

8.09. Coconspirator Statement

(1) A statement by a defendant's coconspirator made in furtherance of the conspiracy during the course of the defendant's involvement in the conspiracy, or prior to the defendant joining the conspiracy, or after the defendant's active involvement has ceased but the conspiracy continues, is admissible to prove the conspiracy and the crime that was the object of the conspiracy, irrespective of the availability of the coconspirator; provided that:

(a) there is a prima facie showing of the existence of the conspiracy, including an overt act and the party's participation in the conspiracy, without recourse to the statement sought to be introduced; and

(b) if the statement was made after the defendant's active involvement had ceased, the defendant had not unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators.

(2) A statement accepting another's solicitation to commit a crime is a verbal act, not hearsay, when offered to prove a conspiracy to commit the underlying crime and is thus admissible without prima facie proof of the conspiracy.

(3) A charge of conspiracy in the accusatory instrument is not required when a statement of a coconspirator is otherwise admissible pursuant to subdivision one or two.

Note

Subdivision (1) is derived from *People v Caban* (5 NY3d 143, 149 [2005]) and *People v Flanagan* (28 NY3d 644 [2017]).

In *Caban*, the Court held:

“ ‘A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule.’ The theory underlying the coconspirator’s exception is that all participants in a conspiracy are deemed responsible for each of the acts and declarations of the others. The exception ‘is not limited to permitting introduction of a conspirator’s declaration to prove that a coconspirator committed the crime of conspiracy, but, rather, may be invoked to support introduction of such declaration to prove a coconspirator’s commission of a substantive crime for which the conspiracy was formed.’ However, as defendant points out, such declarations may be admitted only when a prima facie case of conspiracy has been established. While the prima facie case of conspiracy ‘must be made without recourse to the declarations sought to be introduced,’ ‘the testimony of other witnesses or participants may establish a prima facie case’ ” (*Caban*, 5 NY3d at 148 [citations omitted]; see also *People v Wolf*, 98 NY2d 105, 118 [2002]; *People v Berkowitz*, 50 NY2d 333, 341 [1980]; *People v Salko*, 47 NY2d 230, 237-238 [1979]; cf. *People v Bac Tran*, 80 NY2d 170, 179-180 [1992] [prima facie case not established]).

In *Flanagan* (28 NY3d 644 [2017]), the Court of Appeals held: (1) “when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule”; and (2) “statements made after a conspirator’s alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators (see *United States v Brown*, 332 F3d 363, 373-374 [6th Cir 2003] [‘The defendant carries the burden of proving withdrawal, and must show that he took affirmative action to defeat or disavow the purpose of the conspiracy’]).”

It appears that the Court of Appeals has approved requiring that the prima facie case include proof of an overt act. (See *People v Bongarzone*, 69 NY2d 892, 896 [1987] [“We agree with the courts below that there was sufficient circumstantial evidence upon which to infer the performance of an overt act by the defendant and, in turn, establish a prima facie case of conspiracy. . . . This evidence being sufficient to establish a prima facie case that a conspiracy existed, the evidence concerning the mother’s and sister’s statements which established an overt act was properly received”].) The Appellate Division, Third Department has consistently held that the proof of an overt act, as well as the conspiracy, is required for the admission of the coconspirator’s statement. (See e.g. *People v Portis* 129 AD3d 1300, 1301 [3d Dept 2015].)

In *People v Caban* (5 NY3d at 151), the Court of Appeals approved of admitting hearsay statements of coconspirators “subject to connection”—meaning,

“subject to later proof of a prima facie case of conspiracy. Although any statements admitted pursuant to the coconspirator’s exception must have been made after the formation of the conspiracy—that is, in the course and in furtherance of it—testimony establishing the prima facie case need not precede testimony about the hearsay statements. Inasmuch as the order of proof at trial is committed to the sound discretion of the trial court (*see e.g. People v Olsen*, 34 NY2d 349, 353 [1974]), a coconspirator’s statements are admissible as long as the People independently establish a conspiracy by the close of their case (*see e.g. People v McKane*, 143 NY 455, 473 [1894] [even if the coconspirator’s statements were objectionable at the time they were introduced, they were subsequently made competent by proof of the defendant’s admissions that the coconspirator was acting under his orders]; *People v Becker*, 215 NY 126, 148-149 [1915]).”

