One Person's Thoughts, Another Person's Acts: How the Federal Circuit Courts Interpret the Hillmon Doctrine

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The Federal Rules of Evidence, which took effect on July 1, 1975, represent the first successful effort to fashion a legal cloth of functional trial rules from a patchwork of common-law courtroom procedures. The purpose of the federal rules was to facilitate the swift and fair resolution of legal disputes and to ensure the lofty pursuits of judicial economy, truth and justice. Some commentators have suggested that an unwritten, albeit equally important, goal was to establish a national, uniform standard of courtroom evidentiary procedure. Others maintain that it is premature to

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2. Wellborn, The Definition of Hearsay in the Federal Rules of Evidence, 61 TEX. L. REV. 49, 50 (1982). Prior endeavors at similar codification failed. The American Law Institute's MODEL CODE OF EVIDENCE (1942) was never adopted by any of the states. Id. at 49. The UNIF. R. EVID. (1953) were adopted in full or in part in only six jurisdictions: California, Kansas, New Jersey, Utah, the Virgin Islands, and the Panama Canal Zone. Wellborn, supra at 49 n.7.

3. FED. R. EVID. 102, which states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

4. [U]niformity was an essential key. Because of the mobility of Americans . . . State lines have become more and more indistinct in respect of our economy, politics and sociability. It is quite important to all of us in this nation that our business people, especially, have some reasonable notion of the law in the various states and it is certainly important to all of us as trial lawyers to have some reasonably solid notion as to what the Rules of Evidence are from district to district, whether within your own state or from state to state. [I]t is also important to the federal judiciary that the Rules of Evidence throughout the federal judicial system be uniform. More and more in recent years have federal district and courts of appeals judges been assigned from district to district or circuit to circuit to assist in relieving overburdened judges in other districts and circuits. It is important to them to have some assurance that the Rules of Evidence in the various districts and circuits to which they are assigned are as near as may be the Rules of Evidence with which they have become familiar in their own districts.

Statement of Albert E. Jenner, Jr., Chairman, Advisory Committee on Rules of Evidence, 699
judge whether the rules have achieved their intended purpose. But at least one, Federal Rule of Evidence 803(3), the state-of-mind exception to the rule against hearsay, is impeding the goal of a uniform standard for evidentiary procedure by virtue of its inconsistent application by the federal circuit courts.7

The federal circuits differ over the application of rule 803(3) because they disagree over the rule's reach. Specifically, the courts are split concerning the admission of a declarant's statement about his intention to engage in future conduct with another party. Although some courts limit the use of such statements to proving the intended actions of the declarant, others will admit such statements even when the declarant's subsequent actions rely on the cooperation of another party.8

Rule 803(3) is fairly straightforward. It states that the hearsay rule allows forward-looking statements relating to a declarant's present frame of mind, including his emotions, intentions and physical condition.9 Thus, for example, a witness at trial could say that at the time of the event in dispute, a friend told her, "I feel tired, so I plan to go to bed early tonight." That statement could be used to show that the speaker was indeed weary, intended to go to bed early and probably did

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One final "theme" that is inherent in the very conception of the Rules, is, of course, the belief that uniformity in the field of Evidence amongst all federal courts is preferable to conformity to state law of the state where the federal court happens to be . . . . [C]ommentators have come out overwhelmingly in favor of uniformity amongst federal courts.


6. Fed. R. Evid. 803(3) states in full:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

7. Compare Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n.2 (1st Cir. 1978) (barring the use of rule 803(3) to allow into evidence statements by which an inference regarding third-party conduct could be drawn) with United States v. Moore, 571 F.2d 76, 82 n.3 (2d Cir. 1976) (approving of the use of rule 803(3) to allow into evidence statements by which an inference could be drawn regarding the conduct of a party other than the declarant).

8. Id.; see United States v. Jenkins, 579 F.2d 840 (4th Cir.), cert. denied, 439 U.S. 967 (1978) (supporting, in theory at least, a prohibition on rule 803(3) statements through which inferences about third-party conduct could be drawn); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976) (accepting the opposite view).

9. For the text of the rule, see supra note 6.
exactly as she intended. The rationale for admitting such a statement into evidence is that it is difficult to offer external proof that will definitively show one's mental state, and therefore it is reasonable, where such mental state is at issue, to allow into evidence the declarations of the person most qualified to know that state of mind.

The use of state-of-mind evidence to determine subsequent conduct on the part of the declarant is rooted in the seminal case of Mutual Life Insurance Co. v. Hillmon. In Hillmon, several insurance companies resisted the death benefit policy claims made by Sallie Hillmon, whose husband was purportedly killed at a cowboy campsite in Kansas. The insurance companies attempted to show that the body found at the campsite was not that of John Hillmon, the insured. They tried to prove the body was that of Frederick Walters. Walters had written to his sister and to his fiancee saying that he planned to head to Colorado with Hillmon. The body whose identity was in question was found at the campsite where Hillmon was said to have been accidentally shot. Neither Hillmon nor Walters were seen or heard from again. By using the letters to show Walters' plans, and thus his state of mind at the time, the insurance companies attempted to prove that Walters had actually carried through with those plans. The Court ruled that the letters could be admitted for that purpose, ignoring the possibility that using the letters to show Walters went with Hillmon inspired a long inferential leap—namely that Hillmon was of a mind to go along with Walters and did, in fact, go along.

The "Hillmon doctrine," as it eventually came to be known, was soon criticized. The Supreme Court in Shepard v. United States warned of the

10. Id.
11. McCormick on Evidence § 295 at 697 (2d ed. 1972). See United States v. Ponticelli, 622 F.2d 985 (9th Cir.), cert. denied, 449 U.S. 1016 (1980), which outlines the requirements for admissibility of 803(3) statements. The declarations must be relevant to an issue in the case. They must be made at about the same time as the event about which the speaker is commenting. There must be no opportunity or reason for the declarant to lie about his state of mind. 622 F.2d at 991.
13. Id. at 285-87.
14. Id. at 287.
15. Id. at 287-88.
16. The shooting took place on either March 17 or March 18, 1879. See id. at 286 which cites March 17 as the date of Hillmon's purported death. But see id. at 287 which says Mrs. Hillmon's evidence at trial showed that Hillmon was killed on March 18. Elsewhere in the opinion, March 18 is cited as the date of the shooting. See id. at 294-95.
17. Id. at 286-87.
18. Id.
19. Id. at 295-96.
20. See infra notes 65-83 and accompanying text.
dangers of using the statements of one person to infer the acts of another. 21
In its comments accompanying rule 803(3), the Supreme Court Advisory
Committee on the Rules of Evidence specifically stated that the Hillmon
doctrine remained "undisturbed." 22 The Advisory Committee's interpre-
tation of the scope of the Hillmon doctrine appeared significantly narrower
than that of many courts today. 23 In the note accompanying the rule, the

21. 290 U.S. 96 (1933). In Shepard, an Army major's sick wife says, "Dr. Shepard has
poisoned me." Id. at 98. The statement was offered by the government as a dying declara-
tion. Id. at 99. The Shepard Court rejected the statement on that basis. Id. at 100. It said
that dying declarations "must have [been] spoken with the consciousness of a swift and
certain doom." Id. Mrs. Shepard, however, spoke these words several weeks before her
death at a time when she and her doctors saw signs her health was improving. Id. at 99-100.
The United States Court of Appeals for the Tenth Circuit had held that Mrs. Shepard's
accusation could be offered as a state-of-mind declaration to rebut defense evidence that she
was suicidal. Shepard v. United States, 62 F.2d 683, 685 (10th Cir. 1933). Unlike the state-
ment in Hillmon, however, Mrs. Shepard's statement was backward looking and for that
reason alone should not have been allowed into evidence. 290 U.S. at 105-06 (later 803(3)
disallowed such statements except in very limited circumstances. See supra note 6).

The Supreme Court excluded the declaration as state-of-mind evidence because the gov-
ernment never offered it as anything but a dying declaration at trial. The Court, in dicta,
looked with great disfavor on the use of such statements to inculpate a third party. "[The
prosecution] did not use the declarations by Mrs. Shepard to prove her present thoughts and
feelings, or even her thoughts and feelings in times past. . . . It used the declarations as proof of
an act committed by someone else. . . ." Id. at 104. Moreover, the Court expounded on
the dangers of this type of evidence when offered to show the declarant's state of mind.
It will not do to say that the jury might accept the declarations for any light that
they cast upon the existence of a vital urge, and reject them to the extent that they
charged the death to some one else. Discrimination so subtle is a feat beyond the
compass of ordinary minds. The reverberating clang of those accusatory words
would drown all weaker sounds. It is for ordinary minds, and not for psychoana-
lysts, that our rules of evidence are framed. They have their source very often in
considerations of administrative convenience, of practical expediency, and not in
rules of logic. When the risk of confusion is so great as to upset the balance of
advantage, the evidence goes out.

Id. The Shepard Court then commented on Hillmon, noting the scholarly criticism it had
engendered. Id. at 105 & unnumbered footnote. It also indicated it would not stretch fur-
ther the uses of state-of-mind evidence. Id. "The ruling in Hillmon marks the high water
line beyond which courts have been unwilling to go." Id. The Court was referring to the
fact that Hillmon involved forward-looking declarations. Id. at 105-06. It reasoned that to
admit Mrs. Shepard's backward-looking statement would contribute to confusion. Its ad-
mission might also signal the demise of the hearsay rule by admitting into evidence virtually
any out-of-court statement. Id. at 106.

For scholarly criticism of Hillmon, see Maguire, The Hillmon Case—Thirty-Three Years
After, 38 HARV. L. REV. 709, 717 (1925), in which the author states: "It is not customary to
accept one man's extra-judicial assertions as evidence of another's mental state." See Selig-
man, An Exception to the Hearsay Rule, 26 HARV. L. REV. 146, 155-60 (1912) (contending
that to follow the Hillmon Court and admit statements of future intent to show that planned
acts were carried out, could eventually open the door for the admission of all hearsay).

