San Diego FBA presents

Criminal Legal Skills Series

MASTERING FEDERAL RULE OF EVIDENCE 104

Wednesday, May 17 | 12 – 1 PM
Carter Keep Jury Assembly Room

Join us for a dynamic presentation about how to use Rule 104 hearings to improve and streamline your trial practice.

Panelists: Judge Todd W. Robinson, Holly Sullivan, and Jason Forge
Moderator: Sabrina Feve

FBA Criminal Legal Skills Series Part 1:
"Mastering Federal Rule of Evidence 104"

Jury Assembly Room | May 17, 2023 | 12:00 pm – 1:00 p.m.

1. Intros

Welcome to the San Diego FBA's criminal legal skills presentation: "Mastering Federal Rule of Evidence 104," or more specifically, how to unlock the unfulfilled potential of Rule 104!

Co-Sponsors: San Diego Criminal Defense Bar Association & Criminal Defense Lawyer's Club

Panelists

- **Judge Todd Robinson** currently serves as a United States District Court Judge for the Southern District of California and is responsible for handling both civil and criminal matters. Before being appointed and confirmed to the federal bench, Judge Robinson was a Senior Litigation Counsel with the United States Attorney's Office. Prior to joining the U.S. Attorney's Office in San Diego, Judge Robinson was a Trial Attorney with the Narcotic and Dangerous Drug Section of the U.S. Department of Justice in Washington, D.C.

- **Holly Sullivan** is a trial attorney at the Federal Defenders of San Diego Inc. She originally began at the office in 2002. In 2007, she left the office and joined the trial and appellate panels in the Southern District of California as well as the appellate panel in the Central District of California. In 2018, she returned to the FDSDI office and continues to represent people on a wide variety of charges, provide trainings both locally and nationwide, and engage in substantial litigation in this district.

- **Jason Forge** is a partner in Robbins Geller Rudman & Dowd LLP's San Diego office. He specializes in complex investigations, litigation, and trials. As a federal prosecutor and private practitioner, Jason has conducted and supervised scores of jury and bench trials in federal and state courts, including a month-long trial of a defense contractor in the largest bribery scheme in congressional history, and was a key member

of the litigation team that secured a historic recovery on behalf of Trump University students.

Moderator

- **Sabrina Fève** is an Assistant U.S. Attorney. She joined the office in 2007, after clerking for a U.S. District Judge and spending four years practicing civil litigation. Sabrina's practice focuses on cybercrime and national security matters and, since 2014, she has represented the Department of Justice on the National Institute of Standards and Technology committee tasked with crafting forensic digital evidence standards.

2. Rule 104 Fundamentals:

a. What is it?
   i. Permits the court to make factual findings on preliminary questions of evidence
   ii. Outlines the process for making those findings
b. How does it relate to a motion in limine?
c. Advantages and disadvantages
d. Rule 104(a)
   i. Preliminary questions re whether:
      1. Witness is qualified
      2. Privilege exists
      3. Evidence is admissible
   ii. Hearsay & affidavits permissible
      1. Advis. Comm. Notes (courts are "empowered to hear any relevant evidence, such as affidavits or other reliable hearsay" under Rule 104(a)).
      2. *Bourjaily v. US*, 483 U.S. 171 (1987)
      3. FRE 1011(d)(1)
   iii. Burden of proof is preponderance
   iv. Confrontation Clause does not apply
   v. Examples
      1. A conspiracy exists (FRE 801(d)(2)(E))
      2. Business records (FRE 902(11))
      3. Summary charts (FRE 1006)
      4. Statement made for medical diagnosis (803(4))
      5. Agency relationship exists (802(d)(2)(D))
      6. Witness is unavailable

e. Rule 104(b)
    i. Conditional relevance
    ii. Burden of proof is sufficiency
    iii. Understanding the difference between 104(a) and 104(b)
        1. Example(s)
f. Rule 104(c)
    i. When to conduct an evidentiary hearing outside the presence of the jury:
        1. Involves a confession
        2. Criminal defendant requests
        3. Justice requires
    ii. Question of whether and how to hold a hearing is generally subject to judges' discretion
        1. *US v. Peele*, 574 F.2d 489, 491 (9th Cir. 1978)
g. Rule 104(d) – Defendants who testify on a preliminary question are not subject to cross-exam on collateral issues
h. Rule 104(e) – Preliminary rulings do not limit opposing party's ability to challenge the weight or credibility of evidence admitted under Rule 104

3. Rule 104 Strategies, Tactics, and Best Practices

a. Issues amenable to a Rule 104 hearing
b. How to set up relevant issues for a hearing
c. Examples/anecdotes involving:
    i. Experts
    ii. Coconspirator Statements
    iii. Voluminous Records
    iv. Business & Official Records
    v. Prior Testimony of Unavailable Witnesses

4. Questions from RSVPs and/or Audience

5. Closing

a. Thank You's
b. Upcoming events

THE UNFULFILLED POTENTIAL OF FRE 104

- HON. TODD W. ROBINSON
- JASON A. FORGE
- HOLLY SULLIVAN
- SABRINA L. FÈVE

MAY 17, 2023 – FEDERAL BAR ASSOCIATION

FED. R. EVID. 104

RULE 104(a)

Used to decide **preliminary** questions of admissibility - other than relevance

RULE 104(a)

(a) In General. The court must decide any preliminary question about whether a **witness is qualified**. . .

RULE 104(a)

(a) In General. The court must decide any preliminary question about whether a witness is qualified, **a privilege exists**. . .

RULE 104(a)

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or **evidence is admissible**.

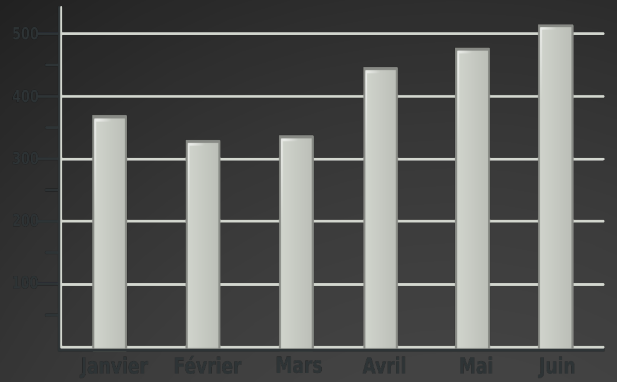
RULE 104(a)

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. **In so deciding, the court is not bound by evidence rules, except those on privilege.**

RULE 104(a)

- Burden of proof = preponderance
- Confrontation Clause ≠ apply
- Courts may "hear any relevant evidence, such as affidavits or other reliable hearsay."

Bourjaily v. US, 483 U.S. 171 (1987)



RULE 104(a)

Examples

RULE 104(b)

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court **may admit the proposed evidence on the condition that the proof be introduced later**.

RULE 104(b)

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, **proof must be introduced sufficient to support a finding that the fact does exist**.

- Different burden of proof
- FRE apply

RULE 104(b)

Examples

RULE 104(c)

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

Whether to hold a hearing on preliminary questions “lies largely within the discretion of the trial court.”

US v. Peele, 574 F.2d 489, 491 (9th Cir. 1978)

RULE 104(d)

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case *does not* become subject to cross-examination on other issues in the case.

RULE 104(e)

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

REASONS TO PURSUE A PRE-TRIAL RULE 104 RULING

HOW TO SEEK A RULE 104 RULING

- Hearing?
- Filing?
- What should you submit?

EXAMPLES

- Expert Testimony
- Coconspirator Statements
- Voluminous Records
- Business & Official Records
- Prior Testimony of Unavailable Witness

QUESTIONS?

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article I. General Provisions (Refs & Annos)

Federal Rules of Evidence Rule 104, 28 U.S.C.A.

Rule 104. Preliminary Questions

Currentness

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

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(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

CREDIT(S)
(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1930; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES
1972 Proposed Rule

Note to Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to

the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, Basic Problems of Evidence 45-50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term "questions," without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for "conditional relevancy" in subdivision (b) and those for confessions in subdivision (d).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are "scattered and inconclusive," and observes:

"Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus, the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant "so far as appears [has] had an opportunity to observe the fact declared." McCormick, § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 47 of the Federal Rules of Criminal Procedure provides:

"An application to the court for an order shall be by motion. * * * It may be supported by affidavit."

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows:

"In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay), Cal.Law Revision Comm'n, Rep., Rec. & Studies, 470 (1962). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides:

"In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege."

Note to Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy." Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, *supra;* California Evidence Code § 403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof here, as generally, is subject to the control of the judge.

Note to Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

Note to Subdivision (d). The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See *Walder v. United States,* 347 U.S. 62 (1954); *Simmons v. United States,* 390 U.S. 377 (1968); *Harris v. New York,* 401 U.S. 222 (1971).

Note to Subdivision (e). For similar provisions see Uniform Rule 8; California Evidence Code § 406; Kansas Code of Civil Procedure § 60-408; New Jersey Evidence Rule 8(1).

1974 Enactment

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended. House Report No. 93-650.

Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice might result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury. Senate Report No. 93-1277.

1987 Amendments

The amendments are technical. No substantive change is intended.

2011 Amendments

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Notes of Decisions (168)

Fed. Rules Evid. Rule 104, 28 U.S.C.A., FRE Rule 104
Including Amendments Received Through 5-1-23

End of Document

a. [8:4701] **Factors considered:** In determining whether the proponent has introduced sufficient evidence to satisfy Rule 104(b), the trial court must examine all the evidence in the case and decide whether the jury could *reasonably* find the conditional fact by a preponderance of the evidence. [*United States v. Trenkler* (1st Cir. 1995) 61 F3d 45, 53]

The trial court does not, however, weigh credibility or make a finding that the conditional fact has been proved by a preponderance of the evidence. [*United States v. Trenkler*, supra, 61 F3d at 53]

b. [8:4702] **Evidence may be admitted conditionally:** Because it is not always possible for the proponent to prove the fact on which relevance is conditioned at the time the evidence is offered, Rule 104(b) authorizes the judge to admit the evidence "on the condition that the proof be introduced later." [FRE 104(b); *Huddleston v. United States*, supra, 485 US at 689, 108 S.Ct. at 1501, fn. 7; *United States v. Ansaldi* (2nd Cir. 2004) 372 F3d 118, 130]

The court may withdraw the evidence from the jury's consideration if, after all the evidence is in, the court determines that the jury could not reasonably conclude that fulfillment of the condition has been established. [*Huddleston v. United States*, supra, 485 US at 689, 108 S.Ct. at 1501, fn. 7]

(1) [8:4703] **Motion to strike where foundation not introduced:** It is not the judge's responsibility to ensure that the foundation evidence is subsequently offered. To preserve the issue for appellate review, the opposing party must move to strike the evidence if the proponent fails to satisfy the condition (¶*8:4675*). [*Huddleston v. United States*, supra, 485 US at 689, 108 S.Ct. at 1501, fn. 7]

c. [8:4704] **Discretionary exclusion (FRE 403):** The trial judge may exclude relevant evidence of other facts under FRE 403 (¶*8:4503 ff.*) if the "probative value is substantially outweighed by the danger of unfair prejudice and the prejudicial effect cannot be addressed by a limiting instruction." [*United States v. Balthazard* (1st Cir. 2004) 360 F3d 309, 313]

"Rule 403 is an extraordinary remedy to be used sparingly" to exclude otherwise admissible evidence. [*Wheeler v. John Deere Co.* (10th Cir. 1988) 862 F2d 1404, 1408; *Aycock v. R.J. Reynolds Tobacco Co.* (11th Cir. 2014) 769 F3d 1063, 1069—evidence intended to bolster party's case is more easily excluded under Rule 403 than evidence that is critical part of case; *see detailed discussion at* ¶*8:4500 ff.*]

[8:4705] *Reserved.*

d. [8:4706] **Application:** The following are common preliminary facts determined under FRE 104(b):

- Whether expert opinion will *assist the jury* under FRE 702. [*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 592, 113 S.Ct. 2786, 2796; *¶8:1627*]
- Whether the *methodology* used by an expert is *reliable* under FRE 702. [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, supra, 509 US at 592, 113 S.Ct. at 2796; *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 US 137, 147-149, 119 S.Ct. 1167, 1174-1175; *McKenzie v. Benton* (10th Cir. 2004) 388 F3d 1342, 1350; *see ¶8:1618 ff.*]
- Whether a *remedial measure* taken by a party is being offered for an inadmissible purpose under FRE 407. [*Hull v. Chevron U.S.A., Inc.* (10th Cir. 1987) 812 F2d 584, 586; *Trull v. Volkswagen of America, Inc.* (1st Cir. 1999) 187 F3d 88, 93]
- Whether an offer was made in the course of settlement negotiations and is thus inadmissible under FRE 408. [*Pierce v. F.R.Tripler & Co.* (2nd Cir. 1992) 955 F2d 820, 826; *¶8:4340*]
- Whether prior "bad acts" evidence is admissible under FRE 404(b). [*United States v. Platero* (10th Cir. 1995) 72 F3d 806, 811; *¶8:1155*]
- Whether statements were made in the course of or in furtherance of a conspiracy. [*In re Flat Glass Antitrust Litig.* (3rd Cir. 2004) 385 F3d 350, 375; *Tunica Web Advertising v. Tunica Casino Operators Ass'n, Inc.* (5th Cir. 2007) 496 F3d 403, 411—in Sherman Act conspiracy in restraint of trade action, preliminary fact determinations required to decide whether statements by defendants' employees were authorized by any of defendants and within scope of employment, and therefore admissible as party admissions and/or coconspirator statements]

[8:4691-4699] *Reserved.*

2. [8:4700] **Relevancy Conditioned on Fact Issue:** When the relevancy of evidence depends on the existence of a particular preliminary fact (e.g., authentication of document), the trial judge must first determine whether the foundation evidence is "sufficient to support a finding that the fact does exist." [FRE 104(b); *Huddleston v. United States* (1988) 485 US 681, 689, 108 S.Ct. 1496, 1501]

Once the judge determines the evidence is sufficient to support such finding, the matter is submitted to the jury. Thus, the jury finally decides issues of conditional relevance. [FRE 104(b); *Sacramona v. Bridgestone/Firestone, Inc.* (1st Cir. 1997) 106 F3d 444, 446; *Ricketts v. City of Hartford* (2nd Cir. 1996) 74 F3d 1397, 1409]

107 S.Ct. 2775
Supreme Court of the United States

William John BOURJAILY, Petitioner
v.
UNITED STATES.

No. 85–6725.
|
Argued April 1, 1987.
|
Decided June 23, 1987.

Synopsis

Defendant was convicted in the United States District Court for the Northern District of Ohio of conspiring to distribute cocaine and possession of cocaine with intent to distribute, and he appealed. The Court of Appeals for the Sixth Circuit, 781 F.2d 539, affirmed. The Supreme Court, Chief Justice Rehnquist, held that: (1) existence of conspiracy and defendant's participation in it need be proven only by preponderance of evidence in order for statements of coconspirator to be admitted; (2) court may consider the proffered hearsay statements in determining the existence of a conspiracy and defendant's participation in it; (3) court is not required by confrontation clause to make an inquiry into the independent indicia of reliability of a statement; and (4) determination that conspiracy existed and that defendant participated in it was supported by the evidence.

