[18] *Id.* at 683 (emphasis added).

[19] 476 F.2d 1099 (2d Cir. 1973), *cert. denied*, ___ U.S. ___, 94 S. Ct. 106 (1973).

prosecution reliance on the co-conspirator exception to the hearsay rule as a basis for automatic admission of accusatory statements is clearly imperiled by the *Puco* and *Adams* interpretations of *Dutton*.

Now that we have listed all of the possible types of prosecutions, all of the possible types of statements and all of the possible objections, it is time to match them up.

From the ensuing formulations, the *Dutton* objection will be excluded. It is in a class by itself, since its usefulness depends upon the evidentiary picture of the specific case rather than upon the legal classifications which may be applied to the case.

CASE 1-A:

Declarant not a co-defendant, and vicarious statement not pleaded as an offense

In this situation, beyond any question, the proper objection is that the evidence is immaterial and irrelevant. The hearsay objection should never be made in this class of case.

The hearsay objection is met if the prosecution has introduced, or promises that it will introduce, any evidence whatever tending to show that the declarant was the criminal agent (*i.e.*, co-conspirator) of the client.

The materiality-relevancy objection is very much stronger. The jury may not consider the declarant's statement against the client, unless it first finds *beyond a reasonable doubt* that the client was a member of the conspiracy.[20]

But once the jury has found beyond reasonable doubt that the client is a member of the conspiracy, there is nothing more

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[20] *See*, SEVENTH CIRCUIT JUDICIAL CONFERENCE COMMITTEE ON JURY INSTRUCTIONS, MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, § 10,00, 36 F.R.D. 457, 503-04 (1965) [commonly known as the LaBuy Instructions]:

> In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.
>
> . . . .
>
> If it is established beyond a reasonable doubt that a conspiracy existed, and that defendant was one of its members, then the acts and declarations of any other member of such conspiracy in or out of such defendant's presence, done in furtherance of the objects of the conspiracy, and during its existence, may be considered as evidence against such defendant. When persons enter into an agreement for an unlawful purpose they become agents for one another.
>
> However, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them.

to be decided as to him. Thus, that particular piece of evidence could not be considered by the jury unless they first find the defendant guilty. For that obvious reason, the evidence should never be admitted by any thoughtful and impartial judge.

In short, the vicarious statement must be excluded because it serves no purpose. The jury cannot use that evidence in resolving any factual issue which it is required to decide. Therefore, the evidence is immaterial in both the legal and literal meanings of that word.

Superficially, this approach would appear to conflict with *Carbo v. United States,*[21] and its progeny. *Carbo* is a case which might have presented the relevancy issue squarely; instead, the case was decided on a collateral point against a hazy background of the propriety of the refusal of a limiting instruction. The defense in *Carbo* appears to have made the customary tactical error: It *conceded* that the third-party statement was material and relevant,[22] but claimed that a limiting instruction should have been given, precluding the jury from considering the evidence unless they first found the defendant to be a conspirator beyond reasonable doubt, exclusively on the basis of other evidence. There was also a nebulous suggestion of a hearsay objection.

The *Carbo* court correctly concluded that such an instruction would mean, "You may not consider this evidence unless you first find the defendant guilty." Pointing to authorities holding that disputed factual questions determining admissibility are to be resolved by the trial judge rather than the jury, the *Carbo* court held that no limiting instruction need be given, and that the jury could consider the hearsay declaration in determining the guilt of the defendant. That conclusion, although questionable, is logically supportable *if* the defense concedes the third-party statement to be material to the case. On the other hand, if the defense challenges the materiality and relevancy of the evidence, *Carbo* is completely inapplicable.

The Second Circuit provided the basis for the *Carbo* doctrine in *United States v. Dennis.*[23] Although the issue was not presented squarely, the *Dennis* court held that the question was simply one of preliminary determination of the admissibility of evidence, that this question was traditionally one for the judge, and that therefore it was questionable whether any limiting instruction need be given.

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[21] 314 F.2d 718 (9th Cir. 1963).
[22] *Id.* at 736.
[23] 183 F.2d 201 (2nd Cir. 1950).

The Ninth Circuit has generally followed *Carbo*. The Second Circuit seems committed to the *Dennis-Carbo* principle, although fairly recently the doctrine evoked a dissent in *United States v. Calarco*.[24] In 1970, the Sixth Circuit, which may now be the nation's most conservative in criminal matters, inferentially adopted the *Carbo* rule in a civil action, *South-East Coal Co. v. Consolidation Coal Co.*,[25] overturning a contrary rule which had obtained in that circuit for more than twenty-five years.