22. FED. R. EVID. 803(3), advisory committee note.
23. Id.
Advisory Committee expressly defined the doctrine as one which uses evidence of an intended act as proof that the particular act was carried out. 

The Advisory Committee note, however, made no mention of the thornier issue of whether the doctrine would allow evidence of a declarant's state of mind to be used to show the subsequent actions of an intended companion or accomplice. Yet that precise expansion of the Hillmon doctrine occurred when the California Supreme Court upheld a murder conviction based in part on an accusatory statement made by the victim in the case of People v. Alcalde. In Alcalde, the court allowed the victim's statement to be used as evidence to support the inference that the defendant planned to be with the victim on the night of her death, that the defendant was with her and that he had an opportunity to kill her. This stretching of the Hillmon doctrine was harshly criticized in a dissent by Justice Traynor who said the use of a declarant's statements to show the intended conduct of another was unreliable and prejudicial.

Nonetheless the significant expansion of the Hillmon doctrine by the Alcalde court was influential with the authors of the California Evidence Code. The California Evidence Code, in turn, had strong impact on the authors of the Federal Rules of Evidence. Although not specifically mentioned in its accompanying rule 803(3), the Supreme Court Advisory Committee was clearly aware of the gloss placed on the Hillmon doctrine by Alcalde. Thus, the Advisory Committee may have agreed with the California code writers, despite the seemingly limiting language of its 803(3)
The inference that it agreed with the Alcalde court's interpretation of Hillmon is fortified by the House Judiciary Committee's subsequent limiting action. The House Judiciary Committee version of 803(3) specifically limited the evidentiary impact of the Hillmon doctrine to permit as evidence only those statements relating directly to the intended future conduct of the declarant. It excludes statements speculating about the future acts of any other person, either directly or by inference. The Senate did not comment on the controversy. Thus, instead of silencing critics and settling the matter, Federal Rule of Evidence 803(3) and the various reports accompanying the rules failed to clarify the scope of the Hillmon doctrine. Indeed, following the adoption of the rules, the federal circuit

30. Fed. R. Evid. 803(3), report of the House Committee on the Judiciary, which states: "[T]he Committee intends that the Rule be construed to limit the . . . [Hillmon doctrine] so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person."


32. Had both the House and the Senate Judiciary panels explicitly restricted the scope of the Hillmon doctrine, then unquestionably their interpretation of its reach would be controlling. See Hungate, An Introduction to the Proposed Rules of Evidence, 32 Fed. Bar J. 225, 228-29 (1973) (Rep. William Hungate, D-Mo., was chairman of the House Subcommittee on Criminal Justice when the panel held numerous hearings on the proposed federal rules.) The Supreme Court Advisory Committee's work on the proposed rules preceded Congress' examination of them by four years. See 1 Weinstein's Evidence, supra note 29, vii-viii. Once the rules and the committee comments were presented to Congress, the legislative branch could have remained silent for 90 days, at the end of which the rules would have automatically gone into effect. Instead, in 1973, Congress adopted Pub. L. No. 93-12, which allowed it to examine and revise the rules. In so doing, Congress left the Advisory Committee without veto opportunity or even a right of response. Clearly, the legislative branch spoke the last, binding words on the subject. Id. at viii-x. The question remains whether the Senate was "speaking" by its silence. The answer, according to one pair of commentators, David W. Louisell and Christopher B. Mueller, is "yes." D. Louisell & C. Mueller, 4 Federal Evidence, § 442, at 561 (1977). They maintain the House Judiciary Committee's limitation on the Hillmon doctrine is "clear and unequivocal" as opposed to the explanation outlined in the obtuse Advisory Committee note. Further, they maintain that had the Senate Judiciary Committee disagreed, it would have objected as it did to other House Judiciary panel alterations of the proposed rules of evidence. Id. at 561-62.

According to several others, Congress had the authority to make binding changes in the federal rules. One author looked to Sibbach v. Wilson & Co., 312 U.S. 1 (1941), to assert that Congress has authority to engage in federal rulemaking for the courts. In Sibbach, the Court said, "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this [the Supreme Court of the United States] or other federal courts authority to make rules not inconsistent with the statutes or the constitution . . . ." Id. at 9-10, quoted in, Note, Congressional Preemption of the Federal Rules of Evidence—Pub. L. No. 93-12, 87 Stat. 9 (Mar. 30, 1973), 49 Wash. L. Rev. 1184, 1188-89 (1974). Another author wrote, "In the federal system control (over court procedure) is cooperatively in the hands of both (Congress and the courts), with Congress having the final word." Degnan, The Law of Federal Evidence Reform, 76 Harv. L. Rev. 275, 285 (1962).
courts have split on the issue of whether state-of-mind evidence stemming from a declarant's words may be used to prove the actions of another person.

The current split in the circuits comes to light in cases involving complicated, illicit drug transactions and other conspiratorial activities. Recently, in United States v. Cicale, the United States Court of Appeals for the Second Circuit upheld the admission of six statements of a declarant, an alleged drug dealer, regarding his intention to meet at various times with Cicale, his supplier. The court grappled with the House Judiciary Committee's narrow interpretation of the Hillmon doctrine before upholding Cicale's conviction, purportedly based on other, nonhearsay evidence. The court said the contested statements were admitted to show the involvement of the declarant in the illegal drug activity. Similarly, in United States v. Pheaster, the United States Court of Appeals for the Ninth Cir-

33. See, e.g., United States v. Cicale, 691 F.2d 95 (2d Cir. 1982), cert. denied, 103 S. Ct. 1771 (1983); United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976).
34. 691 F.2d 95 (1982).
35. Id. at 103 n.2.
36. Id. at 104. The court further asserted that Cicale's participation could be proven via nonhearsay eyewitness testimony. Therefore, the declarant's statements could be used with the nonhearsay evidence to show that Cicale was part of a drug-sale conspiracy. Id. at 103-05. A dissenting judge, however, said the court had erroneously interpreted Hillmon as redefined in the federal rules and had allowed inadmissible state-of-mind hearsay to be offered by the declarant against another person, Cicale. Id. at 109. In its holding, the Cicale court relied heavily on United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), a pre-Federal Rules of Evidence decision that established an evidentiary criteria for the use of hearsay to determine the existence of a conspiracy. In Geaney, the court said that in order for hearsay evidence regarding the existence of a conspiracy to be submitted to a jury, the prosecution must prove the defendant's participation in the conspiracy by a "fair preponderance of the evidence independent of the hearsay utterances." Id. at 1120. If so, the jury may use the hearsay, together with the other evidence to determine the defendant's guilt.

The Geaney standard for admitting coconspirator hearsay statements has been adopted by the majority of the circuits. 1 WEINSTEIN'S EVIDENCE, supra note 29, 104-52 to 104-57 & no.46. It is the applicable standard in the First, Second, Third, Fourth, Sixth, Seventh, and Eighth Circuits. Three circuits, the Fifth, Tenth, and District of Columbia, require only that there be "substantial" evidence of a conspiracy. Id. The Ninth Circuit requires that the court believe a prima facie case exists to show the presence of a conspiracy before allowing the admission of coconspirator hearsay statements. Id. Under the federal rules, conspiracy is addressed in FED. R. EVID. 801(d)(2)(E), which states: "A statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Under FED. R. EVID. 104(a), the judge determines the standard for admitting the hearsay statements of coconspirators. The rule states, in relevant part: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ."
37. 544 F.2d 353 (9th Cir. 1976).
cuit upheld the admission of a classic Hillmon statement from the victim against two men charged with kidnapping, conspiracy, and extortion. The court reached this result despite its acknowledgement of the vitality of some of the criticism of the Hillmon doctrine, and its recognition of the dispute generated by the limiting language of the House Judiciary Committee's report.38

Conversely, the United States Court of Appeals for the Fourth Circuit in United States v. Jenkins,39 noted that Congress had intended rule 803(3) to be limited to statements reflecting the conduct of the declarant.40 But while articulating this standard, the Fourth Circuit nonetheless allowed into evidence a statement of a drug purchaser that ultimately was used against her companion.41 The court circumvented its own standard by defining the admitted statement as one that explained the reason for the companion's conduct and not one that explained the conduct itself.42 Had the statement explained the companion's conduct—which consisted of driving the declarant to her drug supplier—the Fourth Circuit would not have admitted it.

This Comment will discuss these and other federal circuit court interpretations of the Hillmon doctrine. In examining the state-of-mind exception to the hearsay rule, it will trace the doctrine through the adoption of the federal rules and will show the continued disparities in its application among the circuits. This Comment will demonstrate that attempts to circumvent a restrictive reading of Hillmon by ignoring the House Judiciary Committee language accompanying 803(3), or debunking the weight of its authority, have led to confusion on the part of juries, litigators, and courts. It will also consider how the Hillmon doctrine, which is rooted in civil litigation, and its progeny 803(3), may be prejudicial to defendants in criminal cases. Finally, this Comment will explain why a limitation on the reach of the doctrine would be fairer to litigants, thereby advancing the underlying goal of the federal rules.

I. THE HILLMON DOCTRINE: THE LONG AND WINDING ROAD FROM CROOKED CREEK

A. Hearsay through Hillmon

Hearsay is defined in the federal rules as a statement "other than one

38. Id. at 379-80, 380 n.18.
39. 579 F.2d 840 (4th Cir. 1978).
40. Id. at 843.
41. Id. at 844.
42. Id. at 843.
made by the declarant while testifying at the trial or hearing, offered in
evidence to prove the truth of the matter asserted." As the Anglo-American
system of justice has developed, the offering of witness testimony in
court, under oath, in the presence of the trier of fact and subject to cross
examination, is considered a more desirable method of eliciting truth than
reliance upon prior statements made outside this carefully controlled envi-
ronment. Without these in-court controls, the trier of fact is unable to
gauge accurately the out-of-court declarant's perception of an event and
the accuracy of his memory about the incident. Moreover, the trier is at
the mercy of the declarant's communication skills and cannot test them in
court, under oath and subject to cross examination.