Affirmed.

Justice Stevens filed a concurring opinion.

Justice Blackmun filed a dissenting opinion in which Justice Brennan and Justice Marshall joined.

****2776 *171** *Syllabus* [*]

In a tape-recorded telephone conversation with a Federal Bureau of Investigation (FBI) informant arranging to sell cocaine, Angelo Lonardo, who had agreed earlier to find individuals to distribute the drug, said he had a "gentleman friend" (petitioner) who had some questions. In a subsequent telephone call, the informant spoke to the "friend" about the drug's quality and the price, and later arranged with Lonardo for the sale to take place in a designated parking lot, where Lonardo would transfer the drug from the informant's car to the "friend." The transaction took place as planned, and the FBI arrested Lonardo and petitioner immediately after Lonardo placed the drug into petitioner's car. At petitioner's trial that resulted in his conviction of federal drug charges, including a conspiracy charge, the Government introduced, over petitioner's objection, Lonardo's telephone statements regarding the "friend's" participation in the transaction. The District Court found that, considering both the events in the parking lot and Lonardo's statements, the Government had established by a preponderance of the evidence that a conspiracy involving Lonardo and petitioner existed, that Lonardo's statements were made in the course and in furtherance of the conspiracy, and that the statements thus satisfied Federal Rule of Evidence 801(d)(2)(E), which provides that a statement is not hearsay if it is made "by a coconspirator of a party during the course and in furtherance of the conspiracy." The Court of Appeals affirmed, agreeing that Lonardo's statements were admissible under the Federal Rules of Evidence, and also rejecting petitioner's contention that, because he could not cross-examine Lonardo (who exercised his right not to testify), admission of the statements violated his Sixth Amendment right to confront the witnesses against him.

Held: Lonardo's out-of-court statements were properly admitted against petitioner. Pp. 2778–2782.

(a) When the preliminary facts relevant to Rule 801(d)(2)(E)—the existence of a conspiracy and the nonoffering party's involvement in it—are disputed, the offering party must prove them by a preponderance of the evidence, not some higher standard of ***172** proof. Rule of Evidence 104(a) requires that the court determine preliminary questions concerning the admissibility of evidence, but the Rules do not define the standard of proof. The traditional requirement that such questions be established by ****2777** a preponderance of proof, regardless of the burden of proof on the substantive issues, applies here. Pp. 2778–2779.

(b) There is no merit to petitioner's contention—based on the "bootstrapping rule" of *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, and *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039—that a court, in determining the preliminary facts relevant to Rule 801(d)(2)(E), must look only to independent evidence other than the statements sought to be admitted. Both *Glasser* and *Nixon* were decided before Congress enacted the Federal Rules of Evidence, and Rule 104(a) provides that, in determining preliminary questions concerning admissibility, the court "is not bound by the rules of evidence" (except those with respect to privileges), thus authorizing consideration of hearsay. Such construction of Rule 104(a) does not fundamentally change the nature of the co-conspirator exception to the hearsay rule. Out-of-court statements are only presumed unreliable and may be rebutted by appropriate proof, and individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. Thus, a *per se* rule barring consideration of Lonardo's statements during preliminary factfinding is not required. Each of his statements was corroborated by independent evidence, consisting of the events that transpired at the parking lot. Accordingly, it need not be decided whether, under Rule 104(a), the courts below could have relied solely upon Lonardo's hearsay statements to establish the preliminary facts for admissibility. If *Glasser* and *Nixon* are interpreted as meaning that courts cannot look to the hearsay statements themselves for any purpose, they have been superseded by Rule 104(a). It is sufficient in this case to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. Pp. 2779–2782.

(c) Admission of Lonardo's statements against petitioner did not violate his rights under the Confrontation Clause. The requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Clause, and since the statements were admissible under the Rule, there is no constitutional problem. In this context, the Clause, as a general matter, requires the prosecution to demonstrate both the unavailability of the declarant and the indicia of reliability surrounding the out-of-court declaration. However, a showing of unavailability is not required when the hearsay statement is the out-of-court declaration of a co-conspirator. *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390. Moreover, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception, such as the co-conspirator exception. P. 2782.

781 F.2d 539, affirmed.

***173** REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, POWELL, STEVENS, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. ——. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Stephen Allan Saltzburg argued the cause for petitioner. With him on the briefs were *James R. Willis* and *James M. Shellow.*

Lawrence S. Robbins argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Weld,* and *Deputy Solicitor General Bryson.**

* *Judy Clarke* and *Mario G. Conte* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

Federal Rule of Evidence 801(d)(2)(E) provides: "A statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." We granted certiorari to answer three questions regarding the admission of statements under Rule 801(d)(2)(E): (1) whether the court must determine by independent evidence that the conspiracy existed and that the defendant and the declarant were members of this conspiracy; (2) the quantum of proof on which such determinations must be based; and (3) whether a court must in each case examine the circumstances of such a statement to determine its reliability. ****2778** 479 U.S. 881, 107 S.Ct. 268, 93 L.Ed.2d 246 (1986).

In May 1984, Clarence Greathouse, an informant working for the Federal Bureau of Investigation (FBI), arranged to sell a kilogram of cocaine to Angelo Lonardo. Lonardo agreed that he would find individuals to distribute the drug. When the sale became imminent, Lonardo stated in a tape-recorded telephone conversation that he had a "gentleman friend" who had some questions to ask about the cocaine. In a subsequent ***174** telephone call, Greathouse spoke to the "friend" about the quality of the drug and the price. Greathouse then spoke again with Lonardo, and the two arranged the details of the purchase. They agreed that the sale would take place in a designated hotel parking lot, and Lonardo would transfer the drug from Greathouse's car to the "friend," who would be waiting in the parking lot in his own car. Greathouse proceeded with the transaction as planned, and FBI agents arrested Lonardo and petitioner immediately after Lonardo placed a kilogram of cocaine into petitioner's car in the hotel parking lot. In petitioner's car, the agents found over $20,000 in cash.

Petitioner was charged with conspiring to distribute cocaine, in violation of 21 U.S.C. § 846, and possession of cocaine with intent to distribute, a violation of 21 U.S.C. § 841(a)(1). The Government introduced, over petitioner's objection, Angelo Lonardo's telephone statements regarding the participation of the "friend" in the transaction. The District Court found that, considering the events in the parking lot and Lonardo's statements over the telephone, the Government had established by a preponderance of the evidence that a conspiracy involving Lonardo and petitioner existed, and that Lonardo's statements over the telephone had been made in the course of and in furtherance of the conspiracy. App. 66–75. Accordingly, the trial court held that Lonardo's out-of-court statements satisfied Rule 801(d)(2)(E) and were not hearsay. Petitioner was convicted on both counts and sentenced to 15 years. The United States Court of Appeals for the Sixth Circuit affirmed. 781 F.2d 539 (1986). The Court of Appeals agreed with the District Court's analysis and conclusion that Lonardo's out-of-court statements were admissible under the Federal Rules of Evidence. The court also rejected petitioner's contention that because he could not cross-examine Lonardo, the admission of these statements violated his constitutional right to confront the witnesses against him. We affirm.

***175** Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." Federal Rule of Evidence 104(a) provides: "Preliminary questions concerning ... the admissibility of evidence shall be determined by the court." Petitioner and the Government agree that the existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court. The Federal Rules, however, nowhere define the standard of proof the court must observe in resolving these questions.

We are therefore guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case, see *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), or a civil case. See generally ****2779** *Colorado v. Connelly,* 479 U.S. 157, 167–169, 107 S.Ct. 515, 522–523, 93 L.Ed.2d 473 (1986). The preponderance standard ensures that before admitting evidence, the court will have found it more

likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration. As in *Lego v. Twomey,* 404 U.S. 477, 488, 92 S.Ct. 619, 626, 30 L.Ed.2d 618 (1972), we find "nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based ***176** on some higher standard." We think that our previous decisions in this area resolve the matter. See, *e.g., Colorado v. Connelly, supra* (preliminary fact that custodial confessant waived rights must be proved by preponderance of the evidence); *Nix v. Williams,* 467 U.S. 431, 444, n. 5, 104 S.Ct. 2501, 2509, n. 5, 81 L.Ed.2d 377 (1984) (inevitable discovery of illegally seized evidence must be shown to have been more likely than not); *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (voluntariness of consent to search must be shown by preponderance of the evidence); *Lego v. Twomey, supra* (voluntariness of confession must be demonstrated by a preponderance of the evidence). Therefore, we hold that when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence. [1]

Even though petitioner agrees that the courts below applied the proper standard of proof with regard to the preliminary facts relevant to Rule 801(d)(2)(E), he nevertheless challenges the admission of Lonardo's statements. Petitioner argues that in determining whether a conspiracy exists and whether the defendant was a member of it, the court must look only to independent evidence—that is, evidence other than the statements sought to be admitted. Petitioner relies on *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), in which this Court first mentioned the so-called "bootstrapping rule." The relevant issue in *Glasser* was whether Glasser's counsel, who also represented another defendant, faced such a conflict of interest that Glasser received ineffective assistance. Glasser contended that conflicting loyalties led his lawyer not to object to statements made by one of Glasser's ***177** co-conspirators. The Government argued that any objection would have been fruitless because the statements were admissible. The Court rejected this proposition:

> "[S]uch declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy.... Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Id.,* at 74–75, 62 S.Ct., at 467.

The Court revisited the bootstrapping rule in *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), where again, in passing, the Court stated: "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, *by independent evidence,* of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." *Id.,* at 701, and n. 14, 94 S.Ct., at 3104, and n. 14 (emphasis added) (footnote omitted). Read in the light most favorable to petitioner, *Glasser* could mean that a court should not consider hearsay statements at all in determining preliminary facts under Rule 801(d)(2)(E). Petitioner, of course, adopts this view of the bootstrapping rule. *Glasser,* however, could also mean that a court must have *some* proof *aliunde,* but may look at the ****2780** hearsay statements themselves in light of this independent evidence to determine whether a conspiracy has been shown by a preponderance of the evidence. The Courts of Appeals have widely adopted the former view and held that in determining the preliminary facts relevant to co-conspirators' out-of-court statements, a court may not look at the hearsay statements themselves for their evidentiary value.

Both *Glasser* and *Nixon,* however, were decided before Congress enacted the Federal Rules of Evidence in 1975. These Rules now govern the treatment of evidentiary questions in federal courts. Rule 104(a) provides: "Preliminary questions concerning ... the admissibility of evidence shall be determined by the court.... In making its determination ***178** it is not bound by the rules of evidence except those with respect to privileges." Similarly, Rule 1101(d)(1) states that the Rules of Evidence (other than with respect to privileges) shall not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104." The question thus presented is whether any aspect of *Glasser* 's bootstrapping rule remains viable after the enactment of the Federal Rules of Evidence.

Petitioner concedes that Rule 104, on its face, appears to allow the court to make the preliminary factual determinations relevant to Rule 801(d)(2)(E) by considering any evidence it wishes, unhindered by considerations of admissibility. Brief for Petitioner 27. That would seem to many to be the end of the matter. Congress has decided that courts may consider hearsay in making these factual determinations. Out-of-court statements made by anyone, including putative co-conspirators, are often hearsay. Even if they are, they may be considered, *Glasser* and the bootstrapping rule notwithstanding. But petitioner nevertheless argues that

the bootstrapping rule, as most Courts of Appeals have construed it, survived this apparently unequivocal change in the law unscathed and that Rule 104, as applied to the admission of co-conspirator's statements, does not mean what it says. We disagree.

Petitioner claims that Congress evidenced no intent to disturb the bootstrapping rule, which was embedded in the previous approach, and we should not find that Congress altered the rule without affirmative evidence so indicating. It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with ***179** petitioner's interpretation of *Glasser* and *Nixon,* the Rule prevails. [2]

Nor do we agree with petitioner that this construction of Rule 104(a) will allow courts to admit hearsay statements without any credible proof of the conspiracy, thus fundamentally changing the nature of the co-conspirator exception. Petitioner starts with the proposition that co-conspirators' ****2781** out-of-court statements are deemed unreliable and are inadmissible, at least until a conspiracy is shown. Since these statements are unreliable, petitioner contends that they should not form any part of the basis for establishing a conspiracy, the very antecedent that renders them admissible.

Petitioner's theory ignores two simple facts of evidentiary life. First, out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof. See Fed. Rule Evid. 803(24) (otherwise inadmissible hearsay may be admitted if circumstantial guarantees of trustworthiness demonstrated). Second, individual pieces of ***180** evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence. A *per se* rule barring consideration of these hearsay statements during preliminary factfinding is not therefore required. Even if out-of-court declarations by co-conspirators are presumptively unreliable, trial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case. Courts often act as factfinders, and there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area. The party opposing admission has an adequate incentive to point out the shortcomings in such evidence before the trial court finds the preliminary facts. If the opposing party is unsuccessful in keeping the evidence from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case. See, *e.g.,* Fed.Rule Evid. 806 (allowing attack on credibility of out-of-court declarant).

We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy. Petitioner's case presents a paradigm. The out-of-court statements of Lonardo indicated that Lonardo was involved in a conspiracy with a "friend." The statements indicated that the friend had agreed with Lonardo to buy a kilogram of cocaine and to distribute it. The statements also revealed that the friend would be at the hotel parking lot, in his car, and would accept the cocaine from Greathouse's car after Greathouse gave Lonardo the keys. Each one of Lonardo's statements may itself be unreliable, but taken as a whole, the entire conversation between Lonardo and Greathouse was corroborated by ***181** independent evidence. The friend, who turned out to be petitioner, showed up at the prearranged spot at the prearranged time. He picked up the cocaine, and a significant sum of money was found in his car. On these facts, the trial court concluded, in our view correctly, that the Government had established the existence of a conspiracy and petitioner's participation in it.

We need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. To the extent that *Glasser* meant that courts could not look to the hearsay statements themselves for any purpose, it has clearly been superseded by Rule 104(a). It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. As we have held in other cases concerning admissibility determinations, "the judge should receive the evidence and give it such weight as his judgment and experience counsel." *United States v. Matlock,* 415 U.S., at 175, 94 S.Ct., at 995. The courts below properly considered the statements of Lonardo and the subsequent events in finding that the ****2782** Government had established by a preponderance of the evidence that Lonardo was involved in a

conspiracy with petitioner. We have no reason to believe that the District Court's factfinding of this point was clearly erroneous. We hold that Lonardo's out-of-court statements were properly admitted against petitioner. [3]

We also reject any suggestion that admission of these statements against petitioner violated his rights under the Confrontation Clause of the Sixth Amendment. That Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses ***182** against him." At petitioner's trial, Lonardo exercised his right not to testify. Petitioner argued that Lonardo's unavailability rendered the admission of his out-of-court statements unconstitutional since petitioner had no opportunity to confront Lonardo as to these statements. The Court of Appeals held that the requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause, and since the statements were admissible under the Rule, there was no constitutional problem. We agree.