Yet, in none of these cases and in none of their progeny does the issue appear to have been presented or faced squarely. A defendant is entitled to have his guilt determined from his own acts and declarations. Once the jury has found him guilty on the basis of his own acts and declarations, the third-party declaration becomes superfluous. On the other hand, if the jury finds that the defendant's acts and declarations do not demonstrate criminality, he cannot be found guilty because of a hearsay declaration incriminating him. The third-party declaration, therefore, serves no useful purpose and should be excluded altogether as immaterial and irrelevant. The question is simply not one of whether a limiting instruction should be given, as considered in *Carbo, Dennis,* and *South-East Coal.* The proper issue is whether the evidence should be admitted at all.

In this posture, any definitive presentation of the materiality-relevancy objection will have a critically determinative impact upon the expansive tendency of the conspiracy doctrine.

A resourceful prosecutor may try to overcome the relevancy objection by contending that the third-party statement should be admitted for the purpose of proving the *existence* of a conspiracy, rather than the client's connection with that conspiracy. However, if the statement is admitted on that basis, the client is clearly entitled to a limiting instruction that the evidence may not be considered for the purpose of deciding whether the client was a conspirator. Moreover, evidence admitted for so limited a purpose is particularly vulnerable to the well-recognized objection that its probative value is outweighed by its potential for prejudice.[26] The *Dutton* objection relates to the same basic proposition, and the *Bruton* objection may also be helpful here.

If the prosecutor attempts to admit such evidence for the limited purpose of proving the conspiracy, the defense lawyer may appropriately consider yet another move which, depending on the facts, can be extremely helpful: Stipulate to the conspiracy itself as far as necessary to render the proffered evi-

[24] 424 F.2d 657, 661-65 (2nd Cir. 1970).
[25] 434 F.2d 767, 779 (6th Cir. 1970).
[26] Note 7 *supra*, Rule 403.

dence moot. This tactic is considered more fully in the ensuing discussion of trial CASE 1-B.

An offer in *limine* to stipulate to the pleaded conspiracy *except for the participation of the client* (and perhaps one or two close associates) is obviously something that is not appropriate to every case. But in a proper situation, it can be a real body blow to the prosecutor who has planned to build his case on evidence which is marginally material but grossly prejudicial. Even if the court refuses the stipulation, very substantial force is thereby imparted to any subsequent claim that evidence was introduced for its prejudice value, rather than for any bona fide probative purpose.

CASE 1-B:

Declarant not a co-defendant, but statement is pleaded as an offense

The declarant's statement becomes a part of the formal charge against the client in one of two circumstances: Either the making of that statement is alleged to be a substantive crime committed in the course of a conspiracy-type relationship, or it is pleaded as an overt act pursuant to the conspiracy.

In either case, the evidence is clearly competent (statement of client's agent), material (pleaded in the indictment) and relevant (tending to show that the statement was made as charged). This situation is therefore inherently more challenging than CASE 1-A.

The easier of the two situations is the conversation which is pleaded as an overt act. It is completely fundamental that the prosecutor is required to prove only one overt act. By offering to stipulate to the least harmful of the pleaded overt acts, the defense lawyer can render moot *all* evidence whose pretext for admission is to prove the occurrence of an "act in furtherance" which is an element of guilt under the conspiracy statute. Overt acts are frequently pleaded for their prejudice value, rather than for their legal merit as proof that the conspiracy moved beyond the *locus penitentae* stage. It is time for the defense to recognize and meet that tactic.

A word of caution: In many cases it may be difficult to stipulate to an overt act without inadvertently stipulating that the conspiracy occurred. As previously noted, the offer of a comprehensive stipulation can be helpful in many cases. However, in those cases in which the lawyer seeks to deny the conspiracy altogether, delicate draftsmanship is required in order to formulate a tender of stipulation which will remove all necessity for proving an overt act while not conceding that the

stipulated act was performed in furtherance of the pleaded conspiratorial objective. The task is sometimes challenging, but there is no case in which it cannot be done.

And by doing it, you change a 1-B CASE to a 1-A CASE.

