418 [NOTE ON INSTRUCTIONS WITHDRAWN]

405 STATEMENT OF CO-CONSPIRATOR
410 STATEMENT OF CO-CONSPIRATOR; EVIDENCE PRESENTED THAT CONSPIRACY TERMINATED BEFORE STATEMENT WAS MADE
415 STATEMENT OF CO-CONSPIRATOR; EVIDENCE PRESENTED THAT CONSPIRACY TERMINATED BY WITHDRAWAL BEFORE STATEMENT WAS MADE

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 418, a withdrawal note, was approved by the Committee in October 1994 to record the withdrawal of three instructions, Wis JI-Criminal 405, 410, and 415.

Wis JI-Criminal 405 was originally published in 1962 and was revised in 1986 and 1987. The withdrawal of the instruction was approved by the Committee in June 1992.

Wis JI-Criminal 410 and 415 were originally published in 1962 and revised in 1986. Their withdrawal was approved by the Committee in October 1994. Because they existed only as add-ons to Wis JI-Criminal 405, they should have been withdrawn along with Wis JI-Criminal 405 in 1992.

Wis JI-Criminal 405 was intended to be used when a statement of a co-conspirator was introduced under § 908.01(4)(b)5., which provides that a statement is not hearsay if offered against a party and is a statement by a co-conspirator of the party made during the course and in furtherance of the conspiracy.

Wis JI-Criminal 405 implemented three rules:

(1) the decision whether the statement was made during a conspiracy is for the jury;
(2) the burden of proof is beyond a reasonable doubt; and
(3) the jury is not to consider the statement itself in trying to decide whether a conspiracy existed.

The Committee had been aware that the viability of these rules was open to serious question. Despite these questions, the Committee concluded that it did not have the authority to change the rule until the Wisconsin appellate courts explicitly did so in a published opinion. (The reasons for this conclusion were described in the Comment to Wis JI-Criminal 405, © 1987, and are reproduced below.)

The Wisconsin Court of Appeals has now made it clear that some, if not all, of the Wisconsin rule reflected in Wis JI-Criminal 405 is discarded. In State v. Whitaker, 167 N.W.2d 247, 481 N.W.2d 649 (Ct.

App. 1992), the court held that § 901.04(1) of the Wisconsin Rules of Evidence "permits an out-of-court declaration by a party's alleged coconspirator to be considered by the trial court in determining whether there was a conspiracy." 167 Wis.2d at 263.

Whitaker did not specifically address the question whether the jury has any function to perform. But the Committee concluded that the proper procedure in Wisconsin now follows that approved by the United States Supreme Court under the Federal Rules of Evidence. In Bourjaily v. United States, 483 U.S. 171 (1987), the Court held that the admissibility of a co-conspirator's statement is for the trial court to decide, using a preponderance of the evidence standard, and considering the statement itself in determining whether a conspiracy existed at the time the statement was made. The trial court must be satisfied that the statement was made "in the course of and in furtherance of the conspiracy." § 908.01(4)(b)5.

The Confrontation Clause of the Sixth Amendment does not require a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, if those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E). United States v. Inadi, 475 U.S. 387 (1986). Wisconsin's § 908.01(4)(b)5 is identical to Federal Rule of Evidence 801(d)(2)(E). The Inadi rule was adopted for Wisconsin by State v. Webster, 156 Wis.2d 510, 485 N.W.2d 373 (Ct. App. 1990).

Nor does the Confrontation Clause require an additional showing of "independent indicia of reliability." No such inquiry is required when the evidence falls within a "firmly rooted hearsay exception." The co-conspirator exception is such an exception. Bourjaily v. United States, 483 U.S. 171 (1987); State v. Webster, 156 Wis.2d 510, 522, 485 N.W.2d 373 (Ct. App. 1990).

What follows is from the Comment to Wis JI-Criminal 405, © 1987, explaining the Committee's decision not to withdraw the instruction in the absence of an explicit appellate court decision.

The basis for giving an instruction like Wis JI-Criminal 405 is found in Schultz v. State, 133 Wis. 215, 225, 113 N.W. 428 (1907):

> In order that the statements and acts of alleged conspirators in the execution of the common purpose can be properly considered on the question of the guilt or innocence of the accused, it is not enough that the court has determined that a prima facie case of conspiracy has been made, but the jury must first be satisfied by the evidence that the conspiracy in fact existed. They cannot use the statements or acts for any purpose until they have determined this fact. They should have been so instructed in unmistakable language.

Schultz was cited with approval in State v. Meating, 202 Wis. 47, 53, 231 N.W. 263 (1930).

More recent cases discussing the issue have not reviewed jury instructions or discussed the necessity of giving an instruction like Wis JI-Criminal 405. See, for example, State v. Dorcey, 103 Wis.2d 152, 307 N.W.2d 612 (1981); Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978). There is some question about the continued validity of the rule calling for a jury finding on the existence of the conspiracy. In an unpublished decision, the Wisconsin Court of Appeals held that the procedure on which Wis JI-Criminal 405 is based is no longer the correct practice in Wisconsin. Rather, the existence of the conspiracy was held to be solely a question for the court. The decision (State v. Kmecik, District III, May 27, 1986), though recommended for publication, was not published and, therefore, cannot be cited as authority. Further, the decision did not review the

applicable Wisconsin case law in detail or explicitly state that the case law was overruled. Instead, the decision appeared to rest on the proposition that under the new rules of evidence, specifically § 901.04(1), the existence of the conspiracy is a "preliminary question concerning the admissibility of evidence [that] shall be determined by the judge" and that this superseded the case law.

The United States Supreme Court recently addressed these questions in a case interpreting the Federal Rules of Evidence. In Bourjaily v. United States, 483 U.S. 171 (1987), the Court found no constitutional problems with a procedure under the Federal Rules that differs from the current Wisconsin practice in three important respects:

(1) Whether a statement was made during the course of and in furtherance of a conspiracy is a "preliminary question of fact" for the court to decide;

(2) in making this determination, the court may employ the "preponderance of the evidence" standard; and

(3) the court may consider the statement itself in deciding whether the conspiracy existed.

The Bourjaily decision interpreted Federal Rules of Evidence which are essentially the same as their Wisconsin counterparts. So Wisconsin appellate courts are free from federal constitutional constraints if they choose to reconsider the Wisconsin rule. While making the existence of the conspiracy solely a question for the judge may be a better rule on the merits, and one that would avoid the necessity for a possibly hard-to-follow instruction like Wis JI-Criminal 405, the Committee did not believe that the prior rule, embodied in decisions of the Wisconsin Supreme Court, could be abandoned without explicit judicial or statutory authority. The Committee further concluded that § 901.04(1) was not sufficient authority by itself in the absence of construction by an appellate court. [This conclusion is supported by the fact that, prior to Bourjaily, supra, the federal courts were not in agreement on whether this factual issue is to be decided by the judge or the jury. Practice under Federal Rule 801(d)(2)(E) is extensively discussed in Federal Rules of Evidence Manual, by Saltzburg and Redden. The specific issue of how much evidence of a conspiracy is required to justify submitting the statement to the jury is covered at pages 462-68 of that text.]

[The 1987 Comment concluded that given the absence of clear authority to remove Wis JI-Criminal 405, it was retained, based on the assumption that a preliminary finding of sufficient evidence to establish a conspiracy must be made by the trial court, with the ultimate finding of the existence of a conspiracy being for the jury.]

