Evidence—Hearsay—Co-conspirators' Exception—How Much Evidence Is Needed to Establish the Foundation for the Use of the Co-conspirators' Exception to the Hearsay Rule? *White v. State*, 451 S.W.2d 497, 500 (Tex. Crim. App. 1969).

In 1967 the police, under a valid search warrant, entered the apartment of Lionel White in search of narcotics. White was not in the apartment but Judy Guillory was, and she told the police that she had given White $15 to purchase heroin for the two of them. She also stated that White kept his narcotic paraphernalia in a bathroom down the hall. When White returned and saw the police, he ran from the building throwing two capsules of heroin on the roof of an adjoining building as he fled. He was apprehended, and when returned to his apartment, he identified and acknowledged ownership of the narcotic paraphernalia. When White was tried for the possession of narcotic paraphernalia, Judy Guillory was not present. Nevertheless, the trial court admitted her statements on the basis that they were made in furtherance of a conspiracy between White and Guillory and thus came within the co-conspirators' exception to the hearsay rule. White was convicted, but the Texas Court of Criminal Appeals reversed the trial court holding that Guillory's statements to the police could not be construed as advancing or furthering a conspiracy, as the conspiracy had terminated when Guillory made her revealing statements to the police. On the state's motion for rehearing, the court of criminal appeals reviewed its reversal and reaffirmed the trial court on the basis that the conspiracy was not complete until the heroin had been injected, as this was the final object of the conspiracy.[1] White then followed with his own motion for rehearing, and the trial court was again reversed, this time on the grounds that there was no proof of the conspiracy outside of the hearsay statments of Guillory.

It has long been the rule in Texas "that when a conspiracy has been proved the acts and declarations of each conspirator during the pendency of the conspiracy and in furtherance of the common design are receivable against his co-conspirators."[2] The co-conspirators' exception to the

1. White v. State, 451 S.W.2d 497, 500 (Tex. Crim. App. 1969). *See, e.g.*, Robins v. State, 134 Tex. Crim. 617, 117 S.W.2d 82 (1938) (court in a fraud case held that conspiracy not complete until proceeds divided); Sapp v. State, 87 Tex. Crim. 606, 223 S.W. 459 (1919) (murder case, the object of which was to obtain deceased's property; thus conspiracy not complete until deceased's will was probated).

2. 2 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1171 (2 ed. R. Ray & W. Young 1956).

hearsay rule is based upon principles of agency and has been explained by Learned Hand:

> Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a "partnership in crime." What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.[3]

In attempting to apply this rule in the *White* case the trial court overlooked the requirement of establishing a foundation, the conspiracy, upon which to admit the hearsay. In the final rehearing the court of criminal appeals was faced with the problem of the amount of evidence, independent of the hearsay, which is required to establish this foundation. The court ultimately reached the conclusion that on the facts of this case there was insufficient evidence tending to show an acting together outside of the hearsay statements of Judy Guillory; this conclusion necessarily precluded the use of the co-conspirators' exception which would have admitted the acts and declarations of Judy Guillory against White.[4] The purpose of this case note therefore, is to examine the quantum of other evidence necessary to establish the foundation and to determine the significance of *White* in light of previous decisions in this area.

Early Texas decisions required that the conspiracy be established *aliunde*—by other evidence—before the acts and declarations of alleged co-conspirators could be used against the accused.[5] This rule was seemingly accomplished by requiring the trial judge to charge the jury to disregard the acts and declarations of the alleged co-conspirator unless they found a conspiracy to exist beyond a reasonable doubt from the other evidence "since said acts and declarations are only admissible to throw light upon, illustrate and make manifest the purpose, object, motive and intent of the parties forming the conspiracy, and not to prove the conspiracy."[6] The court's fear that the jury would find a conspiracy

3. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926).

4. 451 S.W.2d 497, 502.

5. Newton v. State, 62 Tex. Crim. 622, 138 S.W. 708 (1911) (testimony of alleged co-conspirator could not be used to prove the conspiracy); Sessions v. State, 37 Tex. Crim. 62, 38 S.W. 623 (1897) (a conspiracy cannot be shown by declarations of a co-conspirator; this must be done by evidence from other sources); Cohea v. State, 11 Tex. Ct. App. 153 (1881) (conspiracy cannot be shown by the acts, declarations, or confessions of a co-conspirator but must be shown *aliunde*).

