BOURJAILY V. UNITED STATES: A NEW RULE FOR ADMITTING COCONSPIRATOR HEARSAY STATEMENTS UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E)

Under Rule 801(d)(2)(E), otherwise inadmissible hearsay declarations of a coconspirator are admissible into evidence upon a finding that a conspiracy existed between the declarant and the party the statement is sought to be admitted against. Before the *Bourjaily* decision, trial courts could only consider nonhearsay evidence when making these preliminary determinations. After *Bourjaily*, trial courts can now consider, in addition to any nonprivileged, nonhearsay evidence, the alleged coconspirator hearsay statements themselves.

The central issue in *Bourjaily* was whether this broadening of the scope and application of the coconspirator exception violated a defendant's sixth amendment right to confront the witnesses against him. The author analyzes the arguments for and against changing the way Rule 801(d)(2)(E) determinations are made, and focuses on the question of whether declarations made in the course and in furtherance of a conspiracy can be categorized as trustworthy and reliable. The author concludes that factors exist which tend to make these declarations trustworthy and reliable, but qualifies that conclusion on the existence of "sufficient" nonprivileged, nonhearsay evidence which links the declarant and the alleged coconspirator to a conspiracy.

Drug trafficking is the most widespread and profitable organized crime activity in the United States.[1] Individuals involved in drug trafficking are difficult to prosecute because of organized crime's hierarchical structure. This structure, with its different levels of participation, contains a strong code of silence which discourages members from testifying against each other. To combat this code of silence, prosecutors use conspiracy charges to convict individuals involved in organized crime who use others to further their illegal activities.[2] William Bourjaily, in an attempt to shield his illegal activities, used someone else to transact a drug deal. However, Bourjaily's drug deal ended when federal authorities arrested Bourjaily and convicted him of conspiracy to distribute cocaine and possession of cocaine with intent to distribute.

In *Bourjaily v. United States*,[3] the United States Supreme Court upheld the conspiracy conviction of William Bourjaily and, in the pro-

1. President's Comm'n on Organized Crime, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime 6 (1986) [hereinafter President's Commission].

2. Moore, *Drug Policy and Organized Crime* 82 (1986), *reprinted in* President's Commission, *supra* note 1, app. G at 82.

3. 107 S. Ct. 2775 (1987). For other analyses of *Bourjaily*, see Graham, *Evidence and Trial Advocacy: The Impact of Bourjaily on Admissions by Coconspirators*, 24 CRIM. L. BULL. 48 (1988); Note, *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)*, 78 J. CRIM. L. & CRIMINOLOGY 915 (1988).

cess, strengthened the prosecutor's arsenal against organized crime. The *Bourjaily* decision makes it easier for the government to admit otherwise inadmissible hearsay testimony under the coconspirator hearsay exception.[4] In changing the law of the coconspirator exception, the Court resolved two major issues.

First, the Court abolished the rule against bootstrapping. The rule previously prohibited the introduction of coconspirator hearsay declarations unless independent, non-hearsay evidence proved the existence of a conspiracy. The Court held that trial courts may now consider hearsay statements *themselves* when deciding whether a conspiracy existed between the declarant and the defendant. The trial court makes this decision as a preliminary determination.[5] This preliminary determination is critical because once a trial court finds the existence of a conspiracy, the hearsay statements become admissible under Rule 801(d)(2)(E).[6] Second, the Court ruled that the use of one codefendant's hearsay statements against another codefendant does not violate the confrontation clause of the sixth amendment,[7] even though the first codefendant refuses to testify in court. The Court also held that trial courts are not required to make an independent inquiry into the reliability of hearsay statements that satisfy the requirements of Rule 801(d)(2)(E).[8]

In *Bourjaily*, the government charged William Bourjaily and Angelo Lonardo with conspiracy to distribute cocaine.[9] Lonardo was the

4. FED. R. EVID. 801(d)(2)(E) provides in part: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

5. In the past, this determination was made either at the time the evidence was offered or at the end of the government's case. *See, e.g.*, United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979). Conditional admission of evidence is allowed under Federal Rule of Evidence 104(b), which states:

> (b) **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

In the event the prosecution does not sufficiently prove the existence of a conspiracy, the trial court can declare a mistrial if the trial court finds that the admission of the hearsay statements constituted prejudicial error to the defendant.

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

7. *Id.* at 2782. The confrontation clause of the sixth amendment provides, in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

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

9. United States v. Bourjaily, 781 F.2d 539, 540-41 (6th Cir. 1986). The two codefendants were actually charged with two crimes: conspiracy to distribute and possession with intent to distribute a controlled substance (cocaine), under 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, and 18 U.S.C. § 2. 21 U.S.C. § 841(a)(1) provides: (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . . 21 U.S.C. § 846 provides: Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum pun-

middleman for a drug deal between Bourjaily and an FBI informant. Lonardo arranged the deal after agreeing to find individuals to distribute the cocaine. At trial, Bourjaily objected to the admission of Lonardo's out-of-court statements made to the FBI informant. The statements implicated Bourjaily in a conspiracy to distribute cocaine. Just as Lonardo had told the FBI informant Bourjaily would do, Bourjaily arrived at a scheduled meeting place with more than $20,000 in cash and accepted a package containing one kilogram of cocaine. Bourjaily was convicted of the conspiracy charge. On appeal, Bourjaily argued that the trial court erred in admitting the statements under Federal Rule of Evidence 801(d)(2)(E), the coconspirator exception to the hearsay rule. Furthermore, Bourjaily argued that he had been deprived of his sixth amendment right to confront the witnesses against him because Lonardo had invoked his fifth amendment right not to testify at trial. The United States Court of Appeals for the Sixth Circuit rejected Bourjaily's arguments.[10] The Supreme Court upheld Bourjaily's conviction, reasoning that the admission of coconspirator hearsay declarations does not violate the confrontation clause because such statements fall within a "firmly rooted" hearsay exception and are reliable statements when corroborated.[11]

This Note discusses the *Bourjaily* rule which allows trial courts to consider hearsay statements themselves when deciding whether to admit such statements into evidence under the coconspirator hearsay exception. Specifically, this Note attempts to resolve whether the Court achieved the proper balance between an individual's constitutionally guaranteed rights and the government's interest in prosecuting criminals. Part I discusses background cases which have dealt with the rule against bootstrapping and the confrontation clause. Part II explores the facts and procedural posture of the *Bourjaily* case and discusses the Sixth Circuit's reasoning. In Part III, the Supreme Court's majority and dissenting opinions are examined. Part IV analyzes the *Bourjaily* decision and attempts to show that the Court reached the correct result. This Note recommends that the lower courts interpret *Bourjaily* to require "sufficient" corroboration of hearsay statements by admissible, nonhearsay evidence before the statements can be admitted under Rule 801(d)(2)(E). Finally, this Note concludes that, as long as the courts adopt a sufficient corroboration standard, once the require-

ishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. 18 U.S.C. § 2 provides: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

10. *Bourjaily*, 781 F.2d at 541-43.

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

ments of Rule 801(d)(2)(E) have been satisfied coconspirator statements can be presumed reliable for purposes of the confrontation clause.

I. BACKGROUND

Hearsay is defined 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."[12] Under the hearsay rule, hearsay is inadmissible unless it falls within a recognized exception.[13] Courts have recognized many exceptions to the hearsay rule[14] based on the notion that certain out-of-court statements are as reliable as in-court testimony.[15]

One such exception to the hearsay rule is the coconspirator hearsay exception.[16] The United States Supreme Court first recognized this exception in *United States v. Gooding*.[17] In *Gooding*, the Court had to decide whether a trial court properly admitted into evidence certain out-of-court statements made by a captain of a vessel to an employee.[18] The statements incriminated the owner of the vessel, implicating him in

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12. FED. R. EVID. 801(c).

13. FED. R. EVID. 802.

14. Fed. R. Evid. 802 provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Fed. R. Evid. 803 alone specifies over twenty exceptions. Examples of hearsay statements admissible under the exceptions include statements made by party-opponents which are offered against the party under Fed. R. Evid. 801(d)(2)(A); statements regarding the declarant's then existing state of mind, emotion, sensation, or physical condition under Fed. R. Evid. 803(3); records kept in the course of a regularly conducted business activity under Fed. R. Evid. 803(6); statements of unavailable declarants under Fed. R. Evid. 804, including persons who persist in refusing to testify despite an order from the court to do so under Fed. R. Evid. 804(a)(2); statements made under a belief of impending death under Fed. R. Evid. 804(b)(2); and other exceptions not specifically listed in the Federal Rules of Evidence which have "equivalent circumstantial guarantees of trustworthiness" under Fed. R. Evid. 803(24) and Fed. R. Evid. 804(b)(5), discussed *infra* note 15.