While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme." *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980). Rather, we have attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements. To accommodate these competing interests, the Court has, as a general matter only, required the prosecution to demonstrate both the unavailability of the declarant and the "indicia of reliability" surrounding the out-of-court declaration. *Id.,* at 65–66, 100 S.Ct., at 2538–2539. Last Term in *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), we held that the first of these two generalized inquiries, unavailability, was not required when the hearsay statement is the out-of-court declaration of a co-conspirator. Today, we conclude that the second inquiry, independent indicia of reliability, is also not mandated by the Constitution.

The Court's decision in *Ohio v. Roberts* laid down only "a general approach to the problem" of reconciling hearsay exceptions with the Confrontation Clause. See 448 U.S., at 65, 100 S.Ct. at 2538. In fact, *Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. Because " 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' ***183** *California v. Green,* 399 U.S. [149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1970)], and 'stem from the same roots,' *Dutton v. Evans,* 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970)," *id.,* at 66, 100 S.Ct., at 2539, we concluded in *Roberts* that no independent inquiry into reliability is required when the evidence "falls within a firmly rooted hearsay exception." *Ibid.* We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts,* a court need not independently inquire into the reliability of such statements. Cf. *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (reliability inquiry required where evidentiary rule deviates from common-law approach, admitting co-conspirators' hearsay statements made after termination of ****2783** conspiracy). The admissibility of co-conspirators' statements was first established in this Court over a century and a half ago in *United States v. Gooding,* 12 Wheat. 460, 6 L.Ed. 693 (1827) (interpreting statements of co-conspirator as *res gestae* and thus admissible against defendant), and the Court has repeatedly reaffirmed the exception as accepted practice. In fact, two of the most prominent approvals of the rule came in cases that petitioner maintains are still vital today, *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). To the extent that these cases have not been superseded by the Federal Rules of Evidence, they demonstrate that the co-conspirator exception to the hearsay rule is steeped in our jurisprudence. In *Delaney v. United States,* 263 U.S. 586, 590, 44 S.Ct. 206, 207, 68 L.Ed. 462 (1924), the Court rejected the very challenge petitioner brings today, holding that there can be no separate Confrontation Clause challenge to the admission of a co-conspirator's out-of-court statement. In so ruling, the Court relied on established precedent holding such statements competent evidence. We think that these cases demonstrate that co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion. Accordingly, we hold that the Confrontation Clause does not require a court to embark on an ***184** independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E). [4]

The judgment of the Court of Appeals is

Affirmed.

Justice STEVENS, concurring.

The rule against "bootstrapping" announced in *Glasser v. United States,* 315 U.S. 60, 74–75, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942), has two possible interpretations. The more prevalent interpretation adopted by the Courts of Appeals is that the admissibility of the declaration under the co-conspirator rule must be determined *entirely* by independent evidence. The Court correctly holds that this reading of the *Glasser* rule is foreclosed by the plain language of Rule 104(a) of the Federal Rules of Evidence. That Rule unambiguously authorizes the trial judge to consider the contents of a proffered declaration in determining its admissibility.

I have never been persuaded, however, that this interpretation of the *Glasser* rule is correct. In my view, *Glasser* holds that a declarant's out-of-court statement is inadmissible against his alleged co-conspirators unless there is some corroborating evidence to support the triple conclusion that there was a conspiracy among those defendants, that the declarant was a member of the conspiracy, and that the statement furthered the objectives of the conspiracy. An otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility—it cannot lift itself into admissibility entirely by tugging on its own bootstraps. It may, however, use its own bootstraps, together with other support, to overcome the objection. In the words ***185** of the *Glasser* opinion, there must be proof "*aliunde,*" that is, evidence from another source, that together with the contents of the statement satisfies the preliminary conditions for admission of the statement. *Id.,* at 74, 62 S.Ct., at 467. [1] This interpretation of *Glasser* as requiring some but not complete proof *"aliunde,"* ****2784** is fully consistent with the plain language of Rule 104(a). [2] If, as I assume they did, the drafters of Rule 104(a) understood the *Glasser* rule as I do, they had no reason to indicate that it would be affected by the new Rule. [3]

Thus, the absence of any legislative history indicating an intent to change the *Glasser* rule is entirely consistent with the reasoning of the Court's opinion, which I join.

***186** Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

I disagree with the Court in three respects: [1] First, I do not believe that the Federal Rules of Evidence changed the long- and well-settled law to the effect that the preliminary questions of fact, relating to admissibility of a nontestifying co-conspirator's statement, must be established by evidence independent of that statement itself. Second, I disagree with the Court's conclusion that allowing the co-conspirator's statement to be considered in the resolution of these factual questions will remedy problems of the statement's unreliability. In my view, the abandonment of the independent-evidence requirement will lead, instead, to the opposite result. This is because the abandonment will eliminate one of the few safeguards of reliability that this exemption from the hearsay definition possesses. Third, because the Court alters the traditional hearsay exemption—especially an aspect of it that contributes to the reliability of an admitted statement—I do not believe that the Court can rely on the "firmly rooted hearsay exception" rationale, see *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980), to avoid a determination whether any "indicia of reliability" support the co-conspirator's statement, as the Confrontation Clause surely demands.

I

The Court recognizes that, according to the common-law view of the exemption of a co-conspirator's statement from the hearsay definition, an offering party was required to establish, as preliminary factual matters, the existence of a conspiracy and a defendant's participation therein by evidence apart from the co-conspirator's statement. *Ante,* at 2780. In the Court's view, this settled law was changed in 1975 by the adoption of the Federal Rules of Evidence, particularly ***187** Rules 104(a) and 1101(d)(1). As the Court explains, the plain language of Rule 104(a) allows a trial court to consider any information, including hearsay, in making preliminary factual determinations relating to Rule 801(d)(2)(E). *Ante,* at 2779–2780. Thus, reasons the Court, under the Rule a trial court should be able to examine the co-conspirator's statement itself ****2785** in resolving the

threshold factual question—whether a conspiracy, to which the defendant belonged, existed. According to the Court, in light of Rule 104(a)'s "plain meaning" there is no need to take the "extraordinary" step of looking to legislative history for confirmation of this meaning. *Ante,* at 2780. [2]

I agree that a federal rule's "plain meaning," when it appears, should not be lightly ignored or dismissed. The inclination to accept what seems to be the immediate reading of a federal rule, however, must be tempered with caution when, as in the case of a Federal Rule of Evidence, the rule's complex interrelations with other rules must be understood before one can resolve a particular interpretive problem. See generally Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb.L.Rev. 908, 908 (1978) ("[T]he answers to all questions that may arise under the Rules may not be found in specific terms in the Rules"). In addition, if the language of a rule plainly appears to address a specific problem, one *naturally* would expect legislative history (if it exists) to confirm this plain meaning. In this case, Rule 104(a) cannot be read apart from Rule 801(d)(2)(E), which was a codification of the common-law exemption of co-conspirator statements from the hearsay definition, an exemption that included the independent-evidence requirement. An examination of the legislative history of Rule 801(d)(2)(E) reveals that neither the drafters nor Congress intended to transform this requirement in any way. In sum, the Court espouses an overly ***188** rigid interpretive approach; a more complete analysis casts significant and substantial doubt on the Court's "plain meaning" easy solution.

A

In order to understand why the Federal Rules of Evidence adopted without change the common-law co-conspirator exemption from hearsay, and why this adoption signified the Advisory Committee's intent to retain the exemption's independent-evidence requirement, it is useful to review briefly the contours of this exemption as it stood before enactment of the Rules. By all accounts, the exemption was based upon agency principles, the underlying concept being that a conspiracy is a common undertaking where the conspirators are all agents of each other and where the acts and statements of one can be attributed to all. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(E)[01], pp. 801–232 and 801–233 (1985) (Weinstein & Berger); Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv.L.Rev. 1378, 1384 (1972) (Davenport). As Judge Learned Hand explained this in a frequently quoted remark:

> "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." *Van Riper v. United States,* 13 F.2d 961, 967 (CA2), cert. denied *sub nom. Ackerson v. United States,* 273 U.S. 702, 47 S.Ct. 102, 71 L.Ed. 848 (1926).

Each of the components of this common-law exemption, in turn, had an agency justification. To fall within the exemption, the co-conspirator's statement had to be made "in furtherance of" the conspiracy, a requirement that arose from the agency rationale that an agent's acts or words could be attributed to his principal only so long as the agent was acting ***189** within the scope of his employment. See Levie, Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule, 52 Mich.L.Rev. 1159, 1161 (1954) ****2786** (Levie); 4 D. Louisell & C. Mueller, Federal Evidence § 427, p. 348 (1980) (Louisell & Mueller). The statement also had to be made "during the course of" the conspiracy. This feature necessarily accompanies the "in furtherance of" requirement, for there must be an employment or business relationship in effect between the agent and principal, in accordance with which the agent is acting, for the principal to be bound by his agent's deeds or words. See Levie, 52 Mich.L.Rev., at 1161; 4 Louisell & Mueller 337.

The final feature of the co-conspirator hearsay exemption, the independent-evidence requirement, directly corresponds to the agency concept that an agent's statement cannot be used alone to prove the existence of the agency relationship.

> "Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears *by other evidence* that the making of such statement was within the authority

> of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent" (emphasis added). Restatement (Second) of Agency § 285 (1958).

See Levie, 52 Mich.L.Rev., at 1161. The reason behind this concept is that the agent's authority must be traced back to some act or statement by the alleged principal. See 1 F. Mechem, Law of Agency § 285, p. 205 (1914).

Thus, unlike many common-law hearsay exceptions, the co-conspirator exemption from hearsay with its agency rationale was not based primarily upon any particular guarantees of reliability or trustworthiness that were intended to ensure the truthfulness of the admitted statement and to compensate for the fact that a party would not have the opportunity to test its veracity by cross-examining the declarant. See Davenport, 85 Harv.L.Rev., at 1384. As such, this exemption ***190** was considered to be a "vicarious admission." [3] Although not an admission by a defendant himself, the vicarious admission was a statement imputed to the defendant from the co-conspirator on the basis of their agency relationship. As with all admissions, an "adversary system," rather than a reliability, rationale was used to account for the exemption to the ban on hearsay: it was thought that a party could not complain of the deprivation of the right to cross-examine himself (or another authorized to speak for him) or to advocate his own, or his agent's, untrustworthiness. See McCormick on Evidence § 262, p. 775 (E. Cleary ed. 1984). The co-conspirator "admission" exception was also justified on the ground that the need for this evidence, which was particularly valuable in prosecuting a conspiracy, permitted a somewhat reduced concern for the reliability of the statement. [4] See Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan.L.Rev. 271, 303 (1975); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 395 (2d ed. 1982) (Lempert & Saltzburg).

Although, under common law, the reliability of the co-conspirator's statement was never the primary ground justifying its admissibility, there was some recognition that ****2787** this ***191** exemption from the hearsay rule had certain guarantees of trustworthiness, albeit limited ones. This justification for the exemption has been explained:

> "Active conspirators are likely to know who the members of the conspiracy are and what they have done. When speaking to advance the conspiracy, they are unlikely to describe non-members as conspirators, and they usually will have no incentive to misdescribe the actions of their fellow members." Lempert & Saltzburg 395.

See also 4 J. Wigmore, Evidence § 1080a, p. 199 (J. Chadbourn rev. 1972) ("[T]he general idea of receiving vicarious admissions, is that where the third person was, at the time of speaking, in *circumstances that gave him substantially the same interest* to know something about the matter in hand as had the now opponent, and the *same motive* to make a statement about it, that person's statements have approximately the same testimonial value as if the now opponent had made them") (emphasis in original). And the components of the exemption were understood to contribute to this reliability. When making a statement "during the course of" and "in furtherance of" a conspiracy, a conspirator could be viewed as speaking from the perspective of all the conspirators in order to achieve the common goals of the conspiracy, not from self-serving motives. See Davenport, 85 Harv.L.Rev., at 1387. In particular, the requirement that a conspiracy be established by independent evidence also is seen to contribute to the reliability issue. Yet that requirement goes not so much to the reliability of the statement itself, as to the reliability of the process of admitting it: a statement cannot be introduced *until* independent evidence shows the defendant to be a member of an existing conspiracy. See *id.,* at 1390 ("Independent evidence of the conspiracy's existence and of the defendant's participation in it may supply inferences as to the reliability of the declaration"); Lempert & Saltzburg 395.

***192** The Federal Rules of Evidence did not alter in any way this common-law exemption to hearsay. [5] The Rules essentially codify the components of this exemption: Rule 801(d)(2)(E) provides that the co-conspirator's statement, to be admissible against a party, must be "by a coconspirator of a party during the course and in furtherance of the conspiracy." Moreover, the exemption was placed within the category of "not hearsay," as an admission, in contrast to the hearsay exceptions of Rules 803 and 804. The Advisory Committee explained that the exclusion of admissions from the hearsay category is justified by the traditional "adversary system" rationale, not by any specific "guarantee of trustworthiness" used to justify hearsay exceptions. See Advisory Committee's Notes on Fed.Rule Evid. 801, 28 U.S.C.App., p. 717, 56 F.R.D. 183, 297 (1972); see also Note,

Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay, 53 Ford.L.Rev. 1291, 1295, and n. 25 (1985).

More importantly, by explicitly retaining the agency rationale for the exemption, the Advisory Committee expressed its intention that the exemption would remain identical to the common-law rule and that it would not be expanded in any way. The Advisory Committee recognized that this agency rationale had been subject to criticism. [6] The **2788 drafters *193 of the American Law Institute's Model Code of Evidence had gone so far as to abandon the agency justification and had eliminated the "in furtherance of" requirement, observing that "[t]hese statements are likely to be true, and are usually made with a realization that they are against the declarant's interest." Model Code of Evidence, Rule 508(b) commentary, p. 251 (1942). The Advisory Committee, however, declined to accept without reservation a reliability foundation for Rule 801(d)(2)(E). [7]

The Advisory Committee thus decided to retain the agency justification, in general, and the "in furtherance of" language, in particular, as a compromise position. It thought that the traditional exemption appropriately balanced the prosecution's need for a co-conspirator's statements and the defendant's need for the protections against unreliable statements, protections provided by the components of the common-law exemption. See 4 Weinstein & Berger ¶ 801(d)(2)(E)[01], p. 801–235. The Advisory Committee, however, expressed its doubts about the agency rationale and, on the basis of these doubts, plainly stated that the exemption should not be changed or extended: "[T]he agency theory of conspiracy is at *194 best a fiction and ought not to serve as a basis for admissibility beyond that already established." Advisory Committee's Notes on Fed.Rule Evid. 801, 28 U.S.C.App., p. 718, 56 F.R.D., at 299. In light of this intention *not* to alter the common-law exemption, the Advisory Committee's Notes thus make very clear that Rule 801(d)(2)(E) was to include *all* the components of this exemption, including the independent-evidence requirement. [8]

B

Accordingly, when Rule 801(d)(2)(E) and Rule 104(a) are considered together—an examination that the Court neglects to undertake—there appears to be a conflict between the fact that no change in the co-conspirator hearsay exemption was intended by Rule 801(d)(2)(E) and the freedom that Rule 104(a) gives a trial court to rely on hearsay in resolving preliminary factual questions. Although one must be somewhat of an interpretative funambulist to walk between the conflicting demands of these Rules in order to arrive at a resolution *195 that will satisfy their respective concerns, this effort is far to be preferred over accepting the easily available safety "net" of Rule 104(a)'s "plain meaning." The purposes of *both* Rules can be achieved by considering the relevant preliminary factual question for Rule 104(a) analysis to be the following: "whether a conspiracy that included the declarant and the defendant against whom a statement is offered has been demonstrated to exist on the basis of evidence *independent of the declarant's hearsay statements* " (emphasis **2789 added). S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 735 (4th ed. 1986). This resolution sufficiently answers Rule 104(a)'s concern with allowing a trial court to consider hearsay in determining preliminary factual questions, because the only hearsay not available for its consideration is the statement at issue. The exclusion of the statement from the preliminary analysis maintains the common-law exemption unchanged.