6. Smith v. State, 46 Tex. Crim. 267, 286, 81 S.W. 936, 945 (1904). *See also* Richards v. State, 53 Tex. Crim. 400, 110 S.W. 432 (1908); Schwen v. State, 37 Tex. Crim. 368, 370, 35 S.W. 172, 173 (1896), in which the court stated, "If the fact or act is admissible because of another fact,

from the hearsay alone[7] motivated these strict requirements, and thus the use of the co-conspirators' exception as a tool of the prosecution was severely hampered.

Thompson v. State,[8] decided in 1915, provided an important step in the evolution of the co-conspirators' exception to the hearsay rule in Texas. The court of criminal appeals held that if the evidence as a whole raised the issue of conspiracy between Thompson and his wife then the acts and declarations of the wife were admissible, under the co-conspirators' exception, to prove Thompson's guilt. The court reasoned that the hearsay could not be used independently to establish the conspiracy but that it could be considered with the other evidence in order to determine whether or not a conspiracy existed. The *Thompson* decision appears to remove the requirement that the conspiracy be established *aliunde* before the acts and declarations of alleged co-conspirators can be considered against the accused. However, there is no shortage of subsequent decisions which revert to the more stringent requirement that the conspiracy be established *aliunde*.[9]

In *Posey v. State*,[10] decided in 1937, the court of criminal appeals reiterated the position of earlier decisions and attempted to remove doubts concerning the use of the co-conspirators' exception to the hearsay rule. Posey was convicted of arson. The court held that the removing of furniture and other property from the building prior to the fire by the owner reasonably tended to show a conspiracy between the owner and Posey, thus making the acts and declarations of the owner, pursuant to the conspiracy, admissible against Posey; and further, the court held that these statements could be used by the jury with the other evidence to determine whether or not a conspiracy existed. The court went on to say that the conspiracy could not be established by the hearsay alone, but that this evidence could be considered with the other evidence in establishing the conspiracy so long as the jury were instructed

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and the latter fact is in doubt or controversy, then the court should instruct the jury, if they believed that fact, then to receive the evidence, but if they do not believe the fact, to reject it." For a thorough study of this area and a discussion of the role of the judge and jury see Maquire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1926-27).

7. Blain v. State, 33 Tex. Crim. 236, 240, 26 S.W. 63, 64 (1894).

8. 77 Tex. Crim. 417, 178 S.W. 1192 (1915).

9. Oakley v. State, 125 Tex. Crim. 258, 68 S.W.2d 204 (1934); Hill v. State, 113 Tex. Crim. 85, 18 S.W.2d 1086 (1929) (conspiracy cannot be proved by the acts and declarations of others in absence of accused); Jolly v. State, 87 Tex. Crim. 288, 221 S.W. 279 (1920) (acts and declarations of alleged co-conspirators out of presence of appellant were not available to prove his connection with the conspiracy); Anderson v. State, 88 Tex. Crim. 29, 224 S.W. 782 (1920) (conspiracy must be shown *aliunde* and acts and declarations of co-conspirator cannot be used to prove the conspiracy).

that they disregard the statements of the alleged co-conspirator unless they found a conspiracy to exist beyond a reasonable doubt. The court stated that holdings in previous cases that the acts and declarations could not be used in showing the conspiracy were too broad and resulted from attempts by the courts to rule on the sufficiency of the evidence.

Subsequent decisions have followed the more relaxed rules set out in *Posey* relating to the use of hearsay statements to aid in establishing the foundation upon which their use depends. For example, in *Whitehead v. State*,[11] which involved the fraudulent sale of a worthless oil lease, the court of criminal appeals recognized that the acts and declarations of a co-conspirator could not, standing alone, establish the conspiracy upon which their introduction depended, but that when there was some evidence of a participation in the crime, apart from these statements, there was a sufficient foundation laid upon which they could be admitted. The court reasoned that the defendant's assigning the lease involved in the fraud and his receiving a check in payment thereof from the injured party were adequate to show a participation in the crime and warranted the admission of the acts and declarations of the alleged co-conspirator against him. The court also stated "that the mere identification of the defendant and another as joint participants [in a crime] is sufficient evidence of a conspiracy" to allow the hearsay statements of co-conspirators to be admitted under the co-conspirators' exception to the hearsay rule.