Where the conversation is pleaded as a substantive offense rather than an overt act, no stipulation is possible (except in cases where the defense is insanity, entrapment, coercion, or other matters outside the scope of this discussion). The evidence is competent, material and relevant. Therefore, the defense lawyer should ordinarily make no objection. The proper ruling on his objection can only harm him in the eyes of the jury. If the strategy of the case makes a "psychological" objection desirable, the defense lawyer should make certain that it is phrased in such a manner that its overruling will not cause the jury to believe that the judge thinks the evidence sufficient as to the client. The lawyer's efforts in cases such as these must be concentrated on convincing the jury of the fundamental unfairness of the hearsay accusation.

CASE 2-A:

The declarant is a co-defendant on trial, and the vicarious statement is not pleaded as an offense

This situation is the counterpart of CASE 1-A, except that the statement now becomes relevant *as against the declarant.* He is a defendant on trial, and the statement constitutes an admission by him. However, it remains irrelevant as against the client. Legally, it is a 1-A CASE as to your client; but as a practical matter it is something very different.

The materiality-relevancy objection on behalf of the client remains valid in this situation, but its helpfulness is entirely theoretical. The sustaining of such an objection, standing alone, will precipitate the introduction of evidence that the witness heard the co-defendant say that the client is guilty, together with an instruction that the jury should consider that statement only against the co-defendant. Every lawyer knows that such an instruction is completely useless. Help from *Bruton*[27] is needed here.

Theoretically, the problem could be cured by the granting of a motion for severance, bringing the litigation out of CASE 2-A and into CASE 1-A. Severance motions, however, are denied with about the same frequency with which they are presented. The normal rationale is that it is impossible to determine at the pre-trial stage that severance is necessary.

The situation thus presented confronts the lawyer with the

[27] See note 13 *supra* and accompanying text.

necessity for squarely facing a basic but generally ignored truth: In multiple defendant cases, the defendants must cooperate completely if the facts hold out a reasonable prospect that such cooperation will bring about the aquittal of all defendants — but that is a rare case indeed. Otherwise, there must be *no tactical cooperation whatever* that is discernible by the court or jury.

Prosecutors have been able, by the use of the multi-defendant conspiracy-type indictment, to convict many men who would and often should otherwise have gone free. But every such person convicted because of the divisive tactics of his co-defendant is matched, I am convinced, by three men who have been convicted in consequence of the feeble and misplaced courtesy which has become the accepted defense tactic. By its general agreement never to say anything that might hurt a co-defendant, the defense bar has made possible the expansion of the use of the multi-defendant prosecutorial tactic. That jurors in conspiracy cases have convicted because they have inferred the fact of conspiracy from the logically inexplicable cooperation among the defendants is not a guess; it is a confirmed fact.

Moreover, the defendant who is convicted because of the activities of his co-defendant generally owes his fate to the ineptitude rather than to the malice of the co-defendant's lawyer. The defense lawyer who handles a multi-defendant case competently is as likely to get a mistrial and subsequent severance for the co-defendant as for his own client.

Obviously, the defense lawyer should never do anything that will surprise counsel for a co-defendant. But CASE 1-A is the strongest defense position. I have already attempted to demonstrate that the best defense to CASE 1-B is to attempt, by tender of stipulation, to convert it into a type I-A CASE.

The same principle clearly holds in a 2-A CASE: Try to convert it to a 1-A CASE if possible. Legally, from the standpoint of your client, a 2-A CASE is the same as a 1-A CASE. If you behave as though it were a 1-A CASE, you have the best chance of making it one through mistrial or reversal followed by severance. Tender the same stipulation which you would have offered in a 1-A CASE. Adhere to that position from your opening statement to your summation. When the prosecution proves the extrajudicial declaration by the co-defendant which mentions your client, make the materiality-relevancy objection, and renew your pre-trial motion for severance. Make the best record that you can throughout the trial, and try to come away with a

tenable contention that the outcome might have been different as to your client if he had been tried separately.

The prosecutor's objective is generally to stretch the reach of every one of his weapons as far as possible beyond its logical and constitutional limits. The defense lawyer must unhesitatingly do the same. Never forget: If the co-defendant declarant obtains a mistrial and severance, the impact on your client is almost as beneficial as if it had been his motion which was granted.