As the Court recognizes, *ante,* at 2780, in the more than 10 years since the enactment of the Federal Rules of Evidence, the Courts of Appeals, almost uniformly, have found no conflict between Rule 104(a) and the independent-evidence requirement understood to adhere in Rule 801(d)(2)(E). [9] Indeed, *196 some courts have rejected the suggestion that Rule 104(a) has changed this component of the common-law exemption, because, like the Advisory Committee, they recognize the incremental protection against unreliable statements that this requirement gives to defendants. See, *e.g., United States v. Bell,* 573 F.2d 1040, 1044 (CA8 1978). Yet the Court cavalierly disregards these years of interpretative experience, as well as the rich history of this exemption, and arrives at its conclusion solely on the basis of its "plain meaning" approach.

II

The Court's second argument in favor of abandonment of the independent-evidence rule might best be characterized as an attempt at pragmatic or "real world" analysis. The Court suggests that, while a co-conspirator's statement might be presumed unreliable when considered in isolation, it loses this unreliability when examined together with other evidence of the conspiracy and the defendant's participation in it. *Ante,* at 2781. In the Court's view, such a consideration of the statement will reveal its probative value, as the facts of this case ****2790** demonstrate. Proceeding in this "real world" vein, the Court believes that the trial court is capable of detecting any remaining unreliability in the co-conspirator's statement and that the defendant is afforded the opportunity to point ***197** out any shortcomings of the out-of-court statement. *Ante,* at 2781.

I, too, prefer an approach that includes a realistic view of problems that come before the Court. See, *e.g., Lee v. Illinois,* 476 U.S. 530, 547–548, 106 S.Ct. 2056, 2066, 90 L.Ed.2d 514 (1986) (dissenting opinion). I am inclined, however, to remain with the traditional exemption that has been shaped by years of "real world" experience with the use of co-conspirator statements in trials and by a frank recognition of the possible unreliability of these statements.

As explained above, despite the recognized need by prosecutors for co-conspirator statements, these statements often have been considered to be somewhat unreliable. It has long been understood that such statements in some cases may constitute, at best, nothing more than the "idle chatter" of a declarant or, at worst, malicious gossip. See 4 Weinstein & Berger ¶ 801(d)(2)(E)[01], p. 801–235. Moreover, when confronted with such a statement, an innocent defendant would have a difficult time defending himself against it, for, if he were not in the conspiracy, he would have no idea why the conspirator made the statement. See *United States v. Stipe,* 517 F.Supp. 867, 871 (WD Okla.), aff'd, 653 F.2d 446 (CA10 1981) ("The dangers that an accused may be confronted with numerous statements made by someone else which he never authorized, intended, or even knew about ... cannot be ignored"). Even an experienced trial judge might credit an incriminatory statement that a defendant could not explain, precisely because the defendant had no ready explanation for it. Because of this actual "real world" experience with the possible unreliability of these statements, the Advisory Committee retained the agency rationale for this exemption in Rule 801(d)(2)(E), as well as the safeguards, albeit limited, against unreliability that this rationale provided the defendant. The independent-evidence requirement was one such safeguard.

***198** If this requirement is set aside, then one of the exemption's safeguards is lost. From a "real world" perspective, I do not believe that considering the statement together with the independent evidence will cure this loss. Contrary to the Court's suggestion, the situation in which a trial court now commonly will rely on the co-conspirator's statement to establish the existence of a conspiracy in which the defendant participated will not be limited to instances in which the statement constitutes just another "piece of evidence," to be considered as no more important than the independent evidence. Rather, such a statement will serve the greatest purpose, and thus will be introduced most frequently, in situations where *all* the other evidence that the prosecution can muster to show the existence of a conspiracy will *not* be adequate. In this situation, despite the use of hearsay admissible under other exceptions and the defendant's and other conspirators' actions, the co-conspirator's statement will be necessary to satisfy the trial court by a preponderance of the evidence that the defendant was a member of an existing conspiracy. Accordingly, the statement will likely *control* the interpretation of whatever other evidence exists and could well transform a series of innocuous actions by a defendant into evidence that he was participating in a criminal conspiracy. This is what "bootstrapping" is all about. Thus, the Court removes one reliability safeguard from an exemption, even though the situation in which a co-conspirator's statement will be used to resolve the preliminary factual questions is that in which the court will rely *most* on the statement.

It is at least heartening, however, to see that the Court reserves the question whether a co-conspirator's statement alone, without *any* independent evidence, could establish the existence of a conspiracy and a defendant's participation in it. *Ante,* at 2782; see also *ante,* at 2783 (STEVENS, J., concurring). I have no doubt that, in this ultimate example of "bootstrapping," the ****2791** statement could not pass the preliminary factual test for its own admissibility, even under the ***199** Court's reformulation. For the presumptively unreliable statement would have no corroborative independent evidence that would bring out its probative

value. See *ante,* at 2781. If the statement alone could establish its own foundation for admissibility, a defendant could be convicted of conspiracy on the basis of an unsupported remark by an alleged conspirator—a result that surely the Court could not countenance and that completely cuts the exception adrift from its agency mooring. [10]

III

The Court answers today a question left open in *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). There, while observing that the Confrontation Clause usually required the production of a declarant or a showing of his unavailability so that his out-of-court statement could be admitted against a defendant, the Court concluded that this requirement was not constitutionally mandated in the case of a nontestifying co-conspirator's statement admitted under Rule 801(d)(2)(E). 475 U.S., at 400, 106 S.Ct., at 1129. The Court in *Inadi* did not have occasion to reach the issue of the reliability of such statements for Confrontation Clause purposes, and said so specifically. *Id.,* at 391, n. 3, 106 S.Ct., at 1124, n. 3. Today, the Court concludes that the Constitution does not require any independent "indicia of reliability" for such statements. See *ante,* at 2782. Relying upon *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court reasons that no such "indicia" are needed to satisfy Confrontation Clause concerns, because the admissibility of these statements " 'falls within a firmly rooted hearsay exception.' " *Ante,* at 2782, quoting *Ohio v. Roberts, supra,* at 66, 100 S.Ct., at 2539. In a footnote, the Court dismisses any suggestion that it is altering the co-conspirator ***200** hearsay exemption: in its view, the exemption essentially remains the same, and what has changed is merely a "method of proof." *Ante,* at 2783, n. 4 (emphasis omitted).

In *Roberts* the Court did observe that, for Confrontation Clause purposes, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S., at 66, 100 S.Ct., at 2539. To understand the significance of this statement, however, it is important to remember why hearsay exceptions satisfy the reliability concern of that Clause. The Court in *Roberts* explained that "accuracy in the factfinding process" is a central concern of the Confrontation Clause that cross-examination normally serves. *Id.,* at 65, 100 S.Ct., at 2538. This concern is sometimes satisfied when evidence is admitted under a hearsay exception, even where no cross-examination of the declarant occurs at trial. This is because " 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' " *id.,* at 66, 100 S.Ct., at 2539, quoting *California v. Green,* 399 U.S. 149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1970), and because, with respect to a particular hearsay exception, there are adequate "indicia of reliability" of the out-of-court statement. These indicia serve to guarantee the trustworthiness of the declarant's statement and thus promote the accuracy of the trial—a function otherwise fulfilled by cross-examination. Thus, to answer the Confrontation Clause's concern for reliability with respect to a particular hearsay exception, one must examine what, if any, "indicia of reliability" it possesses. In addition, one must also see how "firmly rooted" the exception is, which suggests that, through experience in its use, the exception has proved to promote the "accuracy of the factfinding process." See generally Note, 53 Ford.L.Rev., at 1306–1307.

The weakness of the Court's assertion—that the Confrontation Clause concern ****2792** about reliability vanishes because Rule 801(d)(2)(E)'s exemption of a co-conspirator's statement from the hearsay definition is a "firmly rooted hearsay exception"—thus becomes immediately apparent. First, as has ***201** been explained and as its inclusion under the admissions rubric would indicate, this exemption has never been justified primarily upon reliability or trustworthiness grounds and its reliability safeguards are not extensive. See also Note, 53 Ford.L.Rev., at 1311–1312. Thus, it is surprising that, without any hesitation, the Court in this case turns to the "firmly rooted hearsay exception" rationale, which is based upon a confidence in adequate "indicia of reliability."

Second, and more astounding, is the Court's reliance upon the "firmly rooted hearsay exception" rationale as it simultaneously removes from the exemption one of the few safeguards against unreliability that it possesses. The Court cannot at all escape from this contradiction by dismissing its alteration of the exception as simply a change in "method of proof." Because the "firmly rooted hearsay exception" is defined in terms of its "indicia of reliability" for Confrontation Clause purposes, a removal of one of these "indicia" significantly transforms the co-conspirator exemption in a relevant respect. In addition, this change takes away from the exemption any weight that experience with its use by courts may have given it, thus undermining its "firmly

rooted" status. In sum, the Court cannot have it both ways: it cannot transform the exemption, as it admittedly does, *and* then avoid Confrontation Clause concerns by conjuring up the "firmly rooted hearsay exception" as some benign genie who will extricate the Court from its inconsistent analysis.

With such a transformation in the co-conspirator hearsay exemption having been made, the Court's reliance upon *Roberts'* language concerning the "firmly rooted hearsay exception" is utterly misplaced. Rather, the pertinent language from *Roberts* becomes the sentence following the one quoted by the Court: "In other cases [where there is no "firmly rooted hearsay exception"], the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S., at 66, 100 S.Ct., at 2539. This showing, I believe, would involve an examination of the statement in terms ***202** of the factors outlined in *Dutton v. Evans,* 400 U.S. 74, 88–89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970) (plurality opinion); see also Note, 53 Ford.L.Rev., at 1302. Intellectual honesty thus demands, at the very least, that, having changed this hearsay exemption, the Court remand the case to allow the lower courts to explore any "particularized guarantees of trustworthiness" the statement might have. [11]

I respectfully dissent.

All Citations

483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144, 55 USLW 4962, 22 Fed. R. Evid. Serv. 1105

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 We intimate no view on the proper standard of proof for questions falling under Federal Rule of Evidence 104(b) (conditional relevancy). We also decline to address the circumstances in which the burden of coming forward to show that the proffered evidence is inadmissible is appropriately placed on the nonoffering party. See E. Cleary, McCormick on Evidence § 53, p. 136, n. 8 (3d ed. 1984). Finally, we do not express an opinion on the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial.

2 The Advisory Committee Notes show that the Rule was not adopted in a fit of absentmindedness. The Note to Rule 104 specifically addresses the process by which a federal court should make the factual determinations requisite to a finding of admissibility:

> "If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are 'scattered and inconclusive,' and observes:
>
> " 'Should the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear *any relevant evidence,* such as affidavits *or other reliable hearsay.*' " 28 U.S.C.App., p. 681 (emphasis added).
>
> The Advisory Committee further noted: "An item, offered and objected to, *may itself be considered in ruling on admissibility,* though not yet admitted in evidence." *Ibid.* (emphasis added). We think this language makes plain the

drafters' intent to abolish any kind of bootstrapping rule. Silence is at best ambiguous, and we decline the invitation to rely on speculation to import ambiguity into what is otherwise a clear rule.

3 Given this disposition, we have no occasion to address the Government's argument, Brief for United States 21–25, that Lonardo's statements are admissible independent of Rule 801(d)(2)(E).

4 We reject any suggestion that by abolishing the bootstrapping rule, the Federal Rules of Evidence have changed the co-conspirator hearsay exception such that it is no longer "firmly rooted" in our legal tradition. The bootstrapping rule relates only to the *method of proof* that the exception has been satisfied. It does not change any element of the co-conspirator exception, which has remained substantively unchanged since its adoption in this country.

1 Glasser had argued that "independently of the statements complained of, there is *no proof* connecting him with the conspiracy." 315 U.S., at 75, 62 S.Ct., at 467 (emphasis added).

2 While the more prevalent interpretation of *Glasser* is that the admissibility of the declaration must be determined entirely by independent evidence, other Courts of Appeals have concluded that Rule 104(a) cut back on *Glasser,* rather than eliminating it completely, and thus preserved its requirement of some proof *aliunde.* As the First Circuit concluded in *United States v. Martorano,* 557 F.2d 1, 12 (1977), cert. denied, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978):

"We believe the new rules [of evidence] must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exists. *Glasser,* however, still stands as a warning to trial judges that such statements should ordinarily be given little weight. Here, *where there is significant independent evidence of the existence of a conspiracy and where the statement seeking admission simply corroborates inferences which can be drawn from the independent evidence,* we see no problem with the consideration of that statement" (emphasis added).

See also *United States v. Vinson,* 606 F.2d 149, 153, n. 8 (CA6 1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980); *United States v. Enright,* 579 F.2d 980, 985, n. 4 (CA6 1978).

3 The Advisory Committee Notes to Rule 104(a) are consistent with my view that some quantum of proof *aliunde* was, and still is, required: "An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence." 28 U.S.C.App., p. 681.

1 I do agree with the Court that the standard of proof by which an offering party establishes the preliminary facts of Rule 801(d)(2)(E) is the preponderance of the evidence. See *ante,* at 2779.

2 The Court casts a cursory glance at this history and purports to find that it supports the Court's interpretation of the Rules in question. See *ante,* at 2780, n. 2.

3 As explained by Dean McCormick, the "vicarious" or "representative" admission concept was justified by an agency rationale. Such admissions were statements of an agent either expressly authorized by a principal or made within the scope of the agent's authority to speak for the principal. See E. Cleary, McCormick on Evidence § 267, pp. 787–788 (3d ed. 1984). In speaking of these statements, I refer here to those by an agent or co-conspirator that are truly hearsay, *i.e.,* used to prove the truth of the matter asserted—not statements that might be considered to be verbal *acts* of the agency or conspiracy that do not fall within the hearsay category and thus are otherwise admissible. As the above quotation from Judge Learned Hand suggests, this distinction is not always made. See McCormick, at 792.