The appellate court dealt at length with the co-conspirators' exception to the hearsay rule in the 1954 case of *Sapet v. State*.[12] The trial court admitted the statements of alleged co-conspirators prior to any showing of a conspiracy.[13] The court of criminal appeals held that this was not error in that subsequent evidence, showing that the alleged co-conspirators were acquainted with each other, that they were seen together prior and subsequent to the crime, and that each had knowledge concerning the planned murder which he would not have had if not involved in the conspiracy, was sufficient to show an acting together apart from the hearsay evidence. Had the subsequent evidence been

10. 132 Tex. Crim. 268, 103 S.W.2d 763, 764 (1937).

11. 148 Tex. Crim. 190, 185 S.W.2d 725, 729 (1945).

12. 159 Tex. Crim. 620, 266 S.W.2d 154 (1954).

13. The order in which the evidence is admitted is not significant so long as there is subsequent, independent evidence of the conspiracy before the jury. *See, e.g.*, Counts v. State, 149 Tex. Crim. 348, 194 S.W.2d 267 (1946); West v. State, 134 Tex. Crim. 565, 116 S.W.2d 726 (1938); Sapp v. State, 87 Tex. Crim. 606, 223 S.W. 459 (1919); Avery v. State, 10 Tex. Ct. App. 199 (1881) (preferable that evidence of conspiracy precede the hearsay). The order of proof rests largely within the discretion of the trial judge. *See* Nelson v. United States, 415 F.2d 483 (5th Cir. 1969); Cox v. State, 8 Tex. Ct. App. 254 (1880).

insufficient, the court noted that this matter would have been handled by the trial judge in his charge to the jury, presumably with a limiting instruction.[14] The court quoted from Abbot on Evidence:

> Slight evidence of concert or collusion between the parties to an illegal transaction admits evidence of the acts and declarations of one against the other . . . .[15]

In other words, the court said in dicta that slight evidence is adequate to establish a foundation upon which to admit the acts and declarations of co-conspirators, and that this foundation does not have to be shown prior to the admission of the hearsay.

Sherrad v. State,[16] decided in 1958, seems to be a retreat from this holding in that the court seemed to be looking for more than slight evidence of conspiracy. A police undercover agent contacted Sherrad at his place of employment and agreed to pay $50 for a pound of marijuana which was to be picked up the following day; the agent made a $10 downpayment to Sherrad. On the following day the agent returned to the same place and was met by one Robson who took the remaining $40 and told the agent where to find the marijuana. There was no evidence showing that Robson and Sherrad were employed at the same place, that they were acquainted with each other or had ever been seen together, and since neither Robson nor Sherrad mentioned the other to the agent, the court of criminal appeals held that there was no connection shown between the parties in order to render admissible the hearsay statements of Robson against Sherrad. There was no foundation upon which to invoke the co-conspirators' exception to the hearsay rule. Judge Woodley, in a vigorous dissent, cited the court's holdings in *Sapet* and *Whitehead* and argued that there was sufficient evidence to show an acting together, and also that Robson and Sherrad were acting together as principals in the sale of marijuana which, ipso facto, rendered them co-conspirators and made the acts and declarations of one admissable against the other.[17] The majority impliedly, at least, rejected the dicta from *Sapet* that slight evidence of an acting together is adequate to establish the foundation for the use of the acts and declarations of co-conspirators. Perhaps, the court felt that an accused would not be adequately protected from evidence of doubtful reliability by the slight evidence requirement.

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14. *See* note 6 *supra*.

15. 159 Tex. Crim. 620, 266 S.W.2d 154, 158 (1954).

16. 167 Tex. Crim. 119, 318 S.W.2d 900 (1958). *See also* Clark v. State, 158 Tex. Crim. 231, 254 S.W.2d 527 (1953).