15. *See* FED. R. EVID. 803(24) and FED. R. EVID. 804(b)(5) which discuss "other exceptions" to the hearsay rules. Under these two rules, statements which are not specifically enumerated as exceptions to the hearsay rule are admissible if they have "equivalent circumstantial guarantees of trustworthiness." Both rules require the court to find that the statement is offered as evidence of a material fact, that the statement is more probative than any other evidence which can be procured through reasonable efforts, and that the interests of justice will best be served by admission of the statement into evidence.

16. *See infra* note 23 and accompanying text.

17. 25 U.S. (12 Wheat.) *460 (1827).

18. The defendant, John Gooding, had employed Captain Hill as the captain of the vessel to transport slaves from Africa to Cuba. Captain Hill told one of the government's witnesses that "Uncle John" would see to it that the crew got paid in the event the voyage was not a success. The issue in the case centered on whether the government's witness could testify as to what Captain Hill told him about "Uncle John." The testimony at trial revealed that the witness understood "Uncle John" to mean John Gooding. *Id.* at *466.

an illegal activity.[19] The Court concluded that the statements were admissible under a res gestae theory,[20] and viewed the captain's declarations as "connected with acts in furtherance of the objects of the voyage."[21] The Court reasoned that once the "in furtherance" requirement is satisfied, responsibility for the act is imputed to others in the conspiracy under an agency rationale. Coconspirators are seen as agents of each other because an act in furtherance of a conspiracy benefits all the coconspirators; therefore, all are held accountable for each other's acts.[22]

The coconspirator exception is now embodied in Federal Rule of Evidence 801(d)(2)(E).[23] The rule treats as "not hearsay" out-of-court declarations if the trial court finds 1) that the declarant and defendant were coconspirators, and 2) that the statements were made during the course and 3) in furtherance of the conspiracy.[24] Although Rule 801(d)(2)(E) clearly indicates when the coconspirator exception applies, problems arise with its application because, in cases where conspiracy is charged, both the trial court and jury have to decide the same issue: whether a conspiracy in fact existed.[25] In these cases, the trial court must first determine whether the declarant and the defendant were coconspirators before the hearsay statement can be admitted under Rule 801(d)(2)(E), and then the jury must decide the same issue when it deliberates on the conspiracy charge.

Courts must make sure that the coconspirator exception is applied properly and that the evidence warrants admission, because a trial court's initial determination of the conspiracy issue is very critical to the defendant.[26] Historically, the courts have faced two concerns with the

19. John Gooding was charged with outfitting the vessel with the intent to transport slaves in violation of the Slave-Trade Act of April 20, 1818. *Id.* at *461.

20. "Res gestae" literally means "things or things happened." BLACK'S LAW DICTIONARY 678 (5th ed. abr. 1983). Under the Court's res gestae theory, the captain's statements were part of the acts necessary to ensure the success of the voyage. Any liability arising from a necessary act was imputed to the owner of the vessel under an agency theory. *Gooding*, 25 U.S. (12 Wheat.) at *469-70.

21. *Gooding*, 25 U.S. (12 Wheat.) at *470.

22. *Id. See infra* note 24.

23. Fed. R. Evid. 801(d)(2)(E) provides in part: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

24. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 267, 792 (E. Cleary 3d ed. 1984). McCormick states that conspiracy law is analogous to partnership law. Under partnership law, partners are liable for another partner's acts when that partner acts within the bounds of his authority on partnership business. Similarly, members of an illegal conspiracy are "partners in crime." As Judge Learned Hand once wrote in regard to these partners in crime, "What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926).

25. *See* C. MCCORMICK, *supra* note 24, § 53 at 138-39.

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

application of Rule 801(d)(2)(E). The first concern involves the "bootstrapping rule" and what evidence a trial court can consider when making its preliminary determination of the existence of a conspiracy between the declarant and the defendant. The second concern involves the confrontation clause and a defendant's right to confront the witnesses against him.

A. The Rule Against Bootstrapping

After the *Gooding* decision in 1827, the coconspirator exception remained unchanged until 1942 when the Supreme Court limited the type of evidence a trial court could consider when determining whether the exception applied. In *Glasser v. United States,*[27] the Supreme Court planted the seed for the rule against bootstrapping. It stated that hearsay declarations of alleged coconspirators are inadmissible unless there is proof aliunde[28] that a conspiracy exists between the declarant and the defendant.[29] "Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."[30] This independent evidence requirement became known as the rule against "bootstrapping." After *Glasser,* the circuits uniformly interpreted the *Glasser* rule against bootstrapping to mean that trial courts could not consider hearsay statements *themselves* when making preliminary determinations under Rule 801(d)(2)(E).[31] Instead, trial courts could only consider evidence *independent* of the hearsay statements.

However, after Congress enacted the Federal Rules of Evidence in 1975,[32] the First Circuit stated that Rule 104(a) conflicted with the *Glasser* rule against bootstrapping.[33] In the court's view, Rule 104(a) allowed trial courts to consider hearsay statements themselves when

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27. 315 U.S. 60 (1942).

28. "Evidence aliunde" is defined as "evidence from outside, from another source." BLACK'S LAW DICTIONARY 38 (5th ed. abr. 1983). This proof aliunde is the "independent" proof requirement of the bootstrapping rule.

29. *Glasser,* 315 U.S. at 74.

30. *Id.* at 75.

31. *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 104[05](2), at 104-46 (1986).

32. Included in the Federal Rules of Evidence in 1975 was Rule 104(a), which states:

> (a) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). *In making its determination it is not bound by the rules of evidence except those with respect to privileges.*
>
> [Emphasis added.]

33. United States v. Martorano, 561 F.2d 406 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978).

making preliminary evidentiary rulings.[34] The court reasoned that a total prohibition against bootstrapping would unnecessarily bar some trustworthy hearsay statements from being admitted into evidence.[35] However, the First Circuit did not hold the rule against bootstrapping completely inoperative. Instead, the court still required "significant independent evidence" of the existence of a conspiracy, and the court would allow judges to view this independent evidence in light of any "highly trustworthy and reliable" portions of any hearsay declarations.[36]

The only other United States Court of Appeals to adopt the First Circuit's minority view that Rule 104(a) allows "bootstrapping" was the Sixth Circuit.[37] In *United States v. Vinson*,[38] the Sixth Circuit also relied on the last sentence[39] of Rule 104(a) and held that a trial court may consider hearsay statements themselves in deciding whether the coconspirator exception applies.[40] The *Bourjaily* case presented the Supreme Court with the same issues as those presented in *Vinson*, and the Court had to decide whether or not to abolish the rule against bootstrapping and adopt a new rule for admitting coconspirator hearsay statements.

B. Confrontation Clause Concerns

The other important issue in *Bourjaily* concerned the confrontation clause and a defendant's right to confront the witnesses against him. The confrontation clause of the sixth amendment[41] is implicated when out-of-court statements are admitted into evidence over the objections of a defendant who has not had the opportunity to cross-examine a witness at trial. Cross-examination allows the jury to observe the demeanor of the witness under oath as the witness is subjected to the rigors of cross-examination.[42]

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34. *Id.* at 408. The court used the last sentence of Rule 104(a) to support its opinion. *See supra* note 32. The rule states that for purposes of making preliminary rulings on the admissibility of evidence, a trial court is not bound by the rules of evidence, except for the rules covering privileges. Because Rule 801(d)(2)(E) is a rule of evidence that does not relate to privileges, a literal reading of Rule 104(a) permits a trial court to consider hearsay statements themselves when deciding the admissibility of the statements.

35. *Martorano*, 561 F.2d at 408.

36. *Id.*

37. J. WEINSTEIN & M. BERGER, *supra* note 31, ¶ 104[05](2), at 104-46.

38. 606 F.2d 149 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

39. *See supra* note 32.

40. United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

41. *See supra* note 7.