The failure of the co-defendant declarant to testify will place you in the strongest legal position possible in the circumstances of a class 2 -B CASE. Your guideposts in that situation are *United States v. Echeles*[28] and *Bruton v. United States*.[29]

ECHELES

Hoard carefully everything ever done or said by the co-defendant before trial which indicates a denial of the charge against him or which is inconsistent with his supposed statements incriminating your client. Then, as a part of your case, *call the co-defendant to the stand* in order to obtain his testimony that he did not make the statements ascribed to him. Of course, he does not have to take the stand, since he is a criminal defendant. But that does not mean that his answers would incriminate him; it means only that he is exercising his right as a criminal defendant to avoid giving *any* testimony, whether incriminating or exculpatory. You want exculpatory testimony. But you can't get it as long as he remains a co-defendant with your client. A severance is the complete answer to that situation. If the judge denies a severance, he must then violate either the co-defendant's right not to testify, or your client's right to compulsory process for defense witnesses.

Echeles, like many meaningful defense weapons, has been discredited by unintelligent defense attempts at inapposite exploitation. As previously noted, one serious defense weakness is a tendency to make test cases out of the wrong facts. Before attempting to use *Echeles*, the defense lawyer should be certain that he can show a likelihood that the testimony of the co-defendant will be important, and must avoid any possibility that the record will reflect a mere transparent tactical maneuver. In a proper case, particularly one in which an accusatory statement by the co-defendant is admitted, *Echeles* retains its original vitality.[30]

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[28] 352 F.2d 892 (7th Cir. 1965).
[29] 391 U.S. 123 (1968).
[30] United States v. Shuford, 454 F.2d 772 (4th Cir. 1971).

Of course, the co-defendant normally should not be called to the stand in the presence of the jury. That would deny him due process and entitle him to a mistrial.[31] However, the client, not having been present when the statement was allegedly made, is in no position to testify that the statement was not made. Therefore, it may become a matter of legitimate importance that the jury be informed that the client was unable to obtain the testimony of the co-defendant in order to weaken any inferences that the jury might otherwise draw from the absence of any refutation of the co-defendant's supposed statement. In that circumstance, the defense lawyer may properly insist upon his right to so inform the jury. The result can be very interesting, and you may wind up with a 1-A CASE.

BRUTON

Like *Echeles, Bruton* is constantly under attack. Much of the narrowing of the *Bruton* doctrine, as with *Echeles*, derives from clumsy defense efforts to fit it into completely inappropriate situations. Yet, *Bruton* represents the most meaningful roadblock placed during recent years in the path of the advance of the conspiracy-type maneuver toward vicarious proof of guilt. Its history should be specially meaningful to the defense lawyer for it shows that the cause is never hopeless: Prosecutors, too, tend to overplay their hands.

For years it was the accepted practice that the confession of a co-defendant which implicated the client could be introduced at a joint trial, if a limiting instruction were given cautioning that the confession should be considered only against the confessor and not against the client. Every knowledgeable criminal lawyer, whether prosecutor, defense lawyer or judge, was conscious of the basic insincerity of the procedure; but it seemed to be cemented into the law.

In 1956, *United States v. Delli Paoli*,[32] a routine case of this type, came before the Court of Appeals for the Second Circuit. It was routinely affirmed. However, the dissent of Justice Frank was memorable and prophetic: "In criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend."[33]

Certiorari was granted. *Delli Paoli* was affirmed 5-4.[34] That seemed to be the end of the matter. The Supreme Court majority had established a conclusive presumption that every juror possessed a dispassionate clinicality of approach and ca-

[31] Griffin v. California, 380 U.S. 609 (1965).
[32] 229 F.2d 319 (2nd Cir. 1956).
[33] *Id.* at 323.
[34] Delli Paoli v. United States, 352 U.S. 232, 233, 246 (1957).

pacity for compartmentalization of the subtly distinguishable which a spectrographer might well envy.

Prosecutors treated *Delli Paoli* as a hunting license; which it was. They literally abused the poor thing into an early grave. The name of the game: find some excuse — any excuse will do — to bring a third-party confession into the case. Repeatedly, petitions pointed out the basic unfairness of the tactic. The Court first responded with *Jackson v. Denno*,[35] and then recoiled from outright subterfuge in *Douglas v. Alabama*.[36] Finally, a short ten years after *Delli Paoli*, the Court shrugged off the government's tender of a compromise offer and flatly overruled *Delli Paoli* in *Bruton v. United States*.[37] Moreover, *Bruton* rights are preserved by the congressional version of the proposed Federal Evidence Rules.[38]