4 In *United States v. Inadi,* 475 U.S. 387, 395–396, 106 S.Ct. 1121, 1126–1127, 89 L.Ed.2d 390 (1986), the Court recently emphasized the importance of co-conspirator statements for conspiracy prosecutions.

5 In codifying the common-law exemption, the Rules should be understood to adopt the Court's application in *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), of the exemption's independent-evidence requirement. The Court there examined the evidence apart from the co-conspirator's statement to see whether this evidence would

establish Glasser's participation in an existing conspiracy. See *id.,* at 75, 62 S.Ct., at 467. In light of my understanding of the history of the co-conspirator exemption from hearsay, I thus disagree with Justice STEVENS' reading of *Glasser.* See *ante,* at 2783–2784 (concurring opinion).

6 In the years prior to the adoption of the Federal Rules, this rationale for justifying the exception for co-conspirator statements was criticized. See, *e.g.,* Levie, 52 Mich.L.Rev., at 1165 (defendant will be unable to force his "alter ego" co-conspirator to take the stand, in order to examine him as to the statement attributed to the defendant, if the co-conspirator invokes his privilege against self-incrimination); see also Note, 53 Ford.L.Rev., at 1296 and nn. 34 and 35. The Advisory Committee's citation of the Levie article reveals the Committee's awareness of this criticism. See Advisory Committee's Notes on Fed.Rule Evid. 801, 28 U.S.C.App., p. 718, 56 F.R.D. 183, 299 (1972).

7 The reliability justifications for the common-law exemption also had been subject to criticism in the years before the enactment of the Federal Rules of Evidence. See Levie, 52 Mich.L.Rev., at 1165–1166 ("The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law"); see also Davenport, 85 Harv.L.Rev., at 1384–1391; Note, 53 Ford.L.Rev., at 1296 and n. 36. The Advisory Committee was aware of this criticism, too. See n. 6, *supra.*

8 The legislative history of Rule 801(d)(2)(E) also confirms that the Rule was intended to make no change in the common-law exemption. See Hearings on Proposed Rules of Evidence before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess., 249 (1973) (statement of Chief Judge Henry J. Friendly: "While there is nothing wrong in [801(d)(2)(E)], it says nothing that would help anybody at all. It is just as bare as can be. It does not advance matters a bit"); Hearings on Federal Rules of Evidence before the Senate Committee on the Judiciary, 93d Cong., 2d Sess., 318 (1974) (statement of Herbert Semmel: "Finally, the House bill would not affect the admissibility of statements by defendants, by co-conspirators or by agents of the defendant all of which would be admissible under 801(d)(2)"). In particular, the history indicates that the independent-evidence requirement was understood to be retained in the Rule. *Id.,* at 162 (statement of Richard H. Keatinge and John T. Blanchard: "Rule 801(d)(2)(E) does not appear to disturb the conventional position that the judge must make the preliminary determination of the adequacy of independent evidence of a conspiracy, the nature of the statements and the party's membership in the conspiracy").

9 Besides the Court of Appeals for the Sixth Circuit, only the Court of Appeals for the First Circuit has accepted the argument that Rule 104(a) permits consideration of the co-conspirator's statement in determining the existence of a conspiracy. See *United States v. Martorano,* 557 F.2d 1, and, on rehearing, 561 F.2d 406 (1977), cert. denied, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978). The First Circuit, however, qualifies its deviation from the traditional rule. See 561 F.2d, at 408 ("But under any view of the law we would, as we said in our original opinion, require significant independent evidence of the existence of the conspiracy, deviating from the *Glasser* practice only to the extent of permitting the district court to consider the independent evidence in the light of the color shed upon it by the highly trustworthy and reliable portions of the hearsay utterance seeking admission"). Several courts have rejected explicitly this inroad into the common-law exception. See, *e.g., United States v. James,* 590 F.2d 575, 581 (CA5) (en banc), cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979); *United States v. Bell,* 573 F.2d 1040, 1044 (CA8 1978); *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238, 261 (CA3 1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Other courts continue to adhere to the traditional rule. See *United States v. DeFillipo,* 590 F.2d 1228, 1236, and n. 12 (CA2), cert. denied, 442 U.S. 920, 99 S.Ct. 2844, 61 L.Ed.2d 288 (1979); *United States v. Portsmouth Paving Corp.,* 694 F.2d 312, 320 (CA4 1982); *United States v. Rabb,* 752 F.2d 1320, 1325 (CA9 1984), cert. denied, 471 U.S. 1019, 105 S.Ct. 2027, 85 L.Ed.2d 308 (1985); *United States v. Austin,* 786 F.2d 986, 989–990 (CA10 1986). Still other courts, while noting the apparent conflict between Rule 104(a) and the independent-evidence requirement, have not passed on the issue. See *United States v. Jackson,* 201 U.S.App.D.C. 212, 229, n. 34, 627 F.2d 1198, 1215, n. 34 (1980); *United States v. Santiago,* 582 F.2d 1128, 1133, n. 11 (CA7 1978).

10 Because in this case the District Court did not consider whether, excluding Lonardo's out-of-court statements, there was enough independent evidence to establish petitioner's participation in the conspiracy, I would remand the case for a resolution of the preliminary factual questions on the basis of an evaluation of this evidence under the common-law standard as adopted by Rule 801(d)(2)(E).

11 Petitioner argues that, were the co-conspirator exemption to remain unaltered with respect to the independent-evidence rule, the exemption would satisfy the Confrontation Clause's concern for adequate "indicia of reliability," except in special cases where the defendant could show that the co-conspirator's statement was unusually unreliable and was crucial to the prosecution's case. Brief for Petitioner 33–39. Given the fact that the reliability foundation of this exemption is not as strong as that for traditional hearsay exceptions, I am inclined to agree that the Confrontation Clause might well demand a particularized reliability analysis in cases where a statement is a significant part of the prosecution's case, before such statements could be admitted over a defendant's objection. See Note, 53 Ford.L.Rev., at 1327 (arguing that such statements should not be admitted when declarant is unavailable, even when there is independent evidence of conspiracy, if statements are "crucial to the prosecutor's case or devastatingly prejudicial to the defendant"); see also Davenport, 85 Harv.L.Rev., at 1401–1404 (describing rules of admissibility of co-conspirator's statements in order to satisfy Confrontation Clause concerns). The Court's removal of the requirement of a showing of unavailability of the declarant for the admissibility of such statements in *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), which effectively could prevent a defendant from cross-examining the declarant, increases the importance of the reliability prong of Confrontation Clause analysis.

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574 F.2d 489
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Willie PEELE, Defendant-Appellant.

No. 77-2306.
|
May 5, 1978.

Synopsis

Defendant was convicted before the United States District Court for the Western District of Washington, Walter T. McGovern, Chief Judge, of bank robbery, and he appealed. The Court of Appeals, Kennedy, Circuit Judge, held that trial court did not err in permitting eyewitnesses to testify on direct examination and leaving questions relating to allegedly suggestive influence of newspaper photograph to be explored by defense counsel on cross-examination; evidentiary hearing on preliminary question of competency was not required since there was no government involvement in newspaper's publication of defendant's photograph which allegedly gave rise to suggestive identification procedure.

Affirmed.

Attorneys and Law Firms

***490** Thomas W. Hillier, II, Seattle, Wash., for defendant-appellant.

Robert Westinghouse, Seattle, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before BROWNING, GOODWIN, and KENNEDY, Circuit Judges.

Opinion

KENNEDY, Circuit Judge:

The appellant, Peele, challenges his conviction for bank robbery under 18 U.S.C. ss 2, 2113(a) & (d). The sole issue here is whether the trial court erred in refusing to hold an evidentiary hearing to determine whether a newspaper photograph identifying Peele as the robber was so suggestive to eyewitnesses that exclusion of their trial testimony was required. We affirm.

On January 27, 1977 two armed men entered and robbed the Seattle Heights Branch of the Old National Bank of Washington. One of the pair entering the bank wore a nylon stocking over his head. The issue at the trial was the identity of this masked robber. The Government charged it was Peele.

As the two robbers left the bank, police units arrived. One robber fled on foot and the other, allegedly Peele, fled in a blue automobile driven by a third participant. Witnesses saw the men change from the blue car to a yellow one. Within ten minutes after the robbery, the yellow car was stopped and the driver and Peele were arrested. The Government states, and appellant does not dispute, that newspaper reporters were “chasing around” during the ten-minute interval between the robbery and appellant's arrest. Reporters were present at the scene of the arrest, and a newspaper story contained photo coverage of the robbery scene

and of the appellant's apprehension by the police. It appears from the record that one photograph clearly depicted the appellant, without a mask.

During the jury trial, it came to the attention of the counsel for the defense that one of the prospective government witnesses, a Judy Bittner, had seen the newspaper photograph and had told the prosecutor that the photograph had aided her in identifying the appellant in a lineup. When Bittner was called to the stand, the defense requested a hearing to determine the extent of any suggestion caused by the newspaper photograph and requested that a hearing be held "perhaps prior to every witness of an identification." Although there is some doubt that the objection was adequately renewed, we assume that the request for voir dire examination on the issue of improper suggestion was applicable to each of the eyewitnesses who testified, including Bittner. The court denied the defense motion and stated that the impact of the photograph was a matter for cross-examination.

Appellant does not suggest that the Government was in any way responsible for the appearance of the photographs in the newspaper. Nevertheless, using the words of the Supreme Court in Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968), he asserts that the identification procedures here were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and that an evidentiary hearing should have been held outside the presence of the jury to evaluate that claim.

The relevant Supreme Court cases indicate that the force of a preidentification suggestion is not alone determinative of admissibility. What controls the case is the likelihood of irreparable misidentification balanced against the necessity for the Government to use the identification procedures in question. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Simmons v. United States, supra ; Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). See United States v. Pheaster, 544 F.2d 353, 370 (9th Cir. 1976), cert. denied, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977). In Stovall v. Denno, supra, the Supreme ***491** Court held that no due process violation occurred when a black defendant, the only black person in the room, was presented for identification, handcuffed to a police officer, at the hospital bedside of the victim of an attack because the need for "an immediate hospital confrontation was imperative." Id. at 302, 87 S.Ct. at 1972. The Court in Stovall did not discuss whether any likelihood of misidentification resulted from the confrontation, but in a case decided the same day the Court emphasized the suggestiveness of the Stovall encounter, stating that "(i)t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." United States v. Wade, 388 U.S. 218, 234, 87 S.Ct. 1926, 1936, 18 L.Ed.2d 1149 (1967). The confrontation did not violate due process because the need for the procedure was compelling. Baker v. Hocker, 496 F.2d 615, 617 (9th Cir. 1974); see United States v. Freie, 545 F.2d 1217, 1224 (9th Cir. 1976), cert. denied, 430 U.S. 966, 97 S.Ct. 1645, 52 L.Ed.2d 356 (1977).

In the case before us there is no government involvement at all in the suggestive identification procedure and thus the balancing test under Stovall and Simmons is not applicable. [1] A case might arise where the mind of a witness is so clouded by suggestions from nongovernment sources that a conviction based principally on the testimony of that witness violates due process, see Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), but that point was not approached in the instant case.

When government involvement is absent from the calculus, leaving us only the question whether or not a suggestive device has impaired the credibility of identification testimony by a particular witness, we see no reason for adopting a rule requiring examination of the witness outside the presence of the jury. The extent to which a suggestion from nongovernment sources has influenced the memory or perception of the witness, or the ability of the witness to articulate or relate the identifying characteristics of the accused, is a proper issue for the trier of fact to determine. Therefore, we hold that it was not error for the court to permit the witness to testify on direct, leaving questions relating to the allegedly suggestive influences to be explored by defense counsel on cross-examination. Only where there is grave doubt as to the admissibility of the witness' testimony would it be necessary to consider whether a hearing on the preliminary question of competency should be held outside the presence of the jury, and even this determination lies largely within the discretion of the trial court. Fed.R.Evid. 104(c) and Notes of Advisory Committee; United States v. Gerry, 515 F.2d 130, 137 (2d Cir.), cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).

The Third Circuit has examined the issue of pretrial publicity from nongovernmental sources in United States v. Zeiler, 470 F.2d 717, 719-20 (3d Cir. 1972), and, for reasons well stated in that opinion, has also concluded that the rule of Simmons is inapplicable. Accord, United States v. Broadhead, 413 F.2d 1351, 1361 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970). See United States v. Grose, 525 F.2d 1115, 1118 (7th Cir. 1975), cert. denied, 424 U.S. 973, 96 S.Ct. 1477, 47 L.Ed.2d 743 (1976).

Appellant's conviction is AFFIRMED.

All Citations

574 F.2d 489, 3 Fed. R. Evid. Serv. 560

Footnotes

1 We are not presented with a case where the police may have assisted or encouraged the pretrial publicity. Cf. United States v. Boston, 508 F.2d 1171, 1177-78 (2d Cir. 1974) (photo released to newspaper by police and later used in photospread; but no likelihood of irreparable misidentification), cert. denied, 421 U.S. 1001, 95 S.Ct. 2401, 44 L.Ed.2d 669 (1975); United States v. Milano, 443 F.2d 1022, 1025-26 (10th Cir.) (photo of suspect released to newspapers by police but no likelihood of irreparable misidentification), cert. denied, 404 U.S. 943, 92 S.Ct. 294, 30 L.Ed.2d 258 (1971).

In Dearinger v. United States, 468 F.2d 1032 (9th Cir. 1972), there was a suggestion of governmental involvement in the pretrial publicity, but the court, applying the Simmons test, held that there was no denial of due process.

728 F.3d 953
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Joseph Anderson EVANS, Sr., Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Joseph Anderson Evans, Sr., Defendant–Appellant.

Nos. 11–30367, 11–30369.
|
Argued and Submitted Feb. 8, 2013.
|
Filed Aug. 27, 2013.

Synopsis

Background: Defendant was convicted in two separate cases in the United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, Senior District Judge, of being an alien in the United States after deportation, and misrepresenting his identity and citizenship to fraudulently obtain supplemental social security benefits, acquire food stamps, make a claim of citizenship, and apply for a passport. Defendant appealed, and the cases were consolidated.

Holdings: The Court of Appeals, Paez, Circuit Judge, held that:

District Court exceeded its authority under umbrella gate-keeping rule when it excluded defendant's birth certificate so as to avoid a miscarriage of justice;

birth certificate was relevant;

District Court exceeded its authority when it excluded birth certificate on ground that its probative value was outweighed by danger of undue delay, after first determining that certificate was not credible evidence;

probative value of birth certificate was not substantially outweighed by danger of undue delay, unfair prejudice, confusion of the issues, or misleading the jury;

exclusion of birth certificate violated defendant's due process right to present defense; and

violation of defendant's due process right was not harmless error.

Vacated and remanded.