42. *See, e.g.*, California v. Green, 399 U.S. 149 (1970). Justice White summed up the role confrontation plays in preserving the integrity of the criminal justice system:

In *California v. Green*,[43] the United States Supreme Court held that the confrontation clause is not violated when prior testimony, given at a preliminary hearing, is admitted into evidence at trial, even if the witness asserts his fifth amendment right against compulsory self-incrimination. In *Green*, the defendant's attorney subjected the witness to extensive cross-examination at a preliminary hearing. At trial, the witness claimed he could not remember who had supplied him with marijuana, even though he had testified at the preliminary hearing that the defendant had been his supplier. The prosecutor then read excerpts from the witness' prior preliminary hearing testimony.

The Court stated that the hearsay rules and the confrontation clause "are generally designed to protect similar values," but acknowledged that a hearsay rule can violate the confrontation clause because the clause is not merely a "codification of the rules of hearsay and their exceptions."[44] However, the Court refused to find constitutional error because the defendant actually confronted the witness at trial.[45]

In the next term, the Court faced the issue of whether the admission of coconspirator hearsay declarations violates the confrontation clause when the declarant does not testify at trial. In *Dutton v. Evans*,[46] the defendant, Alex Evans, was convicted based in part on a hearsay statement made by one of his coconspirators.[47] The Court noted that the hearsay statement itself contained "indicia of reliability" which warranted the admission of the statement against Evans, even though Evans did not have the opportunity to confront the declarant in court.[48] However, there was other significant evidence against Evans,

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> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (citation and quotation marks omitted).

43. 399 U.S. 149 (1970).

44. *Id.* at 155.

45. *Id.* at 164.

46. 400 U.S. 74 (1970).

47. The coconspirator stated to his cellmate, upon returning from an arraignment, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.* at 77.

48. The Court identified four indicia of reliability: (1) the coconspirator's statement did not specify what Evans had done, and thus the jury did not place undue weight on the statement because it was vague; (2) cross-examination of the coconspirator would not have accomplished much beeause other testimony disclosed that the coconspirator had actually witnessed Evans commit the crime; (3) it was unlikely that the coconspirator's statement was based on faulty recollection; and (4) the fact that the coconspirator's statement was blurted out in response to a question from the cellmate indicated it was unlikely that the statement was an intentional fabrication. *Id.* at 88-89.

and the Court did not view the hearsay statement as "crucial" to the government's case, or "devastating" to Evans' case.[49]

In *Ohio v. Roberts*,[50] the Court clarified the relationship between the hearsay declarations of an unavailable witness, the confrontation clause, and the legal concept of "indicia of reliability." In *Roberts*, the defendant objected to the admission of a transcript of testimony previously given by a witness at a preliminary examination. The witness was unavailable at trial because she had left the jurisdiction and could not be located, despite the prosecutor's good faith efforts to locate her. After noting that the witness had been subjected to a form of cross-examination at the preliminary examination, the Court held that the transcript "bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' "[51]

The *Roberts* Court emphasized that the confrontation clause prevents the admission of a prior statement unless the witness is unavailable and the statement bears adequate indicia of reliability.[52] These two requirements were subsequently termed the *Roberts* two-pronged test.[53] With regard to the second prong, the *Roberts* Court stated that reliability can be inferred when the evidence falls within a *firmly rooted hearsay exception*.[54] However, the *Roberts* decision was predicated on the indicia of reliability that surround testimony given at a preliminary examination, not on a firmly rooted hearsay exception. Thus, the *Roberts* case opened the door to speculation about which hearsay exceptions are firmly rooted.[55]

In *United States v. Inadi*,[56] the Court decided that the *Roberts* "unavailability prong" does not apply to a nontestifying coconspirator. The Court distinguished the *Roberts* case from cases dealing with coconspirator hearsay statements because coconspirators make their statements in a different context than witnesses testifying in court.[57] In the Court's view, testimony given at a preliminary hearing "seldom has independent evidentiary significance of its own" and is a justifiable sub-

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49. At least twenty witnesses in total, including an eyewitness to the crime, testified against Evans. *Id.* at 87.

50. 448 U.S. 56 (1980).

51. *Id.* at 73 (quotation marks and citation omitted).

52. The Court indicated that a good-faith effort to obtain the presence of the witness at trial is required on the part of the prosecution in order to satisfy the unavailability requirement. *Id.* at 74.

53. *See, e.g.*, United States v. Bourjaily, 781 F.2d 539, 543 (6th Cir. 1986).

54. *Roberts*, 448 U.S. at 66 (emphasis added).

55. *See, e.g.*, Brown, *The Confrontation Clause and the Hearsay Rule: a Problematic Relationship in Need of a Practical Analysis*, 14 FLA. ST. U.L. REV. 949, 970-71 (1987).

56. 475 U.S. 387 (1986).

57. *Id.* at 395-96.

stitute for live testimony only when a witness is unavailable.[58] In contrast, statements made during the course of a conspiracy provide evidence of the existence of a conspiracy—evidence which cannot be "replicated" at trial.[59] A participant in a conspiracy is not likely to take the stand at trial and "reproduce a significant portion of the evidentiary value of his statements made during the course of the conspiracy."[60] The Court concluded that statements made during a conspiracy are highly probative of the conspiracy itself and "are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence."[61]

Inadi, however, left unresolved whether coconspirator hearsay statements fall under a firmly rooted hearsay exception and thus satisfy the reliability prong of *Roberts.*[62] Also, *Inadi* did not involve codefendants charged with conspiracy where hearsay statements are admitted but the declarant codefendant refuses to take the stand. The *Bourjaily* case provided the Court with the opportunity to decide these questions. The Court's reasoning is best understood after a review of the facts and procedural posture of *Bourjaily.*

II. *BOURJAILY V. UNITED STATES*

On May 25, 1984, FBI agents arrested William Bourjaily as he sat in his car in the parking lot of a hotel.[63] Moments before the arrest, an FBI agent saw Bourjaily accept a package from his alleged coconspirator, Angelo Lonardo. The package contained a kilogram of cocaine. After arresting Bourjaily, the agents recovered the cocaine and found approximately $20,000 in a leather bag under Bourjaily's passenger seat. Bourjaily and Lonardo were both charged with conspiracy to distribute cocaine, and they were tried together.

At trial, an FBI informant testified that he and Lonardo had arranged the cocaine deal, and that Lonardo had agreed to select "people" to distribute the drug. Taped conversations between Lonardo and the informant were also introduced into evidence. In one conversation, Lonardo stated that he had talked to "the people" who were interested in the cocaine. In another conversation, Lonardo stated that he would get in touch with "some people" in order to arrange for the delivery of money to the informant.

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58. *Id.* at 394.
59. *Id.* at 395.
60. *Id.*
61. *Id.* at 396.
62. *See supra* note 55 and accompanying text.
63. United States v. Bourjaily, 781 F.2d 539, 540-42 (6th Cir. 1986). The facts described *infra* are taken from the Sixth Circuit's opinion, *id.* at 540-42.

On the day of the arranged drug sale, Lonardo had two additional phone conversations with the informant. In the first conversation, Lonardo stated that he had a "gentleman friend" with him who wanted to ask some questions. The informant testified that the "friend" asked about the price and quality of the cocaine, and how he was to pay for the cocaine. In the second conversation, Lonardo told the informant to park his car behind a hotel and meet him in the lobby. Lonardo then stated, "My friend will be out in his car and I'll just go over and you know." Shortly thereafter, Lonardo met the informant in the hotel lobby and got the informant's car keys so that Lonardo could transfer the package in the informant's car to his friend.

FBI agents testified that they observed Bourjaily enter the hotel parking lot and drive around in it, stopping in different areas and examining the vehicles parked in the lot. After Bourjaily parked in the farthest area from the hotel entrance, the agents observed Bourjaily drive his car to where Lonardo had just taken the package of cocaine from the informant's car. One agent observed Bourjaily accept the package from Lonardo. The agents then arrested Bourjaily.

Bourjaily objected to the admission into evidence of Lonardo's statements to the FBI informant.[64] The trial court admitted the statements under Federal Rule of Evidence 801(d)(2)(E).[65] Bourjaily was convicted of conspiracy to distribute cocaine and possession with intent to distribute cocaine, and was sentenced to five to fifteen years in prison.[66] On appeal to the Sixth Circuit, Bourjaily argued that the trial court erred in admitting Lonardo's statements into evidence under the coconspirator exception.[67] In the alternative, Bourjaily argued that because Lonardo had invoked his fifth amendment right not to testify at trial, the admission of the statements violated his sixth amendment right to confront the witnesses against him.[68] The panel for the Sixth Circuit rejected these arguments.