Although hearsay evidence is considered inherently less reliable than
evidence offered in court by one with first-hand knowledge, there are some
out-of-court statements that, under certain circumstances, are relevant and
may be very reliable. Further, if the court system must choose between
evidence that is not perfectly reliable and no evidence at all, the facilita-
tion of the trial process may sometimes require the use of certain hearsay
statements in an effort to create a reasonable compromise. Under the
federal rules, a series of exceptions to the hearsay rule have been devel-
oped that, based on the collective experience of litigators, have come to be
regarded as relatively reliable. The principles of reliability and necessity

43. Fed. R. Evid. 801(c).
44. Fed. R. Evid. article VIII, Advisory Committee's note.
45. 4 Weinstein's Evidence, supra note 29, 800-11. Others are blunter in their criti-
cism of hearsay: "Hearsay . . . is something that depends for its credibility upon the state-
ment of somebody who is not there. It is something that somebody said to somebody else.
In plain English, it is gossip. Hearsay remains Hearsay and gossip remains gossip no matter
how plausibly presented or deviously pursued." Statement of Frank Raichle, Advisory
Committee member, A Discussion of the Proposed Federal Rules of Evidence before the An-
(1969). The development of the hearsay rule coincided with the changes in the composition
of the jury from one in the 14th-century that included persons who had knowledge of the
litigants and the facts in the case, to one in the 17th-century that had grown increasingly
impartial. Thus, as jurors came to trial with decreasing out-of-court, first-hand knowledge
of the cases, the justice system evolved to ensure that more in-court, first-hand knowledge
would be offered. 4 Weinstein’s Evidence, supra note 29, 800-09. See 5 Wigmore Evi-
dence § 1364 (3d ed. 1940).
46. 4 Weinstein’s Evidence, supra note 29, 800-07 to 800-08.
47. Fed. R. Evid. article VIII, Advisory Committee’s note.
48. Id. See Spangenberg, The Federal Rules of Evidence—An Attempt At Uniformity in
Federal Courts, 15 Wayne L. Rev. 1061, 1072 (1969), in which the author states:
Hearsay information is simply less reliable than first-hand observation, but it
does have some probative value. If utmost reliability is the criterion, then all hear-
say should be excluded. If relevancy is the only test, then all hearsay would be
admitted to the jury who would have to analyze its relative worth.
49. See Fed. R. Evid. 801, 803, 804; see also Spangenberg, supra note 48, at 1072:
are, in fact, said to inspire the 803(3) exception to the rule against hearsay. The evidence is considered trustworthy because the declarant is believed to be the best commentator on his own state of mind. Moreover, because the exception is limited to "then-existing" mental and physical condition, it is not in danger of distortion through a declarant's faulty memory. Such testimony is necessary because the declarant's state-of-mind commentary is most accurate when it is made, and later repetition of this statement in court is the sole means of bringing this evidence before the trier of fact.

The principle that a declarant is the best reader of his own mind was firmly established in Travelers' Insurance Co. v. Mosley, decided long before the federal rules were enacted. In Mosley, the Supreme Court upheld the admission into evidence of out-of-court statements made by a husband to his wife and child about the circumstances surrounding his serious tumble down some stairs. As paraphrased by the Court, Arthur Mosley, the deceased, told his wife that "he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling down". He made a similar statement to his son. Mosley was insured against death due to accident under a policy issued by Travelers' Insurance Company. Although Mosley died as a result of the injuries he incurred in the fall, the insurance company refused to pay the proceeds to his widow-beneficiary. There were no witnesses to the accident, and Travelers maintained that he died of a brain disease.

At trial, his widow was permitted to testify that shortly before his death her husband had indeed fallen on the stairs and immediately thereafter told her he hit his head and felt great pain. Mosley's son was allowed to

The [Advisory] Committee chose a middle ground, reaching into its collective experience in thousands of trials to determine what types of hearsay have proven to be quite reliable. Reliable hearsay is considered to have sufficient probative value to justify admission even though the hearsay declarant is available and could be called as a witness. Other types of hearsay, considered less reliable, still have enough value to be admissible if it is necessary either to admit the hearsay or forego the evidence entirely. This is the situation when the declarant is unable to attend the trial.

51. Id. at 518-19.
52. Id. at 519.
53. Id. at 520.
54. 75 U.S. (8 Wall.) 397 (1869).
55. Id.
56. Id. at 399.
57. Id.
58. Id. at 398, 400.
testify to similar statements he heard from his father. The jury found for Mrs. Mosley, and the insurance company appealed. The Supreme Court affirmed, dividing the husband's declaration about his fall into his description of the accident and his feelings after it occurred. The Court said both statements were logical, reasonable comments on the event at issue and the attending results. It reasoned that the recently injured Mosley was the best source of knowledge about his pain. "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence."

Mosley's state-of-mind declarations were used in their traditional manner, to describe the declarant's current feelings. Mosley's future actions, based on his present verbalized intent, were not at issue. Over twenty years later, the Supreme Court, in Mutual Life Insurance Co. v. Hillmon, allowed the use of the declarant's statements to depict his present intentions, and by inference to show that those intentions were eventually carried out. In Hillmon, the intentions were expressed in a pair of letters written by traveller Frederick Walters to his loved ones. One letter Walters wrote from Wichita to his financee, Alvina Kasten in Fort Madison, stated, "I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon . . . ." In another letter mailed in early March of 1897, he told his sister that he planned "to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheeptrader, for Colorado or parts unknown to me." Neither Walters nor Hillmon were seen again after the night Hillmon was said to have been accidentally shot at the campfire.

59. Id. at 403-04.
60. Id. at 403.
61. Id. at 409.
62. Id. at 404, 408.
63. Id. at 408.
64. Id. at 404.
66. Id.
67. Id. at 294.
68. Id. at 288.
69. Id.
70. Id. at 285-89. Hillmon was heavily insured—$10,000 from Mutual, $10,000 from New York Life, and $5,000 from Connecticut Mutual. Id. at 285-86. This is significant given that he was described as "absolutely poor, without a definite occupation." J. Wigmore, THE PRINCIPLES OF JUDICIAL PROOF 860 (1913). Furthermore, Hillmon's best friend, Levi Baldwin, ruminated about an insurance fraud scheme to a local doctor in Tonganoxie, Kansas, the year before Hillmon's disappearance. Id. at 860-62. "Doc, would it not be a good scheme to get your life insured for all you can, and get someone to represent you as
The *Hillmon* Court called the Walters’ letters competent evidence of Walters’ intentions when he wrote them.\textsuperscript{71} Since Walters’ intent was a material fact in the case, the Court concluded the letters were admissible to show Walters planned to travel and that he planned to travel with Hillmon.\textsuperscript{72} It said the letters also showed it was probable that Walters carried out his travel plans and that he travelled with Hillmon.\textsuperscript{73} The Court, however, ignored the fact that it might not have been Hillmon’s intention to accompany Walters. In its decision, the Court relied in part on *Mosley*, which established a doctrine, founded in reliability and necessity, that essentially said a person is the best judge of what is on his mind.\textsuperscript{74} The *Hillmon* Court stretched that doctrine, however, by asserting that because one knows his own state of mind one can also accurately perceive and comment on his future actions. Furthermore, in what was arguably dicta, the Court established the foundation for a major inferential leap. It implied that a declaration by one party of his planned conduct, when it involves the participation of another, is competent to show that it is probable that both the declarant and the other party completed that conduct.\textsuperscript{75}

*Hillmon*, a civil case, was also based in part on the decision of what was then the New Jersey Court of Errors and Appeals\textsuperscript{76} in the criminal case of *Hunter v. State*.\textsuperscript{77} Benjamin Hunter was convicted of the murder of John M. Armstrong.\textsuperscript{78} On appeal, he argued that the court should not have admitted a statement Armstrong made to his son on the day of the murder implicating Hunter. The son testified that Armstrong had said “he intended to go with Mr. Hunter, and he and Mr. Hunter were going to Camden that night.”\textsuperscript{79} Hunter also objected to the admission of a letter written by Armstrong to his wife the afternoon before his death, which said, “I will not be home much before nine o’clock. Am going over to Camden again with Mr. Hunter, on business . . . .”\textsuperscript{80}

In upholding the admission of this evidence, the court found the comments made by Armstrong to his family were natural, common and reli-

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\textsuperscript{71} 145 U.S. at 299.
\textsuperscript{72} Id. at 299-300, 295-96.
\textsuperscript{73} Id. at 295-96.
\textsuperscript{74} Id. at 296 (citing 75 U.S. (8 Wall.) at 404-05).
\textsuperscript{75} 145 U.S. at 296.
\textsuperscript{76} The current Supreme Court of New Jersey was previously known as the Court of Errors and Appeals.
\textsuperscript{77} 145 U.S. at 299 (citing 40 N.J.L. 495 (1878)).
\textsuperscript{78} 40 N.J.L. at 496.
\textsuperscript{79} Id. at 534.
\textsuperscript{80} Id. at 536.
Hillmon Doctrine

ble. Armstrong appeared to have no motive to lie.81 The court also found that if it was reasonable for a man to tell his family where he was going, then it was just as reasonable to inform them of the person with whom he planned to travel.82 Thus, Hunter supported the Hillmon Court's view that intended acts of persons other than the declarant could be inferred from a person's state-of-mind declarations about himself.83

B. The Permanent Stretching of Hillmon

Despite its progeny, Hillmon was a civil case concerned only with evidence relating to the intended behavior of the declarant. It was not until the modern-day decision of People v. Alcalde,84 a California criminal case, that the expanded reach of Hillmon became solidified in the common law.