Ronald M. Gould, Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

***956** Stephen R. Hormel (argued), Hormel Law Office, L.L.C., Spokane Valley, WA, for Defendant–Appellant.

Shawn N. Anderson (argued), Assistant United States Attorney, and Michael C. Ormsby, United States Attorney, Yakima, WA, for Plaintiff–Appellee.

Appeal from the United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, Senior District Judge, Presiding. D.C. Nos. 2:10–cr–02121–WFN–1, 2:11–cr–02039–WFN–1.

Before: RAYMOND C. FISHER, RONALD M. GOULD, and RICHARD A. PAEZ, Circuit Judges.

OPINION

PAEZ, Circuit Judge:

In these consolidated appeals, we clarify the limits of a trial court's authority under Federal Rules of Evidence 104 and 403 to exclude relevant evidence when the court questions the credibility of such evidence. In two separate cases, the government charged defendant Joseph Anderson Evans, Sr., with being an alien in the United States after deportation, as well as misrepresenting his identity and citizenship to fraudulently obtain supplemental social security benefits, acquire food stamps, make a claim of citizenship, and apply for a passport. Evans's primary defense to all of the charges was that he was a citizen of the United States, and his primary evidence in support of his defense was a delayed birth certificate issued by the State of Idaho. In a pre-trial ruling, the district court excluded the birth certificate on the ground that it was "substantively fraudulent." The court made this finding following an evidentiary hearing at which the government presented evidence that Evans had obtained the birth certificate by fraudulent misrepresentations and was not a United States citizen. Evans was subsequently convicted of all charges in both cases. We hold that the district court erred in excluding the birth certificate, and that the exclusion of such significant evidence resulted in a violation of Evans's Fifth Amendment due process right to present a defense. We further hold that the error was not harmless, and we therefore vacate Evans's convictions and remand for new trials.

I. FACTS AND PROCEDURAL HISTORY

In April 2010, Evans filed a petition for a delayed birth certificate in Idaho state district court. *See* Idaho Code Ann. §§ 39–267, 39–278. In support of the petition, Evans filed an affidavit on his own behalf and several affidavits from witnesses who offered evidence of his place of birth. Evans also appeared at a non-adversarial hearing where he answered questions posed by the court. At the close of the hearing, the judge granted Evans's petition and ordered the Idaho Bureau of Vital Records and Health Statistics to issue a delayed birth certificate to Evans. In May 2010, the Bureau issued a birth certificate stating that Evans was born in Lapwai, Idaho, on the Nez Perce Indian Reservation. Later that month, Evans applied for a United States passport.

As a result of discrepancies in Evans's passport application, the United States Passport Agency in Seattle referred Evans's case to the State Department's Diplomatic Security Service, which began an investigation into Evans's identity. Later that year, in November 2010, Evans was indicted on one count of being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326. A few months later, in February 2011, he was again indicted, ***957** this time on 42 counts of fraudulently obtaining supplemental social security benefits, unlawfully acquiring food stamps, making a false claim of citizenship, and making a false statement in an application for a passport, in violation of 42 U.S.C. § 1383a(a)(3), 7 U.S.C. § 2024(b), and 18 U.S.C. §§ 911, 1542. The basis for the fraud and false statements alleged in the latter indictment were Evans's alleged misrepresentations of his identity and citizenship.

The two cases were assigned to the same district court judge. Before trial commenced on the § 1326 charge, Evans notified the court that he intended to introduce his delayed birth certificate issued by the State of Idaho as proof of his United States citizenship. The birth certificate was a key piece of evidence in both cases, because to convict Evans on any of the counts, the government had to prove beyond a reasonable doubt that he was not a United States citizen. At a pre-trial conference, the court questioned the admissibility of the birth certificate. The court expressed concern about inconsistencies in the evidence, including inconsistent information about Evans's real name and place of birth. The district judge explained to the parties:

> I received a lot of documents on [sic] this case. There are a lot of motions filed. And all the documents that I've reviewed in the last half a day or so cause me some real concern about going forward with this case at this time. Without discussing at all the admissibility of any of these documents, on their face, just reading them, there is so much inconsistent information about this person, whether his name is Evans or whether it's Shippentower or whether it's Ceniceros–Mora....
>
> What really concerns the court is that, without making a finding on this, there's enough evidence to indicate that going forward could possibly result in fraudulent evidence coming into this case in front of the jury.

The court reasoned that if the Idaho court had relied on inaccurate or false information to find that Evans was born in Idaho and grant the petition for a delayed birth certificate, the birth certificate itself would be inaccurate, and it would therefore be error to admit it. The court concluded that it should hold an evidentiary hearing under Federal Rule of Evidence 104 to determine if the birth certificate was admissible. [1] Prior to the hearing, the government filed a pre-trial Motion to Preclude Admission of Evidence of Birth in Idaho ("Motion to Preclude Evidence").

At the Rule 104 hearing, the government called three witnesses. [2] First, a special agent from Immigration and Customs Enforcement testified about his investigation of Evans's immigration and criminal history. He testified that the State Department's Diplomatic Security Service, which investigates visa fraud, asked him to review the A-file (i.e. the immigration file, or "alien registration file") of a person named "Ramon Ceniceros–Mora." The A-file included, *inter alia,* two documents titled "record of deportable alien," a copy of a sworn statement made to a Border Patrol officer, a 1984 federal judgment of conviction for possession of a false birth ***958** certificate, and a 1990 federal judgment of conviction for a violation of 8 U.S.C. § 1326. [3] The agent testified that he matched Evans to the file of "Ramon Ceniceros–Mora" through fingerprint analysis, photographs, witness interviews, investigation into Evans's application for a delayed birth certificate, and review of Evans's correspondence with the Idaho Bureau of Vital Statistics. On the basis of the records in the A-file, the agent testified that he believed Evans was a native and citizen of Mexico.

The government's second witness was a special agent from the State Department's Diplomatic Security Service. He testified that Evans had submitted an application for a United States passport that contained "fraudulent indicators." He and several other agents subsequently visited Evans at his home to investigate possible visa fraud. During the visit, Evans identified photos of himself that the special agent had taken from the A-file. When the agent told Evans that the photographs were from the file of a person who had been previously deported to Mexico, however, Evans denied being a citizen of Mexico or having ever been deported. The agent also took Evans's fingerprints and matched them to other documents in the A-file.

Finally, the government's third witness was a historian for the United States Marine Corps. She testified that she could find no record of Evans's alleged military service, did not recognize the type of certificate allegedly showing Evans's graduation from training, and thought his military style of dress in photographs was very unusual.

On the basis of the testimony and other evidence presented at the evidentiary hearing, the district court granted the government's Motion to Preclude Evidence. [4] The court cited Federal Rules of Evidence 104(a) and 403 as the bases for its decision, explaining:

> While neither party questions the validity of the Idaho birth certificate on its face, the Government has unequivocally shown that the Idaho birth certificate is substantively fraudulent and that it was obtained through fraud of the Defendant. The Court finds that all three of the Government's witnesses were credible and that there is no support in the record that would allow a reasonable person to determine that the Defendant's Idaho birth certificate is substantively genuine.
>
> > As a gatekeeper, the Court is obligated to exclude the Idaho birth certificate under Fed.R.Evid. 104 ("[p]reliminary questions concerning ... the admissibility of evidence shall be determined by the court"). Under Fed.R.Evid. 403, the Idaho birth certificate is without probative weight, can only lead to undue delay and a possible miscarriage of justice.
> >
> > Furthermore, excluding the Idaho birth certificate does not, as defense counsel contends, deprive Defendant of his Sixth Amendment Jury trial rights. The Court is not making a determination of Defendant's citizenship, but merely a determination of the admissibility of the Idaho birth certificate. Alienage is an essential element of the § 1326 offense and the Government is still required to carry its burden with respect to that ***959** element just as it must with the other elements.

(citation omitted).

The two cases proceeded to trial, with the court beginning with the trial of the § 1326 charge. During jury deliberations on that charge, the jury sent the district court a note asking, "if you are deported are you legally considered an alien?" The court responded that the answer was contained within the jury instructions. When the jury could not reach a unanimous verdict, the court declared a mistrial. At the re-trial of the § 1326 charge, Evans's primary defense was that he was a United States citizen, and his primary evidence in support of that defense was his own testimony. Both of the special agents from the Rule 104(a) hearing testified again at the re-trial. This time, the jury returned a verdict of guilty.

At the trial on the fraud and false statements charges, Evans again argued that he was a United States citizen. All three of the government's witnesses from the Rule 104(a) hearing testified at this trial, and the jury convicted Evans.

Evans timely appealed the judgments of convictions in both cases. On appeal, Evans argues that the exclusion of the birth certificate deprived him of his Fifth Amendment due process right to present a defense and his Sixth Amendment right for a jury to determine every element of the charges brought against him.

II. STANDARD OF REVIEW

We review de novo the district court's interpretation of the Federal Rules of Evidence, *United States v. W.R. Grace,* 504 F.3d 745, 758–59 (9th Cir.2007), but we review the district court's exclusion of evidence for abuse of discretion, *United States v. Lynch,* 437 F.3d 902, 913 (9th Cir.2006) (en banc). "We review de novo whether an evidentiary error rises to the level of a constitutional violation." *United States v. Pineda–Doval,* 614 F.3d 1019, 1032 (9th Cir.2010). A constitutional error is harmless if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Walters,* 309 F.3d 589, 593 (9th Cir.2002) (internal quotation marks omitted).

III. DISCUSSION

The Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." *United States v. Stever,* 603 F.3d 747, 755 (9th Cir.2010) (internal quotation marks omitted). This right includes "the right to present the defendant's version of the facts," *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), and to "put before a jury evidence that might influence the determination of guilt," *Pennsylvania v. Ritchie,* 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *see also Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). We have acknowledged that this right is not "absolute," *Alcala v. Woodford,* 334 F.3d 862, 877 (9th Cir.2003),

since the "adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments," *Taylor v. Illinois,* 484 U.S. 400, 410–11, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). However, " 'when evidence is excluded on the basis of an *improper* application of the evidentiary rules,' " the danger of a due process violation is particularly great, since " 'the exclusion [of the evidence] is unsupported by any legitimate ... justification.' " ***960** *Stever,* 603 F.3d at 755 (brackets omitted) (quoting *United States v. Lopez–Alvarez,* 970 F.2d 583, 588 (9th Cir.1992)). We therefore begin our analysis by considering whether the district court properly applied the Federal Rules of Evidence. We conclude that it did not.

A.

The district court invoked Rule 104(a) as the source of its "gate-keeping" authority. Rule 104(a) states that the court "must decide any preliminary question" of fact or law about three types of issues: whether (1) "a witness is qualified," (2) "a privilege exists," or (3) "evidence is admissible." Fed.R.Evid. 104(a); *see also* Fed.R.Evid. 104(a) advisory committee notes. [5] We have previously considered the trial court's gate-keeping function as it applies to the first two issues, but we have not explicitly considered the scope of the trial court's gate-keeping function with regard to the third issue. [6] We conclude that the trial court's authority to determine if evidence is admissible pursuant to Rule 104(a) is necessarily limited by other rules of evidence—most importantly, Rule 402, which provides that evidence is admissible so long as (1) it is relevant, and (2) it is not otherwise inadmissible under, *inter alia,* the Federal Rules of Evidence. Fed.R.Evid. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.").

Thus, Rule 104(a) provides the trial court with the authority to decide questions that might make evidence inadmissible under some *other* rule of evidence (or under the Constitution, a federal statute, or other Supreme Court rules), but it does not itself provide a substantive basis for excluding the evidence. *See United States v. Brewer,* 947 F.2d 404, 409 (9th Cir.1991) ("Rule 104 ... is limited to the preliminary requirements or conditions that must be proved before a particular rule of evidence may be applied."). For example, trial courts can exercise their authority under Rule 104(a) to determine that a statement was made for the purposes of medical diagnosis, making it admissible under Rule 803(4), *see United States v. Lukashov,* 694 F.3d 1107, 1115 (9th Cir.2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 1744, 185 L.Ed.2d 801 (2013); that a conspiracy ***961** existed, making certain co-conspirator statements admissible under Rule 801(d)(2)(E), *see Bourjaily v. United States,* 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); and that an agency relationship existed, making certain statements admissible under Rule 802(d)(2)(D), *see Hilao v. Estate of Marcos,* 103 F.3d 767, 775–76 (9th Cir.1996). A trial court may also exercise its Rule 104(a) authority to determine, *inter alia,* "the unavailability of a witness whose former testimony is being offered" or whether there is "proof of the interest of the declarant in determining whether the out-of-court statement threatens that interest." *Brewer,* 947 F.2d at 409.

In each of the above scenarios, the trial court uses its Rule 104(a) authority to determine "the existence of a condition," which in turn determines "[t]he applicability of a particular rule of evidence." Fed.R.Evid. 104(a) advisory committee notes. We have not previously considered whether a trial court can exclude evidence pursuant to Rule 104(a) without relying on some substantive basis outside of Rule 104(a), such as another rule of evidence, a federal statute, or the United States Constitution. We now hold that it cannot. [7] *See* Fed.R.Evid. 402. To the extent that the district court here invoked an umbrella "gate-keeping" authority to exclude Evans's birth certificate so as to avoid a "miscarriage of justice," it exceeded the scope of its authority under Rule 104(a). [8]

B.

Because the trial court must admit evidence that is (1) relevant, and (2) not inadmissible under, *inter alia,* some other rule, Fed.R.Evid. 402, we next consider whether these conditions are met here. The government argues that the birth certificate is irrelevant because even if it was "genuine in form," it was "not [genuine] in substance." We disagree. The fact that the birth certificate was properly issued by the State of Idaho establishes that it is "of consequence" to an issue in both cases—Evans's claim of United States citizenship—and that it has some "tendency to make [his alleged citizenship] more ... probable than it would be without the evidence." Fed.R.Evid. 401. [9] This establishes ***962** that the birth certificate was relevant to all the counts in both cases.

Furthermore, to the extent the district court conditioned the relevance of the birth certificate upon its "substantive genuineness," it erred in its application of Rule 104(b). This rule provides that where "the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." Fed.R.Evid. 104(b). [10] If "the foundation evidence is sufficient to support a finding of fulfillment of the condition ... the item is admitted." Fed.R.Evid. 104(b) advisory committee notes. Furthermore, if "after all the evidence on the issue is in, pro and con, the jury *could* reasonably conclude that fulfillment of the condition is not established," the evidence is admitted, because "the issue is for [the jury]." *Id.* (emphasis added). Only if "the evidence is not such as to allow a finding, [does] the judge withdraw[ ] the matter from [the jury's] consideration." *Id.* Of critical importance here, when "determining whether the [party introducing evidence] has introduced sufficient evidence to meet Rule 104(b), *the trial court neither weighs credibility* nor makes a finding that the [party] has proved the conditional fact by a preponderance of the evidence." *Huddleston v. United States,* 485 U.S. 681, 690, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) (emphasis added). "The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence." *Id.*

Here, although the district court did not specifically cite to Rule 104(b), its conclusion that no "reasonable person" could "determine that the Defendant's Idaho birth certificate is substantively genuine" draws its language and reasoning from Rule 104(b). But in reaching the conclusion that no reasonable person could find that Evans's birth certificate was substantively genuine, the district court erroneously weighed the credibility of the government's witnesses against the credibility of the official state document. Indeed, it expressly found that "all three of the Government's witnesses were credible." This was error. The fact that the birth certificate was an official document, issued by the Idaho Bureau of Vital Records and Health Statistics, provided a sufficient basis upon which a juror *could* conclude that the birth certificate was "substantively genuine." And to the extent the Government's evidence suggests otherwise, the issue boils down to the credibility of the parties' conflicting evidence, which is a question for the jury to decide. [11] We therefore hold that to the extent the district court relied on Rule 104(b) in excluding the birth certificate, it erred.