Relying on the Sixth Circuit's previous rejection of the rule against bootstrapping in *United States v. Vinson*,[69] the panel found no judicial error in the trial court considering Lonardo's statements themselves in deciding whether to admit the statements under the coconspirator exception.[70] On the sixth amendment issue, the panel used a bifurcated analysis to determine whether the unavailability and reliability require-

64. *Bourjaily*, 107 S. Ct. at 2778.
65. *Id.*
66. *Id.*
67. *Bourjaily*, 781 F.2d at 541.
68. *Id.*
69. 606 F.2d 149 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). *See supra* notes 37-40 and accompanying text.
70. *Bourjaily*, 781 F.2d at 542.

ments of *Roberts* were satisfied. First, the court utilized Sixth Circuit precedent to conclude that Lonardo was in fact unavailable based on his refusal to testify.[71] Second, the court concluded that Lonardo's statements to the FBI informant bore sufficient indicia of reliability because Rule 801(d)(2)(E) is a well-established hearsay exception.[72]

The Supreme Court granted certiorari to decide three issues relating to Rule 801(d)(2)(E) preliminary admissibility determinations: (1) whether trial courts must determine by independent evidence that a conspiracy existed; (2) the quantum of proof applicable in making these determinations; and (3) whether trial courts must make an independent inquiry into the reliability of these proffered statements.[73] In a 6-3 decision, with Chief Justice Rehnquist writing for the majority, the Court held that a trial court can consider the proffered hearsay statements themselves when making the preliminary determination of whether a conspiracy existed between the declarant and the defendant.[74] Furthermore, the Court held that such determinations are governed by a preponderance of the evidence standard,[75] and that the confrontation clause does not require a trial court to independently inquire into the reliability of the statements.[76] Justice Blackmun, joined by Justices Brennan and Marshall, dissented on the bootstrapping and reliability issues, but agreed with the majority on the preponderance of the evidence issue.[77]

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71. The Sixth Circuit's decision regarding the unavailability prong of *Roberts* is moot for purposes of this Note because of the holding in United States v. Inadi, 475 U.S. 387 (1986). *Inadi* held that the *Roberts* unavailability prong does not apply to coconspirator declarants, and the prosecution does not have to show that a missing witness is "unavailable." *See supra* text accompanying notes 56-61.

72. *Bourjaily*, 781 F.2d at 543. The court relied on Fuson v. Jago, 773 F.2d 55 (6th Cir. 1985), to conclude that Rule 801(d)(2)(E) represents a well-established hearsay exception.

73. *Bourjaily*, 107 S. Ct. at 2777-78.

74. *Id.* at 2782.

75. *Id.* at 2779.

76. *Id.* at 2783.

77. *Id.* at 2784 n.1 (Blackmun, J., dissenting). The Court was unanimous in agreeing that a party seeking the admission of an alleged coconspirator's statement under Rule 801(d)(2)(E) must prove the required preliminary facts by a preponderance of the evidence. The Court relied on a line of cases which deal with preliminary evidentiary issues. *See, e.g.*, Colorado v. Connelly, 107 S. Ct. 515 (1986); Nix v. Williams, 467 U.S. 431 (1984); United States v. Matlock, 415 U.S. 164 (1974); and Leo v. Twomey, 404 U.S. 477 (1972). All these cases held that preliminary evidentiary issues need only be proven by a preponderance of the evidence, and that the jury is the ultimate factfinder and should not be deprived of probative evidence. This Note does not attempt an in-depth analysis of the Court's decision on this issue.

III. THE COURT'S REASONING

A. The Bootstrapping Issue

The Court in *Bourjaily* rejected the rule against bootstrapping because it believed that the rule unnecessarily keeps probative evidence from the trier of fact.[78] The majority relied on the plain meaning of Rule 104(a) for the proposition that a trial court may consider any and all non-privileged evidence when deciding preliminary evidentiary matters.[79] It interpreted the *Glasser* prohibition against bootstrapping to mean that a trial court must have *some* proof *aliunde* to corroborate the hearsay statements.[80] Under the majority's analysis, out-of-court statements are only presumed unreliable.[81] "Appropriate proof" can rebut this presumption.[82] Appropriate proof consists of both hearsay statements and other independent evidence which corroborates the hearsay statements.[83] Also the majority noted that "[t]he sum of an evidentiary presentation may well be greater than its constituent parts."[84] The Court concluded that a per se rule barring a trial court from considering the evidence as a whole serves no legitimate purpose in the truth-seeking process.[85]

The majority then applied this reasoning to the facts of the case and found that Bourjaily's actions corroborated Lonardo's statements about his "gentleman friend."[86] Lonardo said that his "friend" would be in the parking lot of the hotel where the cocaine would be trans-

78. *Bourjaily*, 107 S. Ct. at 2781.
79. *Id.* at 2780.
80. *Id.*
81. *Id.* at 2781.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* The Court further reasoned that at least three alternatives are available to a defendant who opposes the admission of alleged coconspirator hearsay statements. First, a defendant has an "adequate incentive to point out the shortcomings" in the evidence before the trial court makes its preliminary determination under Rule 801(d)(2)(E). Second, upon the admission of the statements, the defendant can attack the probative value of the statements. Finally, Federal Rule of Evidence 806 allows the defendant the opportunity to attack the credibility of any declarant whose out-of-court statements have been admitted into evidence. *Id.* Rule 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

FED. R. EVID. 806.
86. *Bourjaily*, 107 S. Ct. at 2781.

ferred. Bourjaily showed up at the hotel and accepted the package of cocaine from Lonardo. The majority considered Bourjaily's actions to be sufficient corroboration of Lonardo's hearsay declarations.[87]

The dissent rejected the majority's "plain meaning" interpretation of Rule 104(a).[88] Under the dissent's analysis, Rule 801(d)(2)(E)—and not Rule 104(a)—governs whether a trial court can consider the hearsay statement itself when making the Rule 801(d)(2)(E) preliminary determination.[89] The dissent stated that Congress intended to codify the common law coconspirator exception in Rule 801(d)(2)(E), including the independent-evidence requirement of *Glasser*.[90] As support for this view, the dissent noted that all but two of the Courts of Appeals still adhered to the independent-evidence requirement after the enactment of the Federal Rules of Evidence in 1975.[91]

The dissent also rejected the majority's "appropriate evidence" analysis.[92] Instead of presuming that all non-privileged evidence is appropriate for a trial court to consider, the dissent presumed that alleged coconspirator hearsay statements are always unreliable.[93] The dissent favored this presumption of unreliability because of concerns that an innocent defendant would have difficulty defending himself against such hearsay statements, especially if the defendant had no idea why the putative coconspirator made the statements in the first place.[94]

Finally, the dissent stated that the elimination of the rule against bootstrapping eliminates one of the safeguards against the use of unreliable hearsay statements.[95] The dissent was concerned that proffered hearsay statements could be the controlling factor in establishing the existence of a conspiracy, and might even "transform a series of innocu-

87. *Id.* The majority specifically stated that the Court was not deciding the issue of whether a trial court can rely solely upon hearsay statements to determine that a conspiracy existed between the declarant and the defendant at the time the statement was made. *Id.* at 2781-82. Thus, the question remains unanswered whether hearsay statements alone can constitute sufficient evidence to prove the existence of a conspiracy. One would think not. This Note recommends that lower courts interpret *Bourjaily* to require sufficient corroboration of hearsay statements by admissible, nonhearsay evidence before the statements can be admitted under Rule 801(d)(2)(E). *See infra* Part IV. The real question seems to boil down to this: How much independent evidence is required to corroborate the hearsay statements before the threshold for determining a conspiracy is reached?

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

89. *Id.* at 2788 (Blackmun, J., dissenting). *See supra* note 4 for the text of Rule 801(d)(2)(E).

90. *Bourjaily*, 107 S. Ct. at 2788 n.8 (Blackmun, J., dissenting).

91. *Id.* at 2789 n.9 (Blackmun, J., dissenting). *See supra* text accompanying notes 32-40.