Florencio "Frank" Alcalde was convicted of the murder of Bernice Curtis largely on circumstantial evidence, including the state-of-mind declarations made by the victim, and was sentenced to death.85 Alcalde had been a San Francisco welder who, upon leaving his wife and child, began an intense love affair with a woman he referred to only as a "hot blond," but who was shown by circumstantial evidence to be Curtis.86 On the day of her murder, Curtis made statements that would later prove to be the most damaging evidence against Alcalde. She told her brother-in-law and her roommate that she intended to have dinner that evening with "Frank."87 Her bruised, beaten body was discovered the next morning in a field in nearby Santa Clara County.88

On appeal, Alcalde argued against the admission of several items of evidence, including Curtis' comments about her intent to date "Frank," maintaining that they were hearsay.89 The California Supreme Court, in upholding Alcalde's conviction, recognized the deceased's statements as hearsay, but relied in part on Hillmon to allow their use against the defendant. The court said that one can infer an act was completed following one's expressed intent to do the act.90 If made under circumstances that

81. Id. at 538.
82. Id.
83. Id.
84. 24 Cal. 2d 177, 148 P.2d 627 (1944).
85. Id. at 179, 148 P.2d at 628.
86. Id. at 180, 148 P.2d at 628. Curtis was blond, and Alcalde had shown photographs of a blond woman to co-workers. Other evidence showed he had called Curtis at her roominghouse telephone. Id.
87. Id. at 181, 148 P.2d at 628.
88. Id. at 179, 148 P.2d at 628.
89. Id. at 185, 148 P.2d at 631.
90. Id. at 185-86, 148 P.2d at 631.
would render the statements of intent trustworthy, and relevant to an issue central to the case, the declarations could be admitted.\textsuperscript{91} The court observed: (1) it was natural to comment to friends about an intended date; (2) there would be no reason for Curtis to lie about the date; (3) the nickname “Frank,” by which Curtis referred to her date for the evening in question, was a name Alcalde himself had used; and (4) Alcalde had admittedly been dating Curtis.\textsuperscript{92} Thus, the \textit{Alcalde} court concluded that Curtis’ statement, coupled with additional corroborating evidence, could be given to a jury to draw an inference of guilt.\textsuperscript{93}

Justice Traynor, apparently concerned at this stretching of the \textit{Hillmon} doctrine issued a strong dissent.\textsuperscript{94} He pointed to Justice Cardozo’s opinion in \textit{Shepard} to outline how dangerously prejudicial the victim’s statements could be for the defendant.\textsuperscript{95} Traynor maintained that the statement could only be used to show Curtis’ intent and should not have been used to foster the inference that Alcalde had the opportunity to murder Curtis and indeed took advantage of it. He emphasized that a declaration of one person’s thoughts cannot be a reliable indication of the actions that another party may have taken.\textsuperscript{96} He further asserted that the only purpose served by the admission of Curtis’ comment was to allow the jury to infer that Alcalde dated the victim on the night of her death, brought her to the location of the crime, and killed her.\textsuperscript{97}

The \textit{Alcalde} dissent remains a strong and oft-cited argument against the use of state-of-mind declarations to determine the denouement of the intended conduct of a person other than the declarant, particularly in the criminal context.\textsuperscript{98} Additionally, because of the lack of clarity in the federal rules, the same arguments that fueled Justice Traynor’s dissent in \textit{Alcalde} can be heard in the continued debate about the present-day reach of the \textit{Hillmon} doctrine.\textsuperscript{99}

\section*{II. The Rule 803(3) Roadmap}

There is no doubt that Congress in 1975 could have avoided the subse-

\begin{footnotesize}
\textsuperscript{91} \textit{Id.} at 187-88, 148 P.2d at 632.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 188, 148 P.2d at 632.
\textsuperscript{94} \textit{Id.} at 189-90, 148 P.2d at 633.
\textsuperscript{95} \textit{Id.} at 633 (citing \textit{Shepard v. United States}, 290 U.S. 96, 104 (1933)). For details of \textit{Shepard}, see supra note 21.
\textsuperscript{96} \textit{Id.} at 189, 148 P.2d at 633.
\textsuperscript{97} \textit{Id.} at 190, 148 P.2d at 633.
\textsuperscript{98} \textit{See, e.g., United States v. Pheaster,} 544 F.2d 353, 384-85 (9th Cir. 1976) (Ely, J., concurring in part and dissenting in part).
\textsuperscript{99} \textit{Id.}
\end{footnotesize}
quent confusion regarding the scope of the Hillmon doctrine. An examination of the long and seemingly interminable federal rules drafting process offers little insight into the "state of mind" of the drafters and the legislators on this particular issue.

100. See supra note 32.

101. The labyrinth through which the federal rules passed took many turns. In 1961, Chief Justice Warren appointed a Special Committee on Evidence "to study the . . . feasibility" of developing uniform Federal Rules of Evidence. S. REP. No. 1277, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS, 7051. Within a year, the committee deemed the proposed rulemaking effort a worthy endeavor. By March 1963, it was recommended by the Judicial Conference that an Advisory Committee on Rules of Evidence be appointed to begin the task. Id. at 5. In March 1965, the Advisory Committee of judges, lawyers and law professors was formed and the difficult work began. By early 1969, a draft of the committee's proposed rules, along with extensive panel comments, were circulated for comment. Id. Following the issuance of the comments, a revised draft was submitted to the Supreme Court in 1970. It was returned to the Judicial Conference for further revision. The following year, the recirculated draft was returned to the Court and in 1972, the Court promulgated the rules which were scheduled to take effect in July 1973. Id. But, pursuant to Pub. L. No. 93-12, specifically enacted by Congress to give it an opportunity to examine the rules in detail, Congress postponed putting them into effect until the legislators expressly approved them. Id.

The House Judiciary Committee's Subcommittee on Criminal Justice held six days of hearings on the rules and developed a 600-page record of testimony. The subcommittee held mark-up sessions and then developed and circulated its own version of the rules. Within six weeks, some 90 comments came back to the subcommittee. H.R. REP. No. 650, 93d Cong., 1st Sess. 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7077-78. One commentator, Joseph S. McCarthy, Chairman of the District of Columbia's Bar Study Committee on the Federal Rules of Evidence, expressed concern about proposed Rule 803(3). The rule, he said:

may merely refer to the well-accepted use of prior intention (as evidenced by a declaration or otherwise) as circumstantial evidence tending to show that the declarant probably carried out his intention. The decision [Hillmon] however, also approved the use of the intention of A of going on a trip with B as evidence of what B later did. This gets before the trier the intention of someone other than the declarant. But the declarant, though he knows his own state of mind, can only know the intention of B through B's statements to A or through A's inference from circumstances or both. This hearsay exception is said to be reliable only as to A's statements of his own then existing intentions since A is conscious of his own inner state of mind and there are no memory problems. The rationale does not extend to A's statements of B's inner purposes, however, but only to B's declarations of his own existing intention . . . . The Committee therefore recommends either that the Notes be changed to expressly reflect the applicability of Rule 803(3) only to declarations of the intention of A to prove A's probable future conduct or at least that the sentence approving Hillmon be deleted. The latter action would at least avoid foreclosing the raising of the above problem in future cases.

Rules of Evidence (Supplement) Hearings Before the Subcomm. on Criminal Justice (Formerly Designated as Special Subcommittee on Reform of Federal Criminal Laws) of the House Comm. on the Judiciary on the Proposed Rules of Evidence, 93d Cong., 1st Sess. 282-83, 288 (1973). The subcommittee, after five additional mark-up sessions, devised a new version of the rules. H.R. REP. No. 650, at 4. The latest version limited the declarant's state-of-mind comments to his own future comments. Fed. R. Evid. 803(3). It was favorably reported by
Commentators David Louisell and Christopher Mueller contend that the Senate, by silence, assented to the House Judiciary Committee interpretation of *Hillmon*. They assert that elsewhere in the Federal Rules of Evidence, where the House made changes in the Advisory Committee draft, the Senate voiced its disapproval where warranted. Conversely, Stephen Saltzburg and Kenneth Redden do not contend that the House Judiciary Committee had the silent approval of the Senate when it limited the reach of the *Hillmon* doctrine. Instead, these authors have adopted a wait-and-see attitude. They argue that the majority of the courts have allowed state-of-mind evidence showing intent to be admitted against the declarant and other parties where applicable. They further maintain that more case law must develop before it can be determined whether courts are attributing the House judiciary panel’s *Hillmon* limitation to the full Congress and thus following it. The Saltzburg and Redden view is

the full committee. H.R. REP. No. 650 at 4. It was approved by the House on Feb. 6, 1974. S. REP. No. 1277, at 6. Following two days of hearings, the Senate Judiciary Committee panel also reported the rules favorably. *Id.* at 1, 7. The Senate made 44 amendments to the House version of the bill, but it did not comment on, or alter the House’s 803(3) position. CONF. REP. No. 1597, 93d Cong., 2d Sess. 5, 11, reprinted in, 1974 U.S. CODE CONG. & AD. NEWS 7098. After two days in conference at the very end of the legislative session, the conferees ironed out the differences in their versions of the rules, again without mentioning the 803(3) discrepancy. *Id.* The conference report was adopted by Congress within a week after it was completed. 120 Cong. Rec. H12253 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate).

102. D. LOUISELL & C. MUELLER, supra note 32, § 442, at 561-62, in which the authors state:

An inference from silence is often dangerous, and rarely conclusive, but in this case silence seems significant. Even on matters of construction alone, where no change in the text of the Rule was contemplated, comments in the House Report evoked response in the Senate Report, as happened in connection with the very next provision—Rule 803(4). It is reasonable to suppose, therefore, that if the Senate Committee had disagreed with the construction preferred by the House Committee, something would have been said.

FED. R. EVID. 803(4) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

See D. LOUISELL & C. MUELLER, supra note 32, § 442, 561-62 n.23, in which the authors explain that the 803(4) disagreement between the House and the Senate arose because the House wanted to make it clear that the exception should not adversely affect present doctor-patient privilege rules. The Senate, however, wanted to make it clear that the House Judiciary Committee comment would not adversely impact on the privilege waiver provisions of FED. R. CIV. P. 35. The authors cite H.R. REP. No. 650, supra note 101, and S. REP. No. 1277, supra note 101, for details.