C.

We next turn to the district court's application of Rule 403. As part of ***963** its authority to decide preliminary questions of law pursuant to Rule 104(a), the trial court may exclude relevant evidence if "its probative value is substantially outweighed" by, *inter alia,* the danger of unfair prejudice, misleading the jury, or undue delay. [12] Fed.R.Evid. 403; *see also Hankey,* 203 F.3d at 1168 (recognizing that the court's Rule 104(a) authority allows it to exclude evidence under Rule 403). The district court here concluded that Evans's birth certificate was inadmissible under Rule 403 because it was "without probative weight" and could "only lead to undue delay." This was legal error. "Weighing probative value against unfair prejudice under [Rule] 403 means probative value with respect to a material fact *if the evidence is believed,* not the degree the court finds it believable." *Bowden v. McKenna,* 600 F.2d 282, 284–85 (1st Cir.1979) (citing 22 C. Wright & K. Graham, Federal Practice & Procedure: Evidence, § 5214, at 265–66 (1978)) (emphasis added). The court may not exclude relevant evidence—or, in this case, assign it no probative value—on the ground that it does not find the evidence to be credible. *See United States v. Candoli,* 870 F.2d 496, 509 (9th Cir.1989) ("[A] conflict in the evidence goes to the weight of [the evidence], not to its admissibility.").

We find three cases from our sister circuits to be instructive. First, in *Blake v. Pellegrino,* the district court granted the defendant's motion to strike the cause of death from the plaintiff's death certificate, explaining that it did not believe the plaintiff had died in the manner so described. 329 F.3d 43, 45 (1st Cir.2003). The First Circuit held that this was error. *Id.* at 49. The court concluded that "a judge, presiding over a jury trial, may [not] rule on the admissibility of evidence based upon his view of the persuasiveness of that evidence," since the jury, not the judge, was "the ultimate arbiter of the persuasiveness of the proof." *Id.* at 47 (internal quotation marks omitted). The court considered and rejected the possibility that the trial court had acted pursuant to its authority under Rule 104(a):

> Rule 104(a) is inapposite here, for no foundational facts were in issue. Virtually by definition, foundational facts are those facts upon which the admissibility of evidence rests. Those facts include matters such as the genuineness of a document or statement, the maker's personal knowledge, and the like. *In this instance, those facts (e.g., the authenticity of the death certificate and the authority of the medical examiner to sign it) were never in dispute. The district court's problem did not go to any foundational fact, but, rather, to the very core of the evidence: its persuasiveness.* Where, as here, a piece of evidence rests upon a proper foundation, Rule 104(a) does not permit a trial judge to usurp the jury's function and exclude the evidence based on the judge's determination that it lacks persuasive force.

Id. at 48 (emphasis added) (citations omitted). We are persuaded by the court's reasoning. The district court here, as in *Blake*, did not dispute that Evans's birth certificate was properly issued by the State of Idaho, making it facially valid. Rather, the court questioned whether the event that the certificate allegedly documented—in *Blake*, the decedent's alleged death by asphyxia; here, Evans's alleged birth in Idaho—had actually occurred in ***964** the way stated on the certificate. We agree with the First Circuit that this is a question of fact that should be decided by a jury, not a trial judge. We therefore adopt the First Circuit's rule that "a trial judge [may not] refuse to admit evidence simply because he does not believe the truth of the proposition that the evidence asserts." *Id.* at 47.

We find further support for adopting the First Circuit's rule in *Ballou v. Henri Studios, Inc.,* 656 F.2d 1147 (5th Cir.1981). In *Ballou,* the plaintiffs filed a motion to exclude a blood alcohol test indicating that the decedent was intoxicated at the time of his car accident with the defendant. *Id.* at 1149. The trial court held a pre-trial hearing at which several witnesses testified; it then granted the motion, explaining that the test lacked "credibility" in light of certain witness testimony. *Id.* at 1151–52. The Fifth Circuit reversed, concluding that "the court's decision to believe Mrs. Eisenhower's testimony rather than the results of the blood alcohol test constituted a credibility choice which should properly have been reserved for the jury." *Id.* at 1154. The court went on to explain that the district court had mis-applied the Rule 403 balancing test by assigning "little or no probative value" to the test results when it excluded them:

> Rather than discounting the probative value of the test results on the basis of its perception of the degree to which the evidence was worthy of belief, the district court should have determined the probative value of the test results if true, and weighed that probative value against the danger of unfair prejudice, leaving to the jury the difficult choice of whether to credit the evidence.

Id.; see also id. ("Rule 403 does not permit exclusion of evidence because the judge does not find it credible." (internal quotation marks omitted)). The district court here, like the trial court in *Ballou,* erred by assigning no probative weight to the birth certificate. It should have determined the probative value of the birth certificate *if taken as a true record of Evans's birth,* and then weighed it against the other Rule 403 factors.

Finally, we find additional guidance in the Fourth Circuit's decision in *Rainey v. Conerly,* 973 F.2d 321 (4th Cir.1992). In *Rainey,* the trial court *sua sponte* excluded a prisoner's contemporaneous written account of an altercation with a prison guard "because it was dated December 3, 1988, yet purported to describe events that occurred on December 3 through December 5, 1988," and therefore was "not reliable." *Id.* at 326. The Fourth Circuit held that this was error. The court concluded:

> [W]hile the trial court may exclude relevant evidence under Federal Rule of Evidence 403 for certain reasons, the basis advanced by the trial court in this case, that the document was 'not reliable,' is not a proper ground. Issues of credibility are to be resolved by the jury, not the trial court, and in this case the jury should have been trusted to accord the evidence the proper weight in light of any date discrepancy.

Id. (citation and footnote omitted). Here, as in *Rainey,* the trial court relied in part on an improper ground for excluding the birth certificate under Rule 403, i.e. the danger of a "miscarriage of justice." This was error. It should have instead trusted the jury to consider discrepancies between the information contained in the birth certificate and the government's evidence and accord the proper weight to each. [13]

***965** D.

The final question, with respect to the district court's evidentiary rulings, is whether the probative value of the birth certificate —if found credible by the jury—is substantially outweighed by the potential for undue delay, or any other factor in the Rule 403 balancing test. We conclude that it is not. The birth certificate's probative value, if found to be a credible record of Evans's birth, is very high: every charge in the two indictments required the government to prove that Evans was either an alien or not a citizen of the United States, his main defense at both trials was that he was a United States citizen, and the birth certificate was his primary evidence of citizenship. *See United States v. Wiggan,* 700 F.3d 1204, 1213 (9th Cir.2012) ("[A] decision regarding probative value must be influenced by the availability of other sources of evidence on the point in question."). Furthermore, the danger of "undue delay"—the only proper Rule 403 factor that the district court cited—was low, especially since the government's witnesses from the Rule 104(a) pre-trial hearing testified again at both of the trials. Although the government argues that it would have had to "conduct a separate presentation during rebuttal, following the Defendant's offering [the birth certificate] in his case-in-chief," such a burden does not rise to the level of an "undue delay" in this case, nor does it outweigh the probative value of the birth certificate to the central issue in both cases.

The government also argues that three additional Rule 403 factors—unfair prejudice to the government, confusion of the issues, and misleading the jury—substantially outweigh the probative value of the birth certificate. We disagree. [14] If the birth certificate had been admitted, the government could have put forth evidence that it was fraudulently obtained by Evans, as it did at the Rule 104(a) hearing; it could have also introduced evidence detailing the procedures for obtaining a delayed certificate of birth in Idaho. *See Mah Toi v. Brownell,* 219 F.2d 642, 644 (9th Cir.1955) (concluding that the "general" rule is that " '[o]fficial (birth) certificates are prima facie, but not conclusive, evidence of the facts stated therein' " (quoting ***966** 32 C.J.S. Evidence § 766(b))). We fail to see how such an approach would have been prejudicial to the government. To alleviate any concern that the jury might give undue weight to a single item of evidence, the court could have given a cautionary instruction. *See United States v. Boulware,* 384 F.3d 794, 808 (9th Cir.2004) ("Any danger that the jury would have given undue weight to the [evidence] could have been dealt with by a cautionary instruction.").

Admission of the birth certificate also would have posed a low risk of confusing or misleading the jury. Although the birth certificate would have increased the chances that the jury would acquit Evans, such a result could not be attributed to the jury being confused or misled; to find otherwise would be to prejudge the "correct" outcome of the trial before it occurs. *See, e.g., United States v. Crosby,* 75 F.3d 1343, 1349 (9th Cir.1996) (" '[I]f the evidence [that someone else committed the crime] is in

truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.' " (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. ed.1983)) (alterations in original)). It is the jury, not the trial judge, that must decide how much weight to give to Evans's delayed birth certificate in light of the government's evidence suggesting that the birth certificate is fraudulent and that Evans is not a United States citizen. We therefore conclude that it was an abuse of discretion for the district court to exclude Evans's delayed birth certificate under Rule 403.

E.

We next consider whether the exclusion of the birth certificate rose to the level of a constitutional violation. We hold that it did. [15] "The Ninth Circuit has found ... violations [of the constitutional right to present a defense] where the district court incorrectly excluded evidence that was necessary for the defendant to refute a critical element of the prosecution's case." *Pineda–Doval,* 614 F.3d at 1033. Thus, in *Pineda–Doval,* we held that it was constitutional error to exclude evidence of particular Border Patrol policies where the "only real factual dispute ... was whether [the defendant's] driving caused the ten charged deaths," *id.* at 1032, evidence of the policies "went to the question of whether [the agent's] conduct constituted a superseding cause of the accident," *id.,* and exclusion of the evidence "effectively denied the defendant the only argument that he had," *id.* at 1033.

Likewise, in *Stever,* we held that it was constitutional error to exclude "the sole evidence" tending to show that a drug trafficking organization may have trespassed on the defendant's land, where "a major part of the attempted defense" was that the defendant was not involved in growing the marijuana discovered on his land. 603 F.3d at 757 (internal quotations marks omitted). [16] Here, as in *Stever,* the ***967** excluded birth certificate was (1) the main piece of evidence, (2) for the defendant's main defense, to (3) a critical element of the government's case. On this ground, we conclude that the exclusion of the birth certificate amounted to a deprivation of Evans's due process right to present a defense. *See United States v. Ramirez,* 714 F.3d 1134, 1139 (9th Cir.2013) ("To be sure, the Constitution protects a criminal defendant's right to argue a point that goes to the heart of his defense.").

Having found a violation of the right to present a defense, "we must reverse the guilty verdict unless the government convinces us the error was harmless beyond a reasonable doubt." *United States v. Leal–Del Carmen,* 697 F.3d 964, 975 (9th Cir.2012). The government has not met this high burden. Its sole argument is that any error was harmless "given the overwhelming volume and substance of the government's evidence in support of the Defendant's alienage." But we are not persuaded beyond a reasonable doubt that the jury would have believed this evidence rather than believing that Evans was a United States citizen, as suggested by his state-issued birth certificate. The question of Evans's alienage or citizenship was "at the very heart" of the two cases, and his birth certificate was "the most important evidence that the defense could present on that topic." *Wiggan,* 700 F.3d at 1215 (holding that it was an abuse of discretion, and not harmless, to admit grand juror testimony). We do not know the effect that the birth certificate would have had on the outcome of the trial, including whether it would have affected the jurors' assessment of Evans's own testimony or the testimony of any other witnesses. Indeed, the first jury to hear Evans's § 1326 case could not reach a verdict, resulting in a mistrial. We also find it significant that Evans exercised his right not to testify in the case that resulted in a mistrial; we decline to speculate on whether he would have exercised this right in the subsequent two trials—or otherwise changed his trial strategy—had the birth certificate been admitted. We are therefore not convinced beyond a reasonable doubt that the exclusion of the birth certificate was harmless.

IV. CONCLUSION

We conclude that the district court erred in invoking an inherent "gate-keeping" authority to exclude the birth certificate pursuant to Rule 104(a) without relying on some substantive basis outside of Rule 104(a). The court further erred by concluding that no reasonable juror could determine that the birth certificate was "substantively genuine," *see* Fed.R.Evid. 104(b), and by excluding the birth certificate pursuant to Rule 403 without first assessing its probative value when taken as a true record of Evans's birth.

Furthermore, the district court's exclusion of the central piece of evidence for Evans's main defense to a critical element of all the charges in the two cases was a violation of Evans's Fifth Amendment right to present a defense, and the error was not harmless.

For all of the above reasons, we vacate the conviction in No. 11–30367 and all the convictions in No. 11–30369 and remand for a retrial of all charges in both cases.

VACATED AND REMANDED.

GOULD, Circuit Judge, dissenting:
I take a different view and would affirm the district court for three reasons.

First, Federal Rule of Evidence 104(a) literally permits a district court to perform a threshold review of the admissibility of ***968** evidence. Even if Rule 104(a) is limited to the "preliminary requirements or conditions that must be proved before a particular rule of evidence may be applied," *United States v. Brewer,* 947 F.2d 404, 409 (9th Cir.1991), that does not prevent the court from excluding illegitimate evidence when excluding such evidence is the very reason rules of evidence exist. I have no problem reaching the firm conclusion that illegitimate evidence may permissibly be held to be inadmissible due to its inaccurate nature. We should make that our precedential point, rather than the approach favored by the majority.

I illustrate with a thought experiment or hypothetical. Let's say that an organized-crime czar is charged in a serious case and wants to present "exculpatory" evidence. But the prosecution has independent evidence that the defense evidence is as phony as a $3 bill. It might be fraudulently obtained (such as the legitimate document here that was procured by fraudulent means). Or it might be the product of extortion (such as through a threat like "I will kill your children if you don't give me an alibi"). Or it might be the product of bribery (such as a promise to pay a large sum for favorable evidence). In each case, the majority's rule would appear to require the phony evidence to be admitted before the jury, while merely letting the prosecution present responsive evidence to the jury showing that it was procured by fraud, extortion, or bribery. That would require mini-trials within the trial, would be potentially confusing to a jury, and is not literally required by Rule 104.