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

93. *Id.*

94. *Id.*

95. *Id.*

ous actions by a defendant into evidence that he was participating in a criminal conspiracy."[96]

B. Confrontation Clause Issue

The Court held that once the coconspirator exception applies, the confrontation clause "does not require a court to embark on an independent inquiry into the reliability" of such statements.[97] The majority cited *Roberts* for the proposition that an absolute prohibition against the use of out-of-court statements is too extreme and flies in the face of society's interest in accurate factfinding.[98] The Court viewed *Roberts* as harmonizing two competing interests, namely, the limits the confrontation clause places on the kind of evidence that may be used against a defendant, and accurate factfinding. As in *Inadi*, where the competing interests were resolved in favor of accurate factfinding,[99] the Court concluded that the *Roberts* reliability requirement, if made applicable to coconspirator declarations, would frustrate accurate factfinding.[100]

The majority's decision centered on its interpretation of *Roberts*. According to the majority, *Roberts* addressed the issue of whether the confrontation clause requires an independent inquiry into the reliability of admissible hearsay statements. In reaching its decision, the *Bourjaily* Court relied on the "firmly rooted hearsay exception" language in *Roberts*.[101] The majority noted that the "firmly rooted hearsay exception" in *Roberts* was based on the *Green* and *Dutton* decisions.[102] In the majority's view, *Green* recognized that the confrontation clause and the hearsay rules are "generally designed to protect similar values."[103] Furthermore, the majority read *Dutton* for the proposition that the hearsay rules and the confrontation clause "stem from the same roots."[104] The Court reasoned that if the coconspirator exception is a "firmly rooted hearsay exception," then statements which satisfy the requirements of the exception are reliable for purposes of the confrontation clause. The majority then cited *Gooding* for the proposition that the coconspirator exception has been recognized by the Court for more than a century and a half.[105] The majority concluded that the coconspirator exception is "firmly rooted," and that an independent inquiry

96. *Id.*
97. *Bourjaily*, 107 S. Ct. at 2783.
98. *Id.* at 2782.
99. *See supra* text accompanying notes 56-61.
100. *Bourjaily*, 107 S. Ct. at 2782
101. *Id.* at 2782-83 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).
102. *Bourjaily*, 107 S. Ct. at 2782. *See supra* text accompanying note 54.
103. *Bourjaily*, 107 S. Ct. at 2782 (quoting California v. Green, 399 U.S. 149, 155 (1970)).
104. *Id.* (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).
105. *Id.* at 2783.

into the reliability of admissible coconspirator statements is not required by the confrontation clause.[106]

The *Bourjaily* dissent argued that the majority erred in relying upon *Roberts* for the proposition that reliability can be inferred from evidence which falls within a "firmly rooted hearsay exception."[107] Rather, the dissent read *Roberts* as equating accuracy in the factfinding process with cross-examination.[108] Absent an opportunity to cross-examine a witness or hearsay declarant, the dissent argued that out-of-court statements should be admitted only upon a showing that they bear adequate indicia of reliability.[109] The dissent reasoned that these "indicia serve to guarantee the trustworthiness of the declarant's statement and thus promote the accuracy of the trial . . . ."[110]

The dissent essentially disagreed with the majority's implicit assumption that, once a conspiracy is shown to exist, coconspirator statements can be presumed reliable. On the contrary, the dissent noted that the coconspirator exception has never been justified on reliability or trustworthiness grounds.[111] Instead, the dissent noted that the exception has been based on an agency rationale.[112] Under agency law, a principal is bound by his or her agent's statement only when other evidence shows that the agent's statement was within the authority of the agent.[113] Because the majority's decision allows trial courts to consider a coconspirator's statements along with other nonhearsay evidence to establish the existence of a conspiracy, the dissent concluded that the Court's decision significantly transformed the exception.[114] In the dissent's view, the transformation results because the independent evidence requirement of the rule against bootstrapping was, in and of itself, a separate "indicia of reliability," which acted as a safeguard against the admission of unreliable statements.[115] The dissent concluded that the transformation of the exception, because it reduced the reliability of coconspirator hearsay statements, also diminished the protections embodied in the confrontation clause.[116]

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106. *Id.*

107. *Id.* at 2792 (Blackmun, J., dissenting).

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

109. *Id.* at 2791-92 (Blackmun, J., dissenting).

110. *Id.* at 2792 (Blackmun, J., dissenting).

111. *Id.*

112. *Id.* at 2786 n.3 (Blackmun, J., dissenting).

113. *Id.* at 2786 (Blackmun, J., dissenting). Justice Blackmun cited RESTATEMENT (SECOND) OF AGENCY § 285 (1957) for the proposition that an agent's statement, by itself, cannot be used to prove the existence of an agency relationship. *Id. See also supra* note 24.

114. *Id.* at 2792 (Blackmun, J., dissenting).

115. *Id.*

116. *Id.*

IV. Analysis: The Argument For a Corroboration Requirement

Bourjaily is another recent United States Supreme Court decision that strengthens the power of the government and diminishes the scope of an individual constitutional right.[117] As with any change in the law affecting constitutional rights, one questions whether the change is justified based upon an analysis of the competing interests involved in the case. In *Bourjaily,* an individual's right to confront the witnesses against him, and the government's interest in prosecuting criminals, were in direct opposition. This analysis attempts to show that the Court reached the correct decision in *Bourjaily.* Essential to this analysis is this Note's recommendation that the lower courts interpret *Bourjaily* to require sufficient corroboration of hearsay statements by admissible, nonhearsay evidence before the statements can be admitted under Rule 801(d)(2)(E).

A. Eliminating the Rule Against Bootstrapping

Bourjaily changes the law by making it easier for the government to prove the existence of a conspiracy for the purpose of using Rule 801(d)(2)(E) to admit coconspirator hearsay statements into evidence. The *Bourjaily* case virtually assures that more hearsay evidence will be admitted in federal conspiracy trials. Regardless of the legal reasoning employed by the Court, its reasoning is sound only if independent evidence *corroborates* the hearsay statements.[118] Otherwise, individuals could be falsely convicted based on constitutionally insufficient evidence. The Court specifically stated that it was not deciding the issue of whether hearsay statements alone could constitute sufficient evidence to be admitted under Rule 801(d)(2)(E).[119] Instead, the Court decided that trial courts could consider hearsay statements along with other admissible evidence when deciding whether a conspiracy existed between the declarant and the defendant.

This result seems fair for two reasons. First, trial courts have been given much discretion on when, during the course of a trial, to decide Rule 801(d)(2)(E) motions for admissions. In the past, trial courts sometimes admitted hearsay statements into evidence on a conditional basis, subject to the admission of the independent evidence required to

117. *See, e.g.,* Colorado v. Connelly, 107 S. Ct. 515 (1986) (fourteenth amendment does not invalidate confession given to police unless police use coercive activity to obtain it); United States v. Inadi, 475 U.S. 387 (1986) (sixth amendment does not require the government to show that coconspirator declarant is unavailable to testify); United States v. Leon, 468 U.S. 897 (1984) (fourth amendment does not invalidate search warrant obtained in good faith, even if found technically invalid).

118. *See supra* text accompanying notes 78-85.

119. *See supra* note 87.

prove the existence of a conspiracy.[120] If the government did not prove the existence of a conspiracy during its case, the trial court could declare a mistrial based on the prejudicial effect the wrongly admitted hearsay statement had on the defendant. Thus, the *Bourjaily* rule will probably not have a great impact on when trial courts will decide Rule 801(d)(2)(E) determinations during a trial.

Second, based on the Court's interpretation of the *Glasser* case, trial courts should interpret *Bourjaily* to require corroboration of the hearsay statements by other admissible, nonhearsay evidence. According to the Court, *Glasser* could be interpreted to mean that some proof, other than hearsay statements, is needed as corroboration of the statements before they are admissible under the exception. If trial courts interpret *Bourjaily* to require this corroboration, then hearsay statements alone could never constitute enough evidence of a conspiracy to satisfy the requirements of Rule 801(d)(2)(E). Serious doubts about the fairness of the criminal justice system would surely result if a person was convicted just because he was a "friend" of someone who made inculpatory statements about a "friend." In other words, without any admissible corroborating evidence showing that the "friend" actually participated in a conspiracy—such as testimony by witnesses who saw the "friend" accept a package of cocaine, or evidence of taped conversations of the "friend" discussing a planned crime with a coconspirator—hearsay statements, by themselves, could be a figment of the declarant's imagination.