In *Crawford v Washington* (541 US 36, 56 [2004]), the United States Supreme Court recognized that at the time the Confrontation Clause was enacted, statements made in furtherance of a conspiracy were an established nontestimonial hearsay exception.

Consistent with *Crawford*, the Appellate Division has rejected challenges from defendants asserting that coconspirator statements introduced against them violated their right to confrontation under the United States Constitution. (*See e.g. People v Inoa*, 109 AD3d 765 [1st Dept 2013], *affd* 25 NY3d 466 [2015]; *People v Adames*, 53 AD3d 503 [2d Dept 2008].)

In a pre-*Crawford* decision, the Court of Appeals held that the admission of hearsay statements by an unavailable declarant pursuant to the coconspirator exception did not violate the Federal or State Constitutions’ Confrontation Clause. (*People v Sanders*, 56 NY2d 51 [1982].) The *Sanders* Court also held that no reason had been advanced “which would cause us to recognize a State constitutional right of confrontation broader than the Sixth Amendment guarantee as interpreted by the Supreme Court.” (*Id.* at 64-65.) The *Sanders* Court then applied the applicable federal standard for admission of a coconspirator statement when the declarant was unavailable; namely, that there must be some indicia of reliability of the proffered statement.

After *Sanders* and before *Crawford*, the United States Supreme Court declined to require a showing of the declarant’s unavailability (*see United States v Inadi*, 475 US 387 [1986]), or “independent indicia of reliability” (*see Bourjaily v United States*, 483 US 171, 182 [1987]) as prerequisites to the admission of a coconspirator statement.

Thereafter, the Appellate Division, First Department expressed concern about the reliability of coconspirator statements in light of the “combined effect of *Inadi* and *Bourjaily*.” (*People v Persico*, 157 AD2d 339, 345 [1st Dept 1990].) As a result, the First Department adopted the *Sanders* test as a matter of state constitutional law. In the words of the *Persico* court: “If the declarant is available,

he or she will testify and the hearsay will be admitted. If the declarant is unavailable, the hearsay will be admitted anyway, provided it is reliable.” (*Id.* at 349.)

The Court of Appeals has never expressly considered whether the Confrontation Clause of the New York Constitution requires that the coconspirator statement must be shown to be reliable if the declarant is unavailable; however, in *People v James* (93 NY2d 620 [1999]), decided after *Persico*, the Court cited with approval the United States Supreme Court’s holding in *Bourjaily*, that “ ‘a court need not independently inquire into . . . reliability’ ” of a coconspirator statement before admitting it into evidence. (*James*, 93 NY2d at 634.)

Subdivision (2) is derived from *People v Caban* (5 NY3d at 149 [2005]) [“with respect to the conspiracy charge, Garcia’s acceptance of defendant’s solicitation to murder Ortiz was relevant not for its truth, but rather as evidence of an agreement to commit the underlying crime—itsself an essential element of the crime of conspiracy. In other words, whether or not Garcia in fact killed Ortiz, his acceptance of defendant’s invitation to do so was a verbal act which rendered defendant and his coconspirators culpable for the inchoate crime of conspiracy, even if the planned substantive crime never came to fruition”].

Subdivision (3) is derived from *People v Fiore* (12 NY2d 188, 200 [1962]) [“ ‘When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators, in furtherance of its purpose and object, are competent, and in a case like this it is not necessary, in order to make such proof competent, that the conspiracy should be charged in the indictment’ ” (citations omitted)].