17. 167 Tex. Crim. 119, 122, 318 S.W.2d 900, 902 (1958).

The decision in *Saddler v. State*[18] sheds additional light on the problem of the amount of independent evidence needed before the acts and declarations of co-conspirators can be used against the accused. The court of criminal appeals held that the defendant's presence at the scene of the transaction and his receipt of a portion of the money received from the sale of the marijuana by the alleged co-conspirator were sufficient to show an acting together between the parties. The acts and declarations of the co-conspirator were, therefore, admissible against the defendant. In distinguishing the holding in *Saddler* from that in *Sherrad* the court noted that in *Sherrad* the parties were never seen together and were not shown to have ever been acquainted with each other, while in *Saddler* there was ample evidence to show a connection between the parties in relation to the particular transaction under consideration.

In the instant case, *White v. State*, the trial court allowed the hearsay to establish the foundation for its use by failing to require any independent evidence of a conspiracy either prior or subsequent to the admission of the acts and declarations of Judy Guillory and thus permitted the hearsay to be lifted by its own bootstraps to the level of competent evidence.[19] In the final rehearing, the appellate court re-examined the case and concluded that, in accordance with the general rule in Texas, the hearsay statements of a third party, an alleged co-conspirator, could not be used as evidence against an accused unless there was other evidence tending to show a conspiracy.[20] The court held that on the facts present in this case there was insufficient "other" evidence to show a conspiracy between White and Guillory. White's running when he saw the police and his admitting ownership of the narcotic paraphernalia did not supply the amount of "other" evidence needed in order for the hearsay statements of Guillory to be used against White under the co-conspirators' exception to the hearsay rule.[21] The hearsay statements of Judy Guillory, standing alone, could not be used to establish the conspiracy and those statements could not be admitted to prove White's guilt because proof of a conspiracy is a prerequisite to the use of the acts and declarations of an alleged co-conspirator.

The holding in *White* is in line with recent decisions of the court of

18. 167 Tex. Crim. 309, 312, 320 S.W.2d 146, 149 (1958). *See also* Price v. State, 410 S.W.2d 778 (Tex. Crim. App. 1967); Westfall v. State, 375 S.W.2d 911 (Tex. Crim. App. 1964); Angle v. State, 165 Tex. Crim. 305, 306 S.W.2d 718 (1957); Dabney v. State, 159 Tex. Crim. 494, 265 S.W.2d 603 (1954).

19. Glasser v. United States, 315 U.S. 60, 74 (1942). *See also* State v. Benson, 234 N.C. 263, 66 S.E.2d 893 (1951).

20. 451 S.W.2d at 503.

21. 451 S.W.2d at 502.

criminal appeals regarding the use of the co-conspirators' exception to the hearsay rule. It is no longer required that the conspiracy be established *aliunde* before the acts and declarations of the co-conspirator can be used against an accused. But it is necessary that there be independent evidence of the conspiracy apart from the hearsay. *White* adds credence to the belief that slight evidence of a conspiracy will not be sufficient, for if it were, there is no logical reason why Judy Guillory's presence in White's apartment could not have supplied the connection needed in order to make her statements useable against White. The prevailing view seems to be that once there is "some" independent evidence of an acting together then the acts and declarations can be used in combination with this evidence to establish the conspiracy beyond a reasonable doubt, which is necessary before the jury can make full use of the statements to find the accused's guilt.[22] How much evidence fulfills this requirement—the courts seem to look for evidence showing that the accused and the alleged co-conspirator were acquainted with each other, that they were seen together at sometime near the commission of the crime or shortly thereafter, that they divided the bounty of the crime, or that they participated in the crime together. With the exception of the last one, any of the above factors standing alone will probably be insufficient and must be combined with one of the others in order for the prosecution to make use of hearsay statements under the co-conspirators' exception.

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22. Robins v. State, 134 Tex. Crim. 617, 117 S.W.2d 82 (1938), an instruction was given to the effect that defendant's guilt depended upon a finding by the jury of a conspiracy among the parties, and the instruction carefully limited any and all statements made by any of the alleged conspirators, out of the presence of the defendant, to the establishment of a conspiracy.