Bruton was never the sesame to severance which many defense lawyers believed it to be. Since it is based on the inability of jurors to disregard the confession as against the person therein accused, it is probably inapplicable to a bench trial,[39] and it is generally without relevance if the confessor takes the stand.[40] However, if the confessor testifies that the confession was never made, there is obviously only a limited opportunity to cross-examine him concerning it. Similarly, if it appears that the confession adds little to the case against the confessor, it may be possible to contend that its probative value is outweighed by its prejudice against the client — a polite way, if you care to be polite, of saying that the joint trial was an attempt to avoid *Bruton*.[41]

Bruton, of course, is concerned with confessions, not with statements in furtherance of the conspiracy. The latter are admissible, as previously noted, because the law deems them to be statements made by the client through the mouth of his agent, the co-conspirator. In short, *Bruton* is a special case of the exclusion of hearsay evidence. The real meaning of *Bruton* is that evidence which is competent, but condemnatory as against the client, cannot be introduced in the client's joint trial with the declarant.

In order to energize the *Bruton* doctrine, therefore, the lawyer must first show that the co-defendant's statement is

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[35] 378 U.S. 368 (1964).
[36] 380 U.S. 415 (1965).
[37] 391 U.S. 123 (1968).
[38] Note 7 *supra*, Rule 804(b)(3); H.R. REP. No. 650, 93d Cong. 1st Sess. 16-17 (1973).
[39] Bowman v. State, 16 Md. App. 384, 297 A.2d 323, 325 n. 3 (1973).
[40] Rios-Ramirez v. United States, 403 F.2d 1016 (9th Cir. 1968); Nelson v. O'Neil, 402 U.S. 622 (1971).
[41] *See*, United States v. Guarardo-Melendez, 401 F.2d 35, 39 (7th Cir. 1968).

immaterial to a consideration of the case against his client. That brings us back to CASE 1-A for basic philosophy and technique.

However, even if it is impossible to convert your 2-A CASE into a 1-A, *Bruton* establishes a platform from which you may well be able to contend that the probative value of the evidence is outweighed by its prejudice against the client.

Remember: Not all confessions are made after arrest. Statements made during the course of the conspiracy which merely describe it without furthering its objectives — *e.g.*, "Sorry, man. I'm out of stuff right now, because [client] didn't come through as he promised" — are introduced into evidence because they constitute admissions by the declarant; and *Miranda*[42] teaches that there is no effective difference between an admission and a confession. Even if your CLASS 1-A exclusion techniques fail, the proper meaning of *Bruton* is that such evidence cannot be introduced in your client's joint trial with the declarant under an instruction that the jury must consider it only against the declarant.

In *McGregor v. United States*[43] the Fifth Circuit took the position that *Bruton* applies only to statements made after the crime is complete. That decision, however, very clearly reflects the customary confusion between the concepts of hearsay and materiality. The third-party statements in *McGregor* were made in furtherance of the crime; therefore, *Bruton* is inapplicable. When the defense attempted to apply *Bruton* to that situation, the court's response reflected both the issue and the confusion presented by counsel: It held that *Bruton* applied only to statements made after the completion of the crime. *McGregor* is an excellent illustration of the manner in which inept presentations produce harmful decisions. Counsel confronted with vicarious declarations must always distinguish between hearsay and immateriality; between furtherance of a conspiratorial objective and mere narrative; and between the pleaded statement and the statement which is evidentiary only.

A much different picture of the same scene is painted by the Seventh Circuit's 1973 decision in *United States v. Nasser*.[44] The *Nasser* court demonstrates that *Bruton* applies impartially to confessions, admissions and simple accusations, as long as they are merely narrative in character, whether they are made before, during or after the crime. The critical issue, as *Nasser* holds, is whether the statements are made in furtherance of the conspiratorial objective. If not, under *Bruton*, they are not

[42] Miranda v. Arizona, 384 U.S. 436 (1966).
[43] 422 F.2d 925 (5th Cir. 1970).
[44] 476 F.2d 1111, 1120-21 (7th Cir. 1973).

admissible in any trial wherein the non-declarant subject of those statements is a defendant.

CASE 2-B:
Declarant is a co-defendant and the statement is pleaded offense

If the statement is pleaded as an offense only by the declarant, and not against your client, claim prejudicial misjoinder under Rule 14 of the Federal Rules of Criminal Procedure.[45] As against your client, such a case is not 2-B at all but 2-A, and you should handle it as such. A claim of prejudicial joinder, if properly presented and sustained, will make it a 1-A CASE.