103. S. SALTZBURG & K. REDDEN, supra note 5, at 575.

104. *Id.*
shared by University of Virginia law professor Graham Lilly.\textsuperscript{105} He, too, writes that more case law is needed before the impact of the House Judiciary Committee's limit can be assessed. Lilly notes that courts may circumvent the dilemma by admitting state-of-mind declarations against third parties but then giving limiting instructions at trial.\textsuperscript{106}

Judges admit they are confused by the proper reach of the\textit{Hillmon} doctrine following the enactment of the federal rules, and in light of the House Judiciary Committee's limit and the Senate's failure to address it. In a written equivalent of throwing up his hands, Judge Friendly in\textit{United States v. Mangan}\textsuperscript{107} wondered which of the conflicting\textit{Hillmon} interpretations should guide him.\textsuperscript{108} Essentially, under the federal rules, the courts have two choices when they are faced with cases involving state-of-mind evidence that touches on the intended conduct of the declarant and the possible conduct of another party. One option is to accept the House Judiciary Committee's limit on the scope of\textit{Hillmon} as controlling. Thus, evidence of a statement by the declarant regarding his own intended conduct would be admissible at trial to show that the conduct was undertaken. Evidence offered to show the intended conduct of a person other than the declarant would be excluded. The second option is to accept the House Judiciary Committee's limitation as merely a suggestion that failed to be adopted by the Senate or the entire Congress. A court adopting that view would permit a declarant to comment about his intended conduct even if that conduct relied on the participation of another. Thus, the trier of fact would be able to draw the inference that the other party intended to participate in the future act with the declarant and probably did participate.\textsuperscript{109} Before the enactment of the federal rules gave courts these distinct

\textsuperscript{105} G. Lilly,\textit{ An Introduction to the Law of Evidence} § 65, at 226-27 (West 1978).
\textsuperscript{106} Id. at 227.
\textsuperscript{107} 575 F.2d 32 (2d Cir. 1978).
\textsuperscript{108} Id. at 43 n.12. Judge Friendly said:

\begin{quote}
Are the Senate and the President or, for that matter, the members of the House who were not on the Committee to be considered to have adopted the text of the Rule, as glossed by the Advisory Committee's Note that Rule 803(3) enacted\textit{Hillmon}, or the House Committee's "construction" which, in effect, seriously restricts\textit{Hillmon}?\end{quote}

\textsuperscript{109} The First Circuit has opted for the first approach and has spoken against the extension of\textit{Hillmon} to reach the intentions of a person other than the declarant. Gual Morales v. Hernandez Vega, 579 F.2d 677 (1978). The Second Circuit has taken the opposite approach, but because of the conflict surrounding the doctrine it prefers not to rule on 803(3) grounds. United States v. Cicale, 691 F.2d 95 (1982); United States v. Mangan, 575 F.2d 32 (1978). The Third and Fourth Circuits in theory support a limited reach to\textit{Hillmon} statements that is in line with the House Judiciary Committee view. United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978); Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529 (3d Cir.),\textit{cert.
options, discussions concerning the scope of the *Hillmon* doctrine remained largely academic. But when the federal rules directly challenged the common law approach to *Hillmon* through the House Judiciary Committee's interpretation, the debate moved from the pages of the law reviews to the text and notes of court decisions.

III. MODERN-DAY APPLICATION OF THE *HILLMON* DOCTRINE BY FEDERAL CIRCUIT COURTS

A. The Expansive Approach: Extending Alcalde's Stretch

Three federal circuits—the Second, Eighth, and Ninth—follow the lead of the *Alcalde* court and take an expansive approach to the admission of *Hillmon* statements. Two of these circuits—the Second and Ninth—have expressed concern or confusion over the post-rules perimeter of the *Hillmon* doctrine.

The Second Circuit in *United States v. Cicale* was faced with the epitome of the modern-day illicit drug conspiracy, with its large cast of informants, suppliers, purchasers, and users, offering a fertile ground upon which the seeds of the *Hillmon* controversy could take root. In *Cicale*, three alleged drug dealers, working through a sidewalk sales agent, spent six months in negotiations with an undercover narcotics officer. The talks eventually culminated in the arrest of the dealers and subsequent convictions on conspiracy and a variety of drug possession and distribution charges. On appeal to the Second Circuit, one issue was whether six statements made by the street intermediary to the undercover agent implicating Cicale were admissible against Cicale in court.

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110. See supra note 21 for examples of scholarly criticism of *Hillmon*. Prior to the enactment of the Federal Rules, *Hillmon*, which was comprised of several related cases, was cited primarily for its principle of the effects of consolidation. See Signal Mountain Portland Cement Co. v. Brown, 141 F.2d 471, 477, (6th Cir. 1944) (same plaintiff sues in each of several cases but the common defendant, is allowed the same number of jury challenges as the plaintiff, which is deemed to follow *Hillmon*; see also Skirvin v. Mesta, 141 F.2d 668, 672-73 (10th Cir. 1944) (consolidation of actions for trial which seem alike is discretionary with the court).

111. See, e.g., supra note 108.

112. 691 F.2d at 95.

113. Id. at 97-102.
In testimony, the undercover officer related the statements in question. In each, the intermediary had told the officer of his intention to meet his drug supplier in a variety of locations.\textsuperscript{114} In each instance, undercover drug enforcement officials observed the declarant shortly after he made the statements either in the presence of Cicale or entering Cicale's home.\textsuperscript{115} It was clear these statements were offered to show that the declarant intended to meet Cicale for illicit purposes, that the declarant carried out the meetings as planned, and that it could thus be inferred that Cicale participated. The Second Circuit side-stepped the \textit{Hillmon} issue, stating that nonhearsay evidence independent of the declarant's comments proved the illicit nature of the planned transaction and the extent of Cicale's role in it.\textsuperscript{116}

Indeed, there was independent evidence showing that the declarant had conversations and meetings with Cicale,\textsuperscript{117} that Cicale tended to drive evasively after some of these sessions,\textsuperscript{118} and that Cicale spoke to the declarant in cryptic sentences that appeared to indicate a desire to keep their meaning secret.\textsuperscript{119} If viewed in a vacuum, however, that evidence would be less than conclusive evidence of criminal activity. It could be argued that such evidence would show only that the declarant and Cicale knew each other, that Cicale was a poor driver, and that he was concerned about keeping some matter secret. It is only when the explanatory hearsay statements of the declarant are admitted into evidence that the illicit purpose behind the activity can be strongly inferred.

The court admitted that without all the eyewitness evidence, it would have been required to address the controversy over the current scope of the \textit{Hillmon} doctrine, something it clearly attempted to avoid.\textsuperscript{120} Yet the court still added its voice to the debate by pointing out that it had refused

\begin{footnotes}
\item[114] \textit{Id.} at 103 n.2. The first of the six statements, made on January 15, 1981 was paraphrased by the officer who told the court that "he [the intermediary] said he was going to talk to him [the supplier] right now. . . ." \textit{Id.} On March 19 the intermediary had told the officer, "I'll go talk to one of my sources. . . ." \textit{Id.} The officer also said the intermediary "said he was going to go there as soon as he left me." \textit{Id.} The statement made on March 23 to the officer by the intermediary was, "I'm going to drop by the guy's house that is providing this heroin, the source of supply, right now. . . ." \textit{Id.} On March 25 the same intermediary said, "Look, as soon as I finish eating, I'm going to go over to the guy's house . . . ." \textit{Id.} On April 7 he said, "I will go talk to him right now because he lives a couple of blocks from here . . . ." \textit{Id.} And finally, the next day he said, "I'll talk to the guy. He's waiting for me so let me go, and I am going to pick him up right now at the restaurant where he's at." \textit{Id.}
\item[115] \textit{Id.} at 103.
\item[116] \textit{Id.} at 103-04.
\item[117] \textit{Id.} at 104.
\item[118] \textit{Id.}
\item[119] \textit{Id.}
\item[120] \textit{Id.}
\end{footnotes}
in the past to limit *Hillmon* to a declarant's comments about his own intent. The court explained its *Hillmon* Doctrine philosophy by stating that the doctrine permits inferences to be drawn from a declarant's statements to demonstrate a relationship with another who is implicated in a criminal plot.\(^\text{121}\) This relationship then makes more feasible the inference that the other person is also involved in the criminal plan. Thus, the statements can be used to bolster the existence of a conspiracy to perform the illicit act.\(^\text{122}\)

\(^{121}\) Id.  
\(^{122}\) Id. (citing United States v. Stanchich, 550 F.2d 1294, at 1297-98 n.1 (2d Cir. 1977); United States v. D'Amato, 493 F.2d 359, 363 (2d Cir.), cert. denied, 419 U.S. 826 (1974); United States v. Annunziato, 293 F.2d 373, 377-78 (2d Cir.), cert. denied, 368 U.S. 919 (1961)). In *Stanchich*, as in *Cicale*, the court admitted statements of an accused counterfeiter, Alan Fitzgerald, against an associate, Eric Stanchich, using the 801(d)(2)(E) coconspiracy rule to convict him of the same offense. *Sanchich*, 550 F.2d at 1295-98. At issue was the repeated use by Fitzgerald of the phrase "his people" to a businessman working undercover for government drug enforcement officials. *Id.* at 1295-97. For example, the undercover agent attempted to borrow a sample counterfeit bill shown to him by Fitzgerald, ostensibly to show "his banker," but in reality to have it photographed as evidence of the crime. Before granting permission to the agent to hold the bill, Fitzgerald said he needed to check with "his people." *Id.* at 1296. In a situation much like the one in *Cicale*, following the statements, Fitzgerald was seen in the presence of Stanchich and others. *Id.* The trial court dismissed a conspiracy count against Stanchich. Therefore, Stanchich argued it was reversible error to admit those statements as coconspirator exceptions to the rule against hearsay. *Id.* at 1295. On appeal, however, the court relied on *Geaney* and admitted the statements. *Id.* at 1297. "In view of our holding that Fitzgerald's statements were properly admitted under the conspiracy exception, we can leave the argument as to the state of mind exception to another day." *Id.* at 1298 n.1. Nonetheless, the court briefly expounded on the relevance of the state-of-mind exception to this case, and in so doing, seemed to have hopelessly confused the state-of-mind exception with the conspiracy rule. *Id.* at 1297-98 n.1. In essence, the court appeared to contend that when independent, corroborating evidence is offered to bolster the hearsay under circumstances such as those present in *Stanchich*, the evidence will be admissible against an associate or accomplice. Thus, the question of whether the statements at issue fit the coconspiracy rule or the state-of-mind rule is purely academic. In the *Stanchich* Court's view, the result is the same. *Id.* at 1298 n.1.