On the other hand, as the facts in *Bourjaily* indicate, corroborating evidence, when coupled with hearsay statements, can establish the existence of a conspiracy. Lonardo arranged the drug deal with the FBI informant after Lonardo agreed to get others to distribute the cocaine. The evidence at trial indicated that Lonardo did not have the economic resources to buy a kilogram of cocaine, and that he needed to involve others in order to transact any deals. On the day of the arranged drug deal, in a phone conversation, the "friend" asked the informant about the quantity and quality of the cocaine, and how he was to pay for it. Shortly before the transaction, Lonardo made it clear to the informant that his "friend" would be waiting in the parking lot of the hotel where the deal was to take place. Lonardo stated, "My friend will be out in his car and I'll just go over and you know." FBI agents testified that they saw Bourjaily enter the parking lot and reconnoiter it for suspicious-looking vehicles. Finally, the agents saw Bourjaily drive his car over to Lonardo in order to facilitate the transfer of the package.

Bourjaily's actions *sufficiently corroborated* Lonardo's hearsay statement that his friend would be in the parking lot to accept the co-

120. *See supra* note 5 and accompanying text.

caine. Not only did Bourjaily show up according to Lonardo's statement, but he had more than $20,000 in cash in his car, and his actions in the parking lot were consistent with the suspicious behavior normally associated with individuals transacting a drug deal. However, if Bourjaily had not shown up at the hotel and accepted the package in the way he did, a trial court would probably not allow the admission of Lonardo's hearsay statement into evidence. Out of context, with no corroborating evidence, the statement that, "My friend will be out in his car and I'll just go over and you know," is virtually meaningless.

Although the dissent was concerned about the possibility that the admission of a hearsay statement could transform a series of innocuous actions into evidence of the existence of a conspiracy,[121] the facts in *Bourjaily* clearly do not fit into such a classification. Still, to explore whether the dissent's concern is justified, consider the same facts in *Bourjaily*, except assume that Lonardo fabricated his statements to the FBI informant. In other words, assume that Lonardo did not really intend to find individuals to distribute the cocaine. Instead, Lonardo merely asked Bourjaily for a favor, namely, to meet him at the hotel to pick up a "package." Also, assume that Lonardo's "friend" never spoke to the informant over the phone. Furthermore, assume that Bourjaily showed up at the hotel, without any cash in his car, and, without acting suspicious, picked up the package from Lonardo.

If the government then arrests Bourjaily and charges him with conspiracy to distribute cocaine, the prosecution will probably try to admit Lonardo's statements under Rule 801(d)(2)(E). In this situation, only Bourjaily's actions would be available to corroborate the hearsay statements. Bourjaily's actions include going to the hotel and picking up the package. Bourjaily would argue to the trial court that he did not know the contents of the package and that he was just doing a favor for Lonardo.[122] Bourjaily's credibility would be a key factor for the trial court in deciding whether Bourjaily is being honest about his claim of lack of knowledge. In the situation just described, it is not clear how a trial court would decide the Rule 801(d)(2)(E) issue. One hopes that the trial court would conclude that the hearsay statement lacked sufficient corroboration. If the trial court rules against Bourjaily, then the dissent's concerns are justified.

However, this Note recommends that the lower courts interpret *Bourjaily* to require sufficient corroboration of hearsay statements by admissible, nonhearsay evidence before the statements can be admitted under Rule 801(d)(2)(E). Thus, one way to protect against the dissent's

121. *See supra* text accompanying note 96.

122. See *supra* note 85 for three alternatives available to a defendant who opposes the admission of an alleged coconspirator statement.

concerns is for the lower courts to adopt and develop a "sufficient" corroboration standard. By approaching Rule 801(d)(2)(E) determinations in this manner, the courts will be more aware of the potential for instances where a defendant is wrongly accused of participating in a conspiracy. At a minimum, based on the hypothetical discussed above, a sufficient corroboration standard should require more corroborating evidence than merely picking up a package. Other corroborating evidence should exist, such as evidence of large amounts of cash, recorded telephone conversations, or suspicious behavior, before trial courts admit hearsay evidence under Rule 801(d)(2)(E).[123] If the lower courts interpret *Bourjaily* to require the adoption of a sufficient corroboration standard, and the courts approach Rule 801(d)(2)(E) determinations with that standard in mind, the Supreme Court's decision to allow trial courts to consider hearsay statements in the light of any corroborating evidence appears appropriate.

B. Confrontation Clause Issue

Under the confrontation clause, a defendant has a constitutional right to confront the witnesses against him. The Supreme Court has traditionally proceeded with caution when deciding cases involving this clause. However, in *Bourjaily,* the Court appears to have almost disregarded its prior decisions that have defined the scope of the confrontation clause's protections. This subsection analyzes past decisions and shows how *Bourjaily* departed from established precedent to create a separate constitutional rule for coconspirators. After that analysis, the argument is made for having the lower courts interpret *Bourjaily* to re-

123. A review of some recent United States Courts of Appeals decisions indicates that corroborating evidence is usually proven by testimony from surveillance agents or other witnesses who observed the defendant's actions or heard the defendant make inculpatory statements. In all these cases, some form of nonhearsay corroborating evidence was presented to link the defendant to a conspiracy. However, none of the decisions reversed a conviction on the grounds of insufficient corroborating evidence. *See, e.g.,* United States v. Reynolds, 828 F.2d 46, 46-47 (1st Cir. 1987) (physical proximity of defendant to coconspirator at time of drug deal constituted sufficient corroboration); United States v. Silvano, 812 F.2d 754, 762 (1st Cir. 1987) (coconspirator's actions indicated that defendant had communicated certain information to coconspirator); United States v. Perez, 823 F.2d 854, 855 (5th Cir. 1987) (telephone number recorded on defendant's phone pager indicated that coconspirator called defendant and sufficiently connected coconspirator to defendant); United States v. Castello, 830 F.2d 99, 102 (7th Cir. 1987) (witnesses testified that they saw defendant hand drugs involved in sale to coconspirator); United States v. Cerone, 830 F.2d 938, 949 (8th Cir. 1987) (surveillance and testimony corroborated written notes which documented meetings between coconspirators); United States v. Paris, 827 F.2d 395, 397 (9th Cir. 1987) (surveillance agents observed meeting between coconspirator and defendant; and defendant's actions corroborated statement when defendant showed up at scheduled meeting with drugs in his possession); United States v. Martinez, 825 F.2d 1451, 1452 (10th Cir. 1987) (witness's testimony corroborated statement by defendant directing coconspirator to pay $5,000 for drugs); United States v. Hernandez, 829 F.2d 988, 994 (10th Cir. 1987) (defendant's statements constituted strong independent proof of a conspiracy).

quire sufficient corroboration of hearsay statements by admissible, nonhearsay evidence before the statements can be admitted under Rule 801(d)(2)(E). This Note concludes that, as long as the courts adopt a "sufficient" corroboration standard, once the requirements of Rule 801(d)(2)(E) have been satisfied, coconspirator statements can be presumed reliable for purposes of the confrontation clause.

1. THE RELIABILITY AND TRUSTWORTHINESS COMPONENTS OF THE CONFRONTATION CLAUSE

In *California v. Green,* the Court stated that "full and effective cross-examination" is required to comport with the requirements of the confrontation clause.[124] The benefits associated with having a witness testify in front of a jury, as well as the benefits associated with giving the defendant the opportunity to confront a witness, are well known.[125] However, in later cases the Court began to recognize two exceptions to the cross-examination requirement.

In *Dutton,* the Court discussed the possibility that a hearsay statement could be admissible if the statement contained adequate "indicia of reliability."[126] In *Roberts,* the Court identified a situation where the *Dutton* rationale applied. The situation involved an unavailable witness who had testified at a preliminary hearing where the defendant had subjected the witness to a form of cross-examination. However, *Roberts* went beyond deciding the narrow issue the facts of the case presented to the Court. Instead of limiting its decision to situations where the defendant subjects an unavailable witness to a form of cross-examination at a prior judicial hearing, *Roberts* went on to establish a two-prong test, with both an unavailability and a reliability requirement.[127]

In what must be viewed as dicta, *Roberts* further stated that reliability can be inferred when a statement falls within a firmly rooted hearsay exception.[128] Not only was this statement unnecessary for the *Roberts* Court to decide the case, but no one knew which hearsay exceptions were included in the "firmly rooted" category.[129] Although *Roberts* struck a balance between providing the factfinder with reliable evidence and the problem of missing or unavailable witnesses, the decision created a new class of potentially admissible evidence based on a nebulous "firmly rooted" hearsay exception standard.