The majority agrees that the court can condition relevance on validity. But it concludes that in making "a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition," Fed.R.Evid. 104(b) advisory committee's note, a court may not consider the underlying substance and process that led to the issuance of a document because doing so would amount to an improper credibility determination. Applying this rationale in the present case, the majority concludes that "the district court erroneously weighed the credibility of the government's witnesses against the credibility of the official state document." But the existence of the document does not at all bear on the question of whether it was procured by fraud. And the district court cannot be said to have made a credibility determination when Evans presented no evidence at the hearing to support the document's integrity. Adopting the rule of the majority permits a party's old lies to insulate new ones from challenge outside the jury's presence.

Here are the facts: To gain the delayed birth certificate, Evans offered an affidavit and testimony asserting that he was born in Idaho and was a former member of the U.S. Marine Corps. He said under oath that he was "active in the Vietnam [W]ar, from 1969 through 1975" and had twelve years of combat duty where he earned a purple heart. He said that when he came back to the United States, he "donated [his] next eight years of service [in the Marine Corps] for free" until he retired. On this evidence, the Idaho judge granted the delayed birth certificate in the non-adversarial state proceeding and thanked Evans for his military service.

In the federal criminal proceeding, the district court excluded the Idaho birth certificate. It reached this correct decision after hearing extensive evidence that Evans was not a U.S. citizen and never served in the military, let alone in a war zone. [1] Based on this evidence and without ***969** any evidence presented by Evans, the court fairly concluded:

> While neither party questions the validity of the Idaho birth certificate on its face, the Government has unequivocally shown that the Idaho birth certificate is substantively fraudulent and that it was obtained through fraud of the Defendant. The [c]ourt finds that all three of the Government's witnesses were credible and that there is no support in the record that would allow a reasonable person to determine that the Defendant's Idaho birth certificate is substantively genuine.

The majority argues that the court impermissibly made a credibility determination, but as I have explained, this principle should not be applied when all the evidence was on the Government's side and Evans had no witnesses testify at the evidentiary hearing. The district court's rationale quoted above is equivalent to saying that no reasonable jury could determine that the birth certificate was not tainted by fraud. I conclude that the district court made a correct and discerning judgment. There is nothing on the side of nonfraud here, and the district court's decision excluding the evidence was correct.

"Fraud" is "an instance or act of trickery or deceit esp[ecially] when involving misrepresentation." Webster's Third New International Dictionary 904 (3d ed.1993). To tell a lie is to "make an untrue statement with an intent to deceive" or to "create a false or misleading impression." *Id.* at 1305. Lying is a form a fraud. And to determine whether fraud exists, substance and process must be examined. Under the majority rule, the district court could not perform such an examination and evidence procured by fraud would be admissible, leaving it to the jury to sort things out. To my thinking, there is no evidence error at all in excluding fraudulently obtained evidence. I would conclude that Federal Rule of Evidence 104(a) lets the court preliminarily review whether a state document in the form of a belated birth certificate was procured by fraud. That is one reason to affirm the district court.

Second, even if Rule 104(a) should be limited as stated by the majority, Federal Rule of Evidence 403, relied upon by the district court in its Rule 104 decision, gives the district court broad power to exclude evidence if its probative value is substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[2] All the valid evidence presented to the state in the non-adversarial proceeding ***970** for the birth certificate could have been presented in Evans's criminal trial. I would have thought that introducing a fraudulent document would be wasting the jury's time and confusing the issues. It was reasonable for the district court to exclude the delayed birth certificate under Rule 403. *See Old Chief v. United States,* 519 U.S. 172, 184–85, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (performing a Rule 403 analysis requires the court to consider the probative value and prejudice associated with the admission of evidence alongside the probative value and prejudice associated with similar evidentiary alternatives). And our case law confirms that excluding an evidentiary exhibit under Rule 403 is permissible where the relevance of the document is predicated on a disputed factual hypothesis. *Baker v. Delta Air Lines, Inc.,* 6 F.3d 632, 643 (9th Cir.1993). The standard for abuse of discretion under *United States v. Hinkson,* 585 F.3d 1247 (9th Cir.2009) (en banc), prevents us from reversing an evidence ruling if it is not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *See United States v. Redlightning,* 624 F.3d 1090, 1110 (9th Cir.2010) (citing *Hinkson,* 585 F.3d at 1261). Here, the district court's decision is logical and is supported by evidence that the certificate was gained by fraudulent documents and false testimony. Undue delay was likely to result from the certificate's admission. There was no abuse of discretion in applying Federal Rule of Evidence 403. That is a second reason to affirm the district court.

Third, even if the district court abused its broad discretion on evidence rulings despite the sound grounds for the fraudulent birth certificate's exclusion, I would not elevate this to the level of constitutional error and instead would conclude that any error was harmless.[3] *See United States v. Pridgen,* 518 F.3d 87, 91–92 (1st Cir.2008) (stating the harmless-error standard). Evans cannot claim that exclusion of the delayed birth certificate blocked his defense because the court let him give testimony and offer valid documents supporting his claim of citizenship. *See United States v. Stever,* 603 F.3d 747, 755–57 (9th Cir.2010) (holding that there was constitutional error where "the sole evidence" on a major issue was erroneously excluded); *see also United States v. Pineda–Doval,* 614 F.3d 1019, 1032–33 (9th Cir.2010) (holding that there was constitutional error where a total exclusion of evidence wholly "denied the defendant the only argument that he had"). The ruling, even if assumed to be incorrect, did not create fundamental unfairness and a resulting due-process violation in the criminal trial. *See United States v. Ramirez,* 714 F.3d 1134, 1139 (9th Cir.2013) (holding that there was non-constitutional error). Because the error was not constitutional, reversal is improper so long as "it is more probable than not that the error did not materially affect the verdict."

See United States v. Wiggan, 700 F.3d 1204, 1215 (9th Cir.2012) (quoting *Boyd v. City & Cnty. of S.F.,* 576 F.3d 938, 949 (9th Cir.2009)). ***971** Here Evans chose not to present much of the evidence offered in state court to obtain the delayed birth certificate. And the Government presented overwhelming evidence, including several fingerprint matches and photographic matches to an active immigration file and testimony from Evans's sister identifying him as Roman Ceniceros–Mora who was born in Mexico. Evans's testimony also revealed that he had previously committed birth-certificate fraud, that he had physical injuries consistent with those of Ceniceros–Mora, and that he had previously signed statements using Ceniceros–Mora's name. The arresting officer also stated that after Evans was given his *Miranda* warnings, he admitted to having been deported before and said, "[T]ime will tell; I will be back; I will be back." The challenged ruling, if error, was harmless on all the evidence. [4] That is a third reason to affirm the district court.

Hence I respectfully dissent and would affirm the district court.

All Citations

728 F.3d 953, 92 Fed. R. Evid. Serv. 317, 13 Cal. Daily Op. Serv. 9484, 2013 Daily Journal D.A.R. 11,539

Footnotes

1 Evans objected to the hearing. He argued that the birth certificate was admissible as a certified document of Idaho Vital Records, and that the only remaining issue was the weight to be accorded to the birth certificate, which was a question for the jury.

2 Evans did not testify or call any witnesses at the hearing. He instead renewed his objection to the hearing, arguing that the court could not invade the province of the jury by assessing the credibility of the evidence he sought to admit.

3 The government also presented the court with various documents from this A-file as exhibits to its Motion to Preclude Evidence.

4 Although the district court's order referenced "the § 1326 offense," the ruling applied to both cases.

5 "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." Fed.R.Evid. 104(a). The advisory committee notes specify that the judge may "act as a trier of fact" and may also evaluate evidence "in terms of a legally set standard." Fed.R.Evid. 104(a) advisory committee notes.

6 This circuit's case law is particularly well-developed with regard to a trial court's Rule 104(a) authority to decide "whether a witness is qualified," an issue that the Supreme Court addressed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *See, e.g., Avila v. Willits Envtl. Remediation Trust,* 633 F.3d 828, 833–34 (9th Cir.), *cert. denied,* —— U.S. ——, 132 S.Ct. 120, 181 L.Ed.2d 44 (2011); *United States v. Hermanek,* 289 F.3d 1076, 1093 (9th Cir.2002); *United States v. Alatorre,* 222 F.3d 1098, 1100–03 (9th Cir.2000); *United States v. Hankey,* 203 F.3d 1160, 1167–70 (9th Cir.2000); *United States v. Cordoba,* 194 F.3d 1053, 1056–57 (9th Cir.1999); *Hopkins v. Dow Corning Corp.,* 33 F.3d 1116, 1123–24 (9th Cir.1994); *United States v. Rincon,* 28 F.3d 921, 923 (9th Cir.1994); *United States v. Amador–Galvan,* 9 F.3d 1414, 1417–18 (9th Cir.1993). We have also considered the trial court's authority under Rule 104(a) to determine whether "a privilege exists." *United States v. de la Jara,* 973 F.2d 746, 748–49 (9th Cir.1992). *Cf. United States v. Zolin,* 491 U.S. 554, 565–68, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989).

7 The dissent reads Rule 104(a) as giving trial courts the authority to exclude "illegitimate evidence" without relying on any other rule of evidence or federal law. Dissent at 968. But Rule 104(a) does not give the court the authority to exclude

"illegitimate evidence." It gives the court the authority to "decide any preliminary question about whether ... evidence is *admissible*." Fed R. Evid. 104(a) (emphasis added). And the word "admissible," unlike the word "illegitimate" carries with it the meaning—and limitations—proscribed elsewhere in the rules of evidence. *See, e.g.,* Fed.R.Evid. 402 ("Relevant evidence *is admissible* unless any of the following provides otherwise ..." (emphasis added)); *see also* Fed.R.Evid. 402 advisory committee notes ("The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are a presupposition involved in the very conception of a rational system of evidence. They constitute the foundation upon which the structure of admission and exclusion rests." (internal quotation marks and citation omitted)).

8 We note that unlike the district court's other stated reason for excluding Evans's birth certificate, "undue delay," the danger of a "miscarriage of justice" is not one of the grounds upon which a trial court can exclude evidence pursuant to Rule 403. Thus, we disagree with the dissent's conclusion that it is "unnecessary" to discuss the trial court's application of Rule 104(a) separately from its application of Rule 403. *See* Dissent at 969–70 n. 2.

9 "Evidence is relevant if: (a) it has *any* tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed.R.Evid. 401 (emphasis added).

10 A trial court may, for example, condition the admission of evidence on proof that events occurred in a particular location, *United States v. Matta–Ballesteros,* 71 F.3d 754, 767–68 (9th Cir.1995), *as amended,* 98 F.3d 1100 (9th Cir.1996); that a particular party was the author of a document, *United States v. Gil,* 58 F.3d 1414, 1419 (9th Cir.1995); or that a party relied on the advice of a third party, *Aceves v. Allstate Ins. Co.,* 68 F.3d 1160, 1166 (9th Cir.1995).

11 The dissent argues that "the district court cannot be said to have made a credibility determination when Evans presented no evidence at the hearing to support the document's integrity." Dissent at 968. We disagree. The district court weighed the credibility of the defendant's evidence, i.e. the state-issued birth certificate, against the credibility of the government's evidence, i.e. the witness testimony presented at the Rule 104 hearing.

12 "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed.R.Evid. 403.

13 Several other circuits, as well as several legal commentators, have reached similar conclusions. *See In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988,* 37 F.3d 804, 839 (2d Cir.1994) (Van Graafeiland, J., dissenting) ("Credibility and believability are for the jury, not the judge."), *abrogated in part on other grounds by Zicherman v. Korean Air Lines Co.,* 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996); *W. Indus., Inc. v. Newcor Canada Ltd.,* 739 F.2d 1198, 1202 (7th Cir.1984) ("[A] judge in our system does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight."); 22A Kenneth W. Graham, Jr., Federal Practice and Procedure § 5214 (2d ed.2013) ("[I]t seems relatively clear that in the weighing process under Rule 403 the judge cannot consider the credibility of witnesses. In the first place, credibility is a question for the jury; to permit the judge to exclude evidence on the ground that he thinks it incredible would be a remarkable innovation and may even be a violation of the right of trial by jury.... Rule 403 presupposes that the judge can determine the admissibility by assessing logical inferences at the time it is offered. If the judge were supposed to assess credibility as well it is difficult to see how this could be done without first hearing nearly the entire trial." (footnotes omitted)); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?,* 41 Vand. L.Rev. 879, 886 (1988) ("Leading law review commentators and treatise writers have concluded that a judge may not consider the credibility of the source of the evidence in gauging probative value under rule 403." (footnotes omitted)).

14 The government does not cite to the remaining Rule 403, factors, "wasting time" and "needlessly presenting cumulative evidence." In any case, these two factors carry minimal weight in the Rule 403 balancing test here for the same reason as "undue delay."

15 Because we find that the exclusion of the birth certificate was a violation of Evans's Fifth Amendment right to present a defense, we do not address his additional argument that it was a violation of his Sixth Amendment right to have a jury determine the elements of the charges brought against him.

16 *See also Boulware,* 384 F.3d at 808 (finding a due process violation where "the state-court judgment [that had been excluded] was crucial to Boulware's defense on the tax counts, and the judgment directly contradicted the government's theory of the case"); *United States v. Whitman,* 771 F.2d 1348, 1351 (9th Cir.1985) (finding a due process violation where the district court did not allow the defendant to rebut the government's evidence of motive).

1 The official military historian testified that she could not verify Evans's service at all and "found nothing" even after searching casualty cards of those who were injured, the master locator containing the names of all marines, the pay entry base containing the dates that marines entered the service, and the lineal list for commissioned officers. She found no service number for Evans and stated that documents provided by Evans to support his claims of military service were not official documents and were instead "homemade" and "look like somebody made it for them—created it for themselves." Pictures of Evans in military uniform did not observe the dress code and the pictures reflected a rank of Staff Sergeant, even though Evans claimed to be an officer. The historian also stated that Evans could not have been "retired" from the Marine Corps because he did not allege a sufficient period of service for retirement. And finally, she said that Evans could not have served twelve years of active duty in Vietnam through 1975 because (1) "Marine Corps participation drew down and ended as a large scale operation" in 1971 and (2) the "[t]ypical tour for a Vietnam Marine was 13 months," so twelve years of service does not seem possible. Why should a judge require the jury to wade through all this?

2 Unlike the majority, I read the district court's order as relying on Rule 104(a) and Rule 403 conjunctively instead of independently, in part because the district court characterized its own actions as being similar to when a court determines whether proffered scientific expert testimony or co-conspirator statements are admissible under the rules of evidence. Because of this, the majority's discussion of Rule 104(a) as if standing alone is unnecessary.

3 The panel majority also should not have reached the question of whether the exclusion of the birth certificate violated Evans's right to present a defense under the Fifth Amendment because Evans did not brief that argument before the district court, and the court did not address that issue in the challenged order. *See Trigueros v. Adams,* 658 F.3d 983, 988 (9th Cir.2011) ("Ordinarily, arguments not raised before the district court are waived on appeal.").

4 Even if I assume there was constitutional error, I would conclude that it was harmless beyond a reasonable doubt under the standard of *Chapman v. California,* 386 U.S. 18, 23–24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).