In *D'Amato*, decided before the enactment of the federal rules, a drug intermediary arranging a buy between his alleged supplier and an undercover agent told the agent he had to meet "his people" to determine if heroin could be exchanged without up-front capital. 493 F.2d at 361. The middle-man walked over to a black Oldsmobile at a nearby curb and engaged in a brief conversation with the car's driver and passenger, who was later identified as D'Amato. He immediately returned to the undercover agent to say "his people" okayed the deal without the up-front money. *Id.* Similar statements were made in connection with future buys, all of which were used in evidence at trial against D'Amato. *Id.* at 362-63. The Second Circuit also admitted these statements under what was then the case law standard for the coconspiracy rule.

*Annunziato* was another pre-rules case in which the Second Circuit upheld the conviction of a union official for accepting a bribe from a construction company president. 293 F.2d at 373. The district court was held to have correctly admitted testimony from the son of the company president, the elder man having died prior to trial. *Id.* at 376-77. The son testified that his father had told him Annunziato had requested money in connection with a con-
In his dissent, Judge Ward maintained that the majority had improperly used the declarant's state-of-mind comments against Cicale in affirming the trial court's decision that Cicale was part of an illicit drug-selling conspiracy. Judge Ward agreed that hearsay statements could sometimes be used to prove the existence of a conspiracy when there is other nonhearsay evidence available. But he argued that when state-of-mind hearsay evidence is used for that purpose it must be limited solely to the declarant's own future conduct.

The father told the son he intended to send Annunziato the payoff. The court said the statement of the father was admissible as a comment by a coconspirator. The court recognized the problem previously described in Shepard. See supra note 21. It appreciated the danger of faulty memory that is inherent in backward-looking hearsay declarations. In Annunziato, the statements face both directions. The company president was commenting on future intent when he told his son he planned to send the payoff, but he was also making a statement regarding a past event when he said Annunziato had sought the payment. The Annunziato court, however, said Hillmon provided authority to admit the backward and forward-looking testimony. 293 F.2d at 377-78. Citing Prof. Morgan's Basic Problems of Evidence, 293 (1954), it said Walters' letters outlining the author's intent to travel with Hillmon left a strong inference that a prior travel plan existed between Walters and Hillmon. 293 F.2d at 377. The implications that this type of evidence might have on persons other than the declarant, however, did not concern the Annunziato court. It cited Alcalde with approval as support for its position.

The dissent also mentioned a pre-rules case, United States v. Kaplan, 510 F.2d 606 (2d Cir. 1974), which had a factual situation similar to Cicale. In Kaplan, the Second Circuit reversed a narcotics conviction that had been based on inadmissible evidence. An undercover drug enforcement agent made contact with a drug seller. The day before the agent was to consummate a sizable drug purchase agreement, the seller told the agent in a telephone conversation that his drug-supplying "connection" would be at the sale. The following day, when the agent went to the seller's house to make the purchase, Kaplan was present, apparently in a drugged state. Kaplan was never introduced to the agent as the so-called "connection," but through casual conversation with the agent, Kaplan demonstrated some knowledge that a narcotics deal was in progress. Shortly after the agent made the drug purchase, Kaplan and the seller were arrested. The trial court, citing Hillmon, admitted the telephone conversation as evidence of the agent's state of mind upon entering the narcotics sales meeting. The court indicated the statement might also be admissible as a coconspirator statement.

The Second Circuit reversed Kaplan's conviction because of the likelihood that the jury had unfairly used the evidence to show not the agent's state of mind but the intentions and subsequent actions of Kaplan. In other words, the evidence might have shown the jury that Kaplan was actually the "connection." Because the trial judge merely ruminated on how the statement might be a proper coconspirator statement without making the necessary Geaney finding, the appeals court declined to accept the statement on that basis.

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In *Cicale*, the Second Circuit demonstrated its willingness to expansively apply the *Hillmon* doctrine and its reluctance to get involved in a post-federal rules debate about the extent of the doctrine's reach. Instead, the court limited its discussions about the rule 803(3) dispute to footnotes or dicta, indicating its tacit approval of the use of *Hillmon* statements as evidence of the future conduct of persons other than the declarant.\(^\text{125}\) Finally, the *Cicale* court blurred the lines between the 801(d)(2)(E) coconspirator exception to the rule against hearsay with the 803(3) state-of-mind exception. This had the effect of diluting the strength of the hearsay exceptions which are purposely designed to be separate and distinct.\(^\text{126}\)

\(^\text{125}\) 691 F.2d at 104 n.4.

\(^\text{126}\) Id. at 103-05. See supra note 49. The Second Circuit most recently examined the *Hillmon* doctrine in United States v. Sperling, No. 83-1164, slip op. at 1193 (Jan. 20, 1984), in which it reaffirmed its *Cicale* rationale. The *Sperling* court held that "the state-of-mind evidence of one party to an illicit narcotics deal could be used to help convict the other party provided it was augmented by sufficient corroboration. Slip op. at 1202-05.

An undercover narcotics agent negotiated with Beverly Ash for the ostensible purpose of arranging a drug purchase. *Id.* at 1196. Ash told the agent one morning she intended to meet her drug "source" that day at noon. Ash did in fact meet with the defendant, Nicholas Sperling, at a delicatessen at about 12:15 p.m. She later told the agent that her source had agreed to sell him some heroin. *Id.* In addition, convicted drug offender Leroy "Nicky" Barnes, hoping to win a presidential pardon from a life sentence without possibility of parole, testified at Sperling's trial that Barnes and Sperling's father, also serving time in prison, had arranged an Ash-Sperling drug transaction from their cells. *Id.* at 1195. Barnes said he and the elder Sperling had arranged for Ash to meet the defendant at a mid-town Manhattan delicatessen and that each would carry copies of *Life* magazine in order to recognize one another. An undercover agent observed Ash and the defendant entering the delicatessen with the magazines, sitting together, and exchanging a piece of paper. *Id.* at 1195-96. Shortly after this meeting, the agent approached Ash to arrange a drug purchase. *Id.* at 1196.

At trial, the government successfully introduced the statement made to the agent by Ash, who was murdered after her arrest. *Id.* at 1196-98. On appeal Sperling argued against the admission of Ash's state-of-mind declarations to the agent and Barnes' testimony. Sperling maintained that Ash's comments and the jailhouse conversations between his father and Barnes could not be used against him under the *Hillmon* doctrine. *Id.* at 1202. Citing *Cicale*, the Court disagreed. It said "a declarant's *Hillmon* declarations regarding his own state of mind are admissible against a nondeclarant when they are linked with independent evidence that corroborates the declarations." *Id.* at 1203. The court ruled that agent who watched the Ash-Sperling meeting that followed Ash's declarations provided the "link" needed to corroborate Ash's statements and render them admissible at trial. The prison conversations describing the Ash-Sperling meeting were also corroborated through the undercover eyewitnesses. *Id.* at 1203-04. As in *Cicale*, the court failed to consider how this picture of alleged criminal activity was almost meaningless absent Ash's state-of-mind declarations about her future intention to meet her drug source, and the jailhouse conversations between Baines and the elder Sperling to explain it.
The Second Circuit followed an approach in *United States v. Mangan*\(^\text{127}\) that was much like its reasoning in *Cicale*. The Mangan brothers, Frank and Kevin, devised an elaborate scheme for defrauding the Internal Revenue Service. It involved plucking the names and social security numbers of seven existing taxpayers from the IRS files, devising three fictitious businesses to employ the seven, and filing false returns listing heavy partnership losses. Then the brothers procured rooms in cheap hotels and rooming houses as mailing addresses for the seven hefty refunds they hoped to obtain through the filing of the fraudulent returns.\(^\text{128}\) In what was essentially double hearsay, an accomplice of the brothers was permitted to testify to statements made to him by Kevin describing the intended tax fraud. These statements implicated not only Kevin but Frank as well. Kevin explained to the accomplice the method by which the scam would operate. He said his brother Frank would be responsible for choosing taxpayers' names and filing income tax returns in order "to beat these legitimate taxpayers to their own money."\(^\text{129}\)

The court upheld the brothers' convictions and the admission by the lower court of Kevin's statements against Frank under the coconspirator exception to the hearsay rule. In so doing, the court admitted it was making a very close call.\(^\text{130}\) In a footnote, however, the Second Circuit indicated its strong approval of the government's argument that Kevin's statements could have been admitted as 803(3) hearsay exceptions.\(^\text{131}\) Still, the court openly declared that because the federal rules had scrambled the *Hillmon* Doctrine it would rather not rule on that ground.\(^\text{132}\) It noted, however, that the 803(3) argument was relevant in *Mangan* because of its factual similarity to *Hillmon*.\(^\text{133}\) In *Mangan*, Kevin's statements showed not only his own plans but those of Frank with whom Kevin believed he would be working.\(^\text{134}\) In *Hillmon*, Walters' letters arguably

\(^{127}\) 575 F.2d 32 (1978).

\(^{128}\) *Id.* at 36. They were able to initiate the scheme because Frank Mangan was an Internal Revenue Service agent. *Id.*

\(^{129}\) *Id.* at 42.