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124. California v. Green, 399 U.S. 149, 158 (1970).
125. *See supra* note 42.
126. *See supra* text accompanying notes 46-49.
127. *See supra* text accompanying notes 52-54.
128. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
129. *See, e.g.,* Brown, *supra* note 55, at 970-71.

The *Bourjaily* Court basically relied on the dicta included in *Roberts* to conclude that an independent inquiry is not required when hearsay statements are admitted under Rule 801(d)(2)(E). As the dissent pointed out, the majority selectively used bits and pieces from *Green* and *Dutton* to conclude that the hearsay rules and the confrontation clause are designed to protect similar values. The *Bourjaily* Court did not even attempt to discuss the role that cross-examination plays in ensuring accurate factfinding. Instead, the Court used the dicta in *Roberts* to conclude that the coconspirator exception is a "firmly rooted" exception.

The end result of *Inadi* and *Bourjaily* is to create a separate constitutional rule for coconspirators. *Inadi* classifies coconspirators as "unavailable" for purposes of applying the *Roberts* unavailability test. *Bourjaily* classifies coconspirator statements as possessing adequate indicia of reliability for purposes of confrontation clause concerns. Thus, *Bourjaily* represents a significant change in the law. The only rational way to reconcile the Court's past decisions is to conclude, as the Court did in *Inadi,* that coconspirators make their statements in a different context than witnesses testifying in court.[130] However, once this conclusion is reached, there still remains the question of whether coconspirator statements, made in the course and in furtherance of a conspiracy, can be presumed reliable and trustworthy for purposes of the confrontation clause. At a minimum, this clause should protect a defendant from having unreliable and untrustworthy evidence admitted against her or him. One way to achieve this protection is to interpret *Bourjaily* as requiring sufficient corroboration of hearsay statements by admissible, nonhearsay evidence.

2. THE ARGUMENT FOR A CORROBORATION REQUIREMENT

The United States Government's brief identified five factors to support the proposition that statements made by coconspirators are reliable when made in the course and in furtherance of a conspiracy.[131] If these factors support this proposition, then one might conclude that coconspirator statements are reliable, especially if the courts adopt a sufficient corroboration requirement. The following discussion exam-

130. *See supra* text accompanying notes 56-61.

131. Brief for the United States, Bourjaily v. United States, 107 S. Ct. 2775 (1987) (No. 85-6725) (LEXIS, Genfed library, Briefs file). The five factors are: 1) the statements are usually spontaneous reactions; 2) the statements are usually against the declarant's penal interest; 3) idle chatter and deliberately fabricated statements are technically not admissible under the coconspirator exception; 4) members of a conspiracy are more likely aware of each others' role in a conspiracy; and 5) coconspirators usually speak differently when talking to each other. *Id.*

ines the inherent reliability of hearsay statements made during the course and in furtherance of a conspiracy.

First, the government argued that statements made during a conspiracy are usually spontaneous reactions,[132] made to ensure the success of the conspiracy, and thus are not based on faulty recollection.[133] The typical spontaneous reaction consists of a statement that answers a question regarding some aspect of a conspiracy. The answer is usually spontaneous because individuals involved in crime, like all of us, notice when a person is not straightforward and hesitates in giving a response. In other words, individuals involved in a conspiracy have a vested interest in being frank and straightforward with each other because the success of the conspiracy depends on each member performing his function in the conspiracy.

For instance, consider the following situation. A drug deal is postponed to a later date. The prospective buyer senses trouble and asks the seller why the deal was postponed. The seller realizes that his future ability to sell drugs to the buyer is at stake and responds that his supplier had to leave town to go to his parents' fiftieth wedding anniversary. The seller's statement is reliable because the seller would not likely forget that his supplier had to leave town to attend his parents' fiftieth wedding anniversary.[134] Furthermore, the statement was made to ensure the success of the conspiracy because the seller wanted to sell drugs to the buyer in the future.[135]

The *Gooding* case also supports the proposition that coconspirator statements are usually spontaneous reactions which are not based on faulty recollection. In *Gooding*, the captain of a ship was seeking to employ mates in order to sail to Africa for the purpose of illegally trans-

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132. *Id.* "Spontaneous reactions" are similar to both "present sense impressions" under Fed. R. Evid. 803(1) and "excited utterances" under Fed. R. Evid. 803(2). However, not all spontaneous reactions will be considered either present sense impressions or excited utterances. Present sense impressions are statements describing or explaining an event which were made while the declarant was perceiving the event, or shortly thereafter. Excited utterances are statements relating to a startling event which were made while the declarant was under the stress of excitement caused by the event. A spontaneous reaction does not necessarily mean that an event was being perceived, or that the declarant was under any stress, when the statement was made. However, a spontaneous reaction could consist of answering a question without hesitation.

133. Brief for the United States, *supra* note 131.

134. *See* United States v. Paris, 827 F.2d 395, 397 (9th Cir. 1987). The supplier in that case did in fact go to Cleveland to attend his parents' fiftieth wedding anniversary. The government ultimately used this evidence to corroborate the seller's hearsay statements about the identity of the supplier.

135. *Id.* at 400. *See also* United States v. Crespo, No. 86-1361, slip op. at 21 (9th Cir. Oct. 26, 1987) (statement that apartment house was used by defendant as a "safe house" to conduct cocaine transactions satisfied the "in furtherance" requirement because statement was intended to allay buyer's fears about safety of apartment). *Cf.* United States v. Shoffner, 826 F.2d 619, 628 (7th Cir. 1987) (statements made to induce someone to join conspiracy satisfy the "in furtherance" requirement).

porting slaves.[136] In answer to a question about who would ensure payment of a prospective mate's wages, the captain spontaneously replied that "Uncle John" would.[137] The United States Supreme Court found no error in having this hearsay statement admitted against John Gooding because hiring mates was necessary for the success of the voyage.[138]

Second, the government argued that coconspirator statements are usually against the declarant's penal interest, thus decreasing the likelihood that they are false or mistaken.[139] The United States Supreme Court has noted that statements against one's penal interest carry their own "indicia of reliability."[140] These statements are reliable because reasonable individuals would not make such statements unless they believe them to be true.[141]

Third, the government argued that idle chatter and remarks, inadvertently misreported statements, and deliberately fabricated statements are technically not admissible under the coconspirator exception.[142] This factor relates to the "during the course and in furtherance" requirements of Rule 801(d)(2)(E).[143] The "in furtherance" requirement acts as a safeguard against the admission of statements that do not further a conspiracy because no corroborating evidence will exist to confirm the truth of the statement. Consider the following two hypotheticals.

First, assume that a person selling drugs tells a buyer that his supplier drives either a red Subaru or a white Toyota. The seller has never been seen with anyone who drives either type of car. Second, assume that the seller says that his supplier will bring the cocaine for a drug deal, and that the supplier drives either a red Subaru or a white Toyota.

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136. *See supra* notes 18-21 and accompanying text.

137. *See supra* note 18.

138. *See supra* text accompanying notes 17-22.

139. Brief for the United States, *supra* note 131.

140. United States v. Matlock, 415 U.S. 164, 176 (1974).

141. There are many recent cases which illustrate this point. *See, e.g.*, United States v. Reynolds, 828 F.2d 46, 47 (1st Cir. 1987) (reasonable jury could infer that defendant was conspirator after listening to defendant's recorded statement that "I'm getting my cut out of [the drug deal]."); Berrisford v. Wood, 826 F.2d 747, 751 (8th Cir. 1987) (coconspirator's statement that "you are going to be . . . my alibi" falls within a firmly rooted hearsay exception because it was against coconspirator's penal interest); United States v. Dozier, 826 F.2d 866, 871 (9th Cir. 1987) (statement admitting involvement in conspiracy and identifying ringleader was against coconspirator's penal interest and was sufficient indication of reliability).