In the same context, it should be remembered that *Echeles* can sometimes makes a 2-B CASE into a 1-A CASE.

If the co-defendant's statement is pleaded as an overt act pursuant to a conspiracy charged against both the co-defendant and the client, you should tender the stipulation to the least harmful overt act, as suggested in the discussion of CASE 1-B. I would recommend that the co-defendant-declarant join in that offer of stipulation, if I were representing him. The statement is admissible against him, pleaded or not, because it constitutes an admission of guilt. But he may be able to get considerable mileage out of *United States v. Hernandez-Carreras.*[46] *Hernandez* holds that a defendant cannot be convicted of conspiracy on his own statement that others are involved, if there is no meaningful corroboration. There may be plenty of corroboration in your case; but if so, you can rely on the *Guarardo-Melendez* case[47] to urge that the statement is being used to prejudice the client rather than to convict the declarant. The concurrence of these arguments may convince the court that the admission of the statement would cause more peril of reversal than its value as evidence would warrant. (Of course, no *Bruton* objection is tenable in this situation; an overt act, by definition, is subject to agency-type attribution.)

The tender of stipulation in other areas and total disassociation from the declarant, as suggested in defense of 2-A CASES, is equally valid here.

In all other respects, the 2-B CASE must be conducted in the same manner as the 1-B CASE.

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[45] FED. R. CRIM. P. 14. Note in this connection the suggestion concerning discovery which is made at the end of this article.

[46] 451 F.2d 1315 (9th Cir. 1971).

[47] 401 F.2d 35, 39 (7th Cir. 1968).

A FINAL NOTE:

Sweet are the discovery uses of adversity

As previously stated, vicarious declarations are admitted against the client because some proof exists that they are his own statements, made through the mouth of an agent-conspirator.

But if they are his statements, Rule 16a of the Federal Rules of Criminal Procedure says that he is entitled to pre-trial discovery of those statements. A federal judge in New York recently issued an opinion agreeing with that position.[48] He pointed out that a defendant has greater need for advance knowledge of his vicarious statements than his personal statements, since the former are more likely to take him by surprise.

Within three months, that decision had been reversed on appeal by the Government, which is always sensitive to any development which might permit a defendant to learn what he has done. The records of the appellate proceeding indicate that the frenetic consideration given to the "emergency" precluded any meaningful analysis of the district judge's order. The opinion of the Court of Appeals for the Second Circuit[49] appears to deal principally with the distinction between statements made in the course of a conspiracy and statements made after its termination. While there can be no question that the order was reversed, the appellate opinion avoids any consideration of the ultimate issue: If a statement is discoverable under Rule 16a, does it become immunized against discovery if it is not *disclosed to the Government* until the conspiracy is terminated? The answer would appear to be obvious. *Every* statement discoverable under 16(a)(1) is proved by a Government witness. If the witness status of the source of the information precludes discovery, 16(a)(1) has no meaning.

Since the logic of the district court opinion is so very clear, and since the court of appeals opinion simply does not meet the issue, continued reliance on the *principle* of the trial court decision is clearly appropriate — at least outside the Second Circuit.

It should further be remembered that the Second Circuit confirmed the right to such discovery if the source is not a prospective Government witness. Move under Rule 16a for inspection and copying of "any relevant written or recorded statements or confessions made by or attributed to the defendant, either personally or vicariously." The least you should get is additional discovery. At best, if an attempt is made to use a vicarious statement which has not been furnished for pre-trial inspection,

[48] United States v. Percevault, 14 CR. L. 2090 (E.D.N.Y. Oct. 1973).
[49] 14 CR. L. 2369 (2d Cir., Jan. 8, 1974).

you will be in a position to meaningfully move for its exclusion. Failure to have furnished it will have prejudiced your position irretrievably, since your entire strategy at both trial and pre-trial stages will have been based upon the supposed absence of any such statement.

Obviously.

The high regard in which prosecutors are held by the judiciary reflects the sincerity with which they espouse such cogent propositions as the necessity for strict adherence to the restrictions of 18 U.S.C. 3500, the fact that no promises are ever made to accomplice-witnesses, and the compelling necessity for grand jury secrecy in order to safeguard its function as a protector against unfounded accusations.

Perhaps if we learn to state our propositions with equal sincerity, we may come to share with the prosecutors a favored position in the esteem of the judiciary.

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