\(^{130}\) *Id.* at 43. The court indicated it had qualms about the government's theory that the statements met the 801(d)(2)(E) requirement as being in furtherance of the conspiracy. In the court's view, the statements may not have been made to induce the listener to come on board the conspiracy because the listener was already part of the conspiracy. In the end, the court opted for an evidentiary technicality. The defense apparently failed to object to the introduction of the statement, thus waiving the contention that it was not in furtherance of the conspiracy. *Id.* at 43-44.

\(^{131}\) *Id.* at 43 n.12.

\(^{132}\) *Id.*

\(^{133}\) *Id.*

\(^{134}\) *Id.*
showed not only Walters’ intent to travel, but, by inference, Hillmon’s intent to accompany him.\textsuperscript{135} The implication then was that the statement made by Kevin commenting on his and his brother’s criminal intentions would have been admissible as an 803(3) exception.\textsuperscript{136}

The prevailing view has been that the Second Circuit is correct in its interpretation of \textit{Hillmon}.\textsuperscript{137} Indeed, since the adoption of the federal rules, most courts have continued to permit statements offered under the \textit{Hillmon} doctrine to be used to demonstrate the intent not only of the declarant but also of others.\textsuperscript{138} The Ninth Circuit has continued this practice. In \textit{United States v. Pheaster},\textsuperscript{139} the court sustained kidnapping, conspiracy, and extortion charges against two men with evidence that included a classic \textit{Hillmon} statement from the victim.\textsuperscript{140} Larry Adell, the teenage son of a southern California multi-millionaire, told a date on the evening he was abducted from a fast-food chain parking lot that he intended to meet “Angelo” in the lot to obtain some free marijuana that had been promised to him.\textsuperscript{141} Adell made similar statements to another friend.\textsuperscript{142} One defendant, Angelo Inciso, was the “Angelo” who allegedly met, and by inference, kidnapped Adell. He argued that the boy’s statement could not be used to show Adell actually met “Angelo” that night.\textsuperscript{143} Inciso contended that, if used at all, the statement should have only been

\textsuperscript{135} Id. (citing 145 U.S. at 296).

\textsuperscript{136} The Second Circuit continued its support of an expanded reach of \textit{Hillmon} in United States v. Moore, 571 F.2d 76 (1978). In \textit{Moore}, the court reversed the interstate kidnapping convictions of two men because of a lack of sufficient evidence. It refused to rule, however, on the propriety of the lower court’s admission of a conversation between one of the alleged kidnappers and a friend. \textit{Id.} at 82. One kidnapper, Burnell, while bragging about the abduction plot, told a friend that Moore, his accomplice, “would have somebody take (the victim) out of the states,” and that “he would never be found.” \textit{Id.} at 81. On appeal, Burnell argued that Congress in enacting the federal rules had limited the scope of \textit{Hillmon} to declarations of the intended future conduct of the speaker. \textit{Id.} at 82 n.3. The Second Circuit brushed aside that contention in a brief footnote. The court indicated that it viewed the position of the Advisory Committee, which took a standard common-law \textit{Hillmon} approach, as controlling. \textit{Id.}

\textsuperscript{137} See \textit{McCormick on Evidence} § 295, at 698 (2d ed. 1972). The author states that the courts have not been willing to limit to the declarant those statements offered as evidence under \textit{Hillmon}. See Note, \textit{Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the Hillmon Doctrine}, 35 \textit{Vand. L. Rev.} 659, 687 (1982), in which the writer states: “No federal court has expressly refused to apply the common law \textit{Hillmon} doctrine or the ‘undisturbed’ version of rule 803(3).”

\textsuperscript{138} See, e.g., United States v. Cicale, 691 F.2d 95 (2d Cir. 1982); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976).

\textsuperscript{139} 544 F.2d 353 (9th Cir. 1976).

\textsuperscript{140} \textit{Id.} at 358.

\textsuperscript{141} \textit{Id.} at 358, 375.

\textsuperscript{142} \textit{Id.} at 375.

\textsuperscript{143} \textit{Id.}
permitted to show Adell’s state of mind; thus the name of his intended contact need not have been given to the jury.  

Looking to Hillmon, California case law, particularly Alcalde, the Federal Rules of Evidence and the California Evidence Code, the Ninth Circuit rejected Inciso’s arguments. Although fully exploring all avenues of the Hillmon debate, the court opted for an expansive, common-law approach to the doctrine. Thus, it admitted Adell’s statement, which arguably by inference, sheds light on Inciso’s behavior.

Then, in dicta, the court added a confusing caveat. It noted that the federal rules were not in effect when Pheaster was at trial. The court said, however, that the rules provided a benchmark for the court to analyze the common-law status of the state-of-mind hearsay exception. Clearly, courts applying a common-law analysis of the Hillmon doctrine have permitted a declarant’s state-of-mind evidence to support an inference regarding the future conduct of one other than the declarant. Because, as noted by the court, Pheaster was caught between the common law and the federal rules, it could be read as merely an intellectual exercise without precedential value.

In a concurring and dissenting opinion, however, Judge Ely demonstrated he had qualms about the majority approach to the state-of-mind

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144. Id.
145. See supra note 28.
146. 544 F.2d at 376-80. The court provided extremely detailed insight into its rationale regarding the relationship between Pheaster and the Hillmon doctrine. It made note of the objections by commentators against extending the doctrine to reach the conduct of a person other than the declarant. It pointed out Professor McCormick’s concern about the possible inaccuracy of an inference from a state-of-mind declaration aimed toward a third party. Id. at 376 and n.13 (citing MCCORMICK ON EVIDENCE § 295, at 698 (2d ed. 1972)). But then the Ninth Circuit rejected the reservation. “One such objection is based on the unreliability of the inference but is not, in our view, compelling.” 544 F.2d at 376. The court further stated that Hillmon was a civil case, but was applied with a long reach in Alcalde, which was a criminal case. It also noted that Alcalde was mentioned with approval by the California Evidence Code writers, thus rejecting the narrow scope urged by Inciso. Id. at 379. As mentioned previously, the California Evidence Code was an important source for the authors of the Federal Rules of Evidence. See supra note 29. Finally, after addressing the Advisory Committee and the House Judiciary Committee notes to rule 803(3), the Ninth Circuit concluded, “[W]e read the note of the Advisory Committee as presuming that the Hillmon doctrine would be incorporated in full force . . . [T]he language suggests that the Advisory Committee presumed that such a broad interpretation was the prevailing common law position.” Id. at 379-80. The court opted to uphold the admission of the Adell statement. Id. at 380.
147. Id. at 380.
148. Id. at 379.
149. See, e.g., People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (1944); United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961).
evidence and that he feared the decision would be precedent-setting. However, he felt bound by *Hillmon* to support the majority opinion. Nevertheless, Judge Ely noted the vast criticism that had been levied against *Hillmon*, mentioning specifically *Shepard*, Judge Traynor's dissent in *Alcalde*, and the commentary of legal scholars. Judge Ely said he agreed with those critics. He also said the House Judiciary Committee's intent to limit the *Hillmon* doctrine was yet additional proof that the views of the critics "are now widely believed to be valid."

A subsequent application of a common-law *Hillmon* analysis in *United States v. Astorga-Torres* indicates that the Ninth Circuit now views *Pheaster* as controlling. In *Astorga-Torres*, the court upheld drug and conspiracy charges against several defendants, one of whom had implicated the others by stating he intended to bring "guards" with him to the site of a large drug transaction. The court cited *Pheaster* with approval, although noting that *Pheaster* was technically a pre-rules case that analyzed the *Hillmon* doctrine. It said that one defendant's comment that he would bring "guards" with him was admissible under the federal rules as evidence to show that the declarant carried out his intent. But the court also stated that such evidence required the judge to issue a limiting instruction to the jury not to use the statement as proof that the guards were present at the drug purchase or that the defendants were indeed those guards. Instead, the evidence could only be used to show that the declarant intended to bring guards with him, from which the jury could draw the inference that he carried out his intent.

In *Pheaster* and *Astorga-Torres*, the Ninth Circuit has provided an in-depth examination of its options for the admission of state-of-mind declarations in light of the adoption of the federal rules. But despite its weighty
analysis, it has opted for the traditional Hillmon standard by admitting statements that reflect not only the state of mind of the declarant but that of others as well.\textsuperscript{161}

The United States Court of Appeals for the Eighth Circuit also applies an expansive, common-law approach to the Hillmon doctrine, but without discussing the impact of the federal rules on its Hillmon philosophy. A recent example of this is \textit{United States v. Calvert}\textsuperscript{162} in which the defendant, Calvert, launched a scheme to enter into a business partnership with an inventor. As part of his plan, Calvert procured sizable insurance policies on the inventor’s life, naming his own father as beneficiary. Calvert then planned to hire someone to kill the inventor and intended to collect the policy proceeds.\textsuperscript{163} At trial, over Calvert’s hearsay objection, testimony was admitted demonstrating the victim’s future intentions. Specifically, the victim had told his wife, shortly before he was murdered, that he planned to discuss with Calvert the possibility of backing out of the inventor partnership and cancelling the insurance.\textsuperscript{164} Evidence also showed that shortly before the murder Calvert visited an old acquaintance to offer him $5,000 to kill the inventor.\textsuperscript{165}

The Eighth Circuit upheld the admissibility of the evidence as a state-of-mind declaration of the victim.\textsuperscript{166} The court said evidence showed the victim intended to extricate himself from the business arrangement.\textsuperscript{167} It could also be used to show that he probably expressed that desire to Calvert. Additionally, this evidence could be used to prove Calvert had a motive to pay a fast visit to his friend to present his murder-for-hire offer.\textsuperscript{168} Without addressing the many inferences that could be drawn from this evidence regarding Calvert’s behavior, the court relied on Hillmon and rule 803(3) as authority for admitting the statements to show the victim’s intent.\textsuperscript{169} Although the Eighth Circuit decided \textit{Calvert} after the enactment of the federal rules, no mention was made of the controversy over the scope of Hillmon that has followed in the wake of the rules. Given that the court expressed no doubt about the vitality of the common-law Hillmon approach under the federal rules, it would not be surprising if in the future

\textsuperscript{161} See supra notes 139-60 and accompanying text.
\textsuperscript{162} 523 F.2d 895 (8th Cir.), cert. denied, 424 U.S. 911 (1975).
\textsuperscript{163} Id. at 900-01.
\textsuperscript{164} Id. at 910.
\textsuperscript{165} Id. at 901.
\textsuperscript{166} Id. at 910.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
the Eighth Circuit continued this approach.\textsuperscript{170}

\textbf{B. The Restrictive Approach: Adopting the House Judiciary Committee's Limit}

Since the Federal Rules have been enacted, two circuits, the First and the Fourth, have expressly stated that 803(3) limits the reach of \textit{Hillmon}. The Third Circuit also supports a limitation on the scope of the \textit{Hillmon} doctrine but has made no specific reference to the post-rules controversy over the use of the doctrine to admit evidence against third parties.