Cf. FED. R. EVID. 804(b)(3) (statements tending to subject the declarant to civil or criminal liability that a reasonable man in his position would not have made unless he believed the statement to be true are an exception to the hearsay rule as long as the declarant is unavailable as a witness). Rule 804(b)(3) differs from the coconspirator exception, under which the declarant does not have to be "unavailable" before the out-of-court statements are admissible under *Inadi*. *See supra* text accompanying notes 56-61.

142. Brief for the United States, *supra* note 131.

143. *See supra* notes 22-23 and accompanying text.

Shortly thereafter, a person arrives in a white Toyota, and government agents find a briefcase full of cocaine in his or her car.[144]

In the first hypothetical, independent evidence does not corroborate the hearsay statements, and the statements carry little probative value. The seller's hearsay statement by itself could never constitute sufficient evidence to convict the alleged supplier. There are far too many red Subarus and white Toyotas on which to base the supplier's identity.

On the other hand, the second hypothetical illustrates how corroboration of a hearsay statement can make the statement highly probative of the existence of a conspiracy. Without the statement, the government could only prove a possession charge, not a conspiracy charge. Therefore, without corroboration, mere idle chatter and deliberately fabricated statements are of low probative value and will not provide evidence beyond a reasonable doubt to convict an individual of conspiracy.[145]

Fourth, the government argued that members of a conspiracy are more likely aware of each other's role in a conspiracy because they each benefit when the enterprise is a success.[146] Coconspirators have a vested interest in knowing what other conspirators' responsibilities are in a given enterprise. This is especially true in conspiracies involving fewer participants. The facts in *Bourjaily* support this proposition.

Lonardo's statements about his "friend" indicated that this friend played a key role in the success of the drug deal. His friend had the money for the transaction and was to accept delivery of the contraband in a hotel parking lot. Lonardo had no reason to misrepresent that his friend would be in the hotel parking lot to consummate the transaction. In fact, Lonardo's "reputation" and ability to transact business with the seller and Bourjaily depended in part on the success of the deal.[147]

Fifth, the government argued that coconspirators usually speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand, and thus their declarations are in some respects more reliable than their testimony at trial.[148] The facts in *Bourjaily* also support this proposition.

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144. The second hypothetical is based on events described in United States v. Paris, 827 F.2d 395 (9th Cir. 1987).

145. *See infra* note 151.

146. Brief for the United States, *supra* note 131.

147. Interestingly, Lonardo might now have a reputation for testifying against members of organized crime groups. In United States v. Cerone, 830 F.2d 938, 941 (8th Cir. 1987), Angelo Lonardo, described as a "Cleveland underboss," is listed as testifying against the heads of the Chicago, Cleveland, Kansas City, and Milwaukee organized crime groups. The case involved a conspiracy to skim cash from two casinos in Las Vegas. This appears to be the same Lonardo because Bourjaily and Lonardo were arrested in the Cleveland area. *Bourjaily*, 781 F.2d at 541.

148. Brief for the United States, *supra* note 131.

Recorded telephone conversations admitted into evidence at trial indicated that Lonardo and the FBI informant used the word "trees" in order to conceal the fact that they were talking about cocaine.[149] The use of the word "trees" is, in and of itself, probative of the declarants concealing something in their conversations, unless they can show they are legitimately in the business of selling trees. Without a rational explanation for why the word "trees" appears in a conversation, juries are free to infer a reason. A reasonable inference is that the declarants were using code language to conceal their conversation.[150]

In summary, the government's five factors support the proposition that coconspirator hearsay statements are reliable when the statements are *corroborated by other independent evidence.* The gravamen of the government's argument was that out-of-court statements are inherently reliable when they are made in furtherance of the goals of a conspiracy. Logically, the "in furtherance" requirement demands that independent evidence corroborate the statements. Otherwise, the prosecution will not be able to link the subject of the declaration to the conspiracy. Again, a bare statement that an individual is going to help distribute some drugs, without independent corroboration, will not constitute sufficient evidence to convict the individual beyond a reasonable doubt.[151]

Nevertheless, there are also arguments against assuming the inherent reliability of out-of-court statements of coconspirators. First, the purpose of the confrontation clause is to guarantee the accuracy of the factfinding process, and the coconspirator exception has never been justified primarily upon reliability or trustworthiness grounds.[152] Therefore, it is misplaced faith to consider coconspirator statements as inherently reliable because they have never in the past been admitted for that reason. Instead, the statements have been admitted because there has been independent evidence which links the defendant to the conspiracy. Next, these out-of-court statements have the potential to be the critical evidence which controls whether the jury will be allowed to consider the statement.[153] In other words, the statement itself will prove to be the modicum of evidence that determines whether the statement is admitted under the coconspirator exception. Finally, innocent defendants will have a difficult time defending themselves when confronted with these

149. Record of trial, Bourjaily v. United States, 107 S. Ct. 2775 (1987) (No. 85-6725) (LEXIS, Genfed library, Briefs file).

150. *Cf.* United States v. Nersesian, 824 F.2d 1294, 1326 (2d Cir. 1987) (trial court free to conclude that defendant's statement that "[t]here's not a house that I have, but I sold it" related to conspiracy drug charge and linked defendant to the charge).

151. Without any other corroborating evidence, a reasonable doubt would exist as to the defendant's guilt. *See generally In re* Winship, 397 U.S. 358 (1970).

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

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

out-of-court hearsay statements.[154] Innocent defendants will have difficulty explaining the statement because they will have no idea why the statements were made in the first place.

These arguments against assuming the reliability of coconspirator statements are persuasive arguments for the lower courts to adopt a corroboration standard requiring sufficient corroboration of hearsay statements by admissible, nonhearsay evidence before admitting them under Rule 801(d)(2)(E). If the lower courts adopt a corroboration standard, individuals will be protected against erroneous convictions because hearsay statements will not be admitted into evidence unless other evidence exists which sufficiently corroborates the statements. As long as there are at least two pieces of evidence—evidence which sufficiently links the defendant to the conspiracy and an out-of-court statement—a court should not have to independently inquire into the reliability of the statement. Furthermore, there is no sixth amendment deprivation, because corroborated coconspirator statements are reliable due to the unique relationship coconspirators have with each other, a relationship based on common illegal goals.[155]

V. CONCLUSION

Bourjaily abolished the rule against bootstrapping and increased the government's power to prosecute individuals involved in organized crime. Under the new law, once coconspirator hearsay statements are properly admitted into evidence,[156] trial courts do not have to independently determine whether the statements are reliable. *Bourjaily* departed from established precedent to create a separate constitutional rule for coconspirators. The Court disregarded past decisions that had defined the scope of protection which the confrontation clause guarantees to defendants. The only rational way to reconcile the Court's precedent with *Bourjaily* is to conclude, as the Court did in *Inadi,* that coconspirators make their statements in a different context than do witnesses testifying in court. However, once this conclusion is reached, the question of whether coconspirator statements can be presumed reliable and

154. *Id.*

155. It should be pointed out that wrongly accused defendants still have weapons at their disposal at trial after a hearsay statement is admitted under Rule 801(d)(2)(E). As the majority pointed out, upon admission of the statements, a defendant can attack both the probative value of the statements and the credibility of the declarant. *See supra* note 85. Even in a case such as *Bourjaily,* where a codefendant invokes his fifth amendment right not to testify, the defendant still has the right under Rule 806 to attack the credibility of his codefendant. Fed. R. Evid. 806 allows a defendant to attack the credibility of a nontestifying declarant with "any evidence which would be admissible for those purposes if declarant had testified as a witness."

156. Rule 801(d)(2)(E) requires that the declarant's statements be made in the course and in furtherance of a conspiracy between the declarant and the defendant.

trustworthy for purposes of the confrontation clause still remains. One way to achieve this protection is for the courts to adopt a "sufficient" corroboration standard.

This Note recommends that the lower courts interpret *Bourjaily* to require sufficient corroboration of hearsay statements by admissible, nonhearsay evidence before the statements can be admitted under Rule 801(d)(2)(E). If the courts adopt a sufficient corroboration standard, individuals will be protected against erroneous convictions because hearsay statements will only be admitted into evidence when other evidence exists which sufficiently corroborates the statements. As long as the courts adopt a sufficient corroboration standard, once the requirements of Rule 801(d)(2)(E) have been satisfied, coconspirator statements can be presumed reliable for purposes of the confrontation clause. This presumption is rational because *corroborated* coconspirator statements can be presumed reliable due to the unique relationship coconspirators have with each other—a relationship based on common illegal goals.

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