In the United States Court of Appeals for the First Circuit in \textit{Gual Morales v. Hernandez Vega},\textsuperscript{171} a district court dismissed Gual Morales' action against his employers, the management of the Puerto Rico Aquedcut and Sewer Authority, because it fell outside a one-year statute of limitations. Gual Morales had alleged that the agency supervisors had conspired to fire him for his union activities, and that the management representatives on the grievance panel had conspired to prevent him from being reinstated.\textsuperscript{172} Additionally, Gual Morales asserted that the sewer agency's lawyer had sought to improperly influence defendant Arroyo, a member of the agency grievance committee, who was presumably neutral.\textsuperscript{173} The lawyer's conduct, Gual Morales contended, could be attributed to the management of the sewer authority.\textsuperscript{174} While no specific statements were attributed to the management, the court noted that Gual Morales had hoped to introduce an affidavit that indicated one of the

\begin{itemize}
\item \textsuperscript{170} \textit{Calvert}, a criminal case involving a state-of-mind declaration in which the declarant was unavailable to appear in court, also raised a constitutional problem not addressed by the court. The sixth amendment guarantees the defendant in a criminal case the right to confront his accusers. U.S. CONST. amend. VI, which states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Arguably, in \textit{Calvert}, since statements of an absent declarant were introduced by the government to help convict the defendant, he might have a legitimate sixth amendment argument. The reasoning of the Supreme Court in \textit{Ohio v. Roberts}, 448 U.S. 56 (1980), however, runs contrary to such an argument. In that case the Court held that a defendant could be confronted at trial by the hearsay statement of an absent declarant in some cases without losing his constitutional protections. \textit{Id.} at 66. The statement, however, must be reliable. "Reliability can be inferred" if the hearsay falls into the category of a "firmly rooted exception," \textit{Id.}, or if it can be shown to be particularly trustworthy. \textit{Id.} Subsequently, some scholars have maintained that the hearsay exceptions of the federal rules should meet the Supreme Court criteria. "In the absence of some special unfairness or unreliability, compliance with article VIII of the Federal Rules of Evidence should constitute compliance with Constitutional confrontation requirements." 4 \textsc{Weinstein's Evidence}, \textit{supra} note 29, at 800-28.
\item \textsuperscript{171} 579 F.2d 677 (1st Cir. 1978).
\item \textsuperscript{172} \textit{Id.} at 678.
\item \textsuperscript{173} \textit{Id.} at 678, 680.
\item \textsuperscript{174} \textit{Id.} at 679.
\end{itemize}
agency's attorneys sought to influence the outcome of the grievance proceeding by "getting to" the neutral member.\textsuperscript{175}

The First Circuit reversed the summary judgment in favor of the defendants.\textsuperscript{176} In so doing, however, the court let stand the trial court's decision to exclude the state-of-mind declarations alleged to have been made by the lawyer.\textsuperscript{177} Confining its explanation to a brief footnote, the court adopted the House Judiciary Committee's limitation of \textit{Hillmon}.\textsuperscript{178} It said that under Federal Rule of Evidence 803(3), the attorney's comments, if made, could not be admissible against another party, namely the defendant, Arroyo.\textsuperscript{179}

In \textit{United States v. Jenkins},\textsuperscript{180} the United States Court of Appeals for the Fourth Circuit also established the House Judiciary Committee's limitation of rule 803(3) as its standard for allowing state-of-mind admissions into evidence. While articulating this standard, however, the \textit{Jenkins} court permitted the admission of state-of-mind evidence showing the future conduct of a person other than the declarant.\textsuperscript{181} Ironically, it did so citing \textit{Hillmon}, and distinguishing \textit{Jenkins} from \textit{United States v. Kaplan},\textsuperscript{182} a Second Circuit case in which the court excluded state-of-mind evidence regarding the conduct of a person other than the declarant.\textsuperscript{183} The court defined the issue in \textit{Jenkins} not as conduct but as rationale or reason for the conduct.\textsuperscript{184}

In \textit{Jenkins}, a federal wiretap intercepted a telephone conversation between Beatrice Johnson and a suspected drug dealer. In the conversation the two made plans for an early morning business meeting at the dealer's home.\textsuperscript{185} "I'm on my way," was the last comment Johnson made to the dealer.\textsuperscript{186} Johnson's boyfriend, Jenkins, had driven her to his planned rendezvous and later lied about it to the grand jury.\textsuperscript{187} Initially he said he was visiting friends in the neighborhood where the drug dealer also happened to live and that Johnson was along for the ride. He said Johnson never left

\begin{footnotes}
\item[175] Id.
\item[176] Id. at 680.
\item[177] Id. at 680 n.2.
\item[178] Id.
\item[179] Id. The lower court cited 803(3), \textsc{Fed. R. Evid.} 28 U.S.C.A. (West 1983), note to paragraph (3), which is the House Judiciary Committee restriction of \textit{Hillmon}.
\item[181] Id. at 844-45.
\item[182] 510 F.2d 606 (2d Cir. 1974).
\item[183] See \textit{supra} note 124 for a discussion of \textit{Kaplan}.
\item[184] 579 F.2d at 843.
\item[185] Id. at 841.
\item[186] Id. at 842.
\item[187] Id. at 841.
\end{footnotes}
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the van while he went in to visit these unnamed friends. At a second grand jury appearance, Jenkins said Johnson left the van briefly for an unknown destination while he was inside with these same friends. Finally, he said he drove to the neighborhood to see a friend, and that Johnson asked to come along to see another unnamed friend. The Fourth Circuit upheld the admission of the wiretap conversation to show why Jenkins had made the trip.

The Jenkins court followed the House Judiciary Committee's 803(3) limit, attributing it to the will of Congress. The court noted that had Johnson's statement been offered to show that Jenkins accompanied Johnson, it would not have been admissible. The Fourth Circuit distinguished Kaplan on the basis that the state-of-mind evidence was accusatorial and not simply explanatory. The court noted that in Kaplan an undercover narcotics agent was told by a seller of drugs that the seller's "connection" would be at a drug purchase the next day. Thus, when Kaplan was present at the sale, the evidence was, in effect, a comment on Kaplan's role or conduct. In Jenkins, the court maintained that the evidence was always limited solely to the reason why Jenkins made the late-night van trip. It did not go to the issue of whether he actually made the trip, since that was never at issue.

The dissent, while fully supporting the court's narrow Hillmon standard, asserted that the majority erred in its application of the standard. The wiretap evidence of the conversation between Johnson and the drug dealer was improperly allowed to prove by inference what it could not be used to show directly. The logical inference from this evidence was that Johnson asked Jenkins for a ride to the drug dealer's home. Thus, it could be further inferred that Jenkins agreed, knew of Johnson's intended destination, and deliberately lied about the evening's activities to the grand jury.

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188. Id.
189. Id. at 841-42.
190. Id. at 842.
191. Id. at 843.
192. Id.
193. Id.
194. Id. at 843-44.
195. Id. at 844 (citing 510 F.2d at 608).
196. Id. at 844.
197. Id. The court also noted that in Kaplan the Second Circuit had decided the undercover agent's state of mind was not material to the case as Johnson's was in this instance. Id. See supra note 11, which discusses Ponticelli, indicating that a declarant's state of mind must be relevant to admit this type of hearsay.
198. 579 F.2d at 844-5.
The United States Court of Appeals for the Third Circuit also supports, in theory at least, a limit on the reach of *Hillmon* statements. This circuit, has addressed the issue in a case tried before the enactment of the federal rules, but brought up on appeal after they went into effect. In *Baughman v. Cooper-Jarrett, Inc.*, an out-of-work trucker sued his former employer and four other companies for conspiring to blacklist him. Following two trials the lower court ruled, in part, in favor of the truck driver, and against one of the companies, Wilson Freight Forwarding. On appeal, Wilson argued that the statement of a Cooper-Jarrett vice president was inadmissible as evidence that a conspiracy existed among the trucking firms. The vice president had said Baughman "will not drive any of Cooper-Jarrett's trucks ever again nor will he drive for any other freight company."

The court of appeals maintained that evidence that the trucker would not be allowed to drive for Cooper-Jarrett was not very probative on the issue of whether a conspiracy against the trucker existed. The evidence that the trucker would not be permitted to drive for others was probative only of the speaker's state of mind. The court added that it was not reliable evidence of the future conduct of other firms whose cooperation would be required to carry out the speaker's intent. In spite of its narrow view of the *Hillmon* doctrine, however, the *Baughman* court concluded the evidence could be used to show the vice president's intent to

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199. *Id.* The dissent contended, therefore, that *Jenkins* was an even better argument than *Kaplan* for excluding the evidence. It argued that the reason the Second Circuit ultimately reversed Kaplan's conviction was because the jury could not distinguish between the effect of the comment on the agent's state of mind and its reflection on Kaplan's activities at the meeting. *Id.* (citing 510 F.2d at 610). This inability by the jury to distinguish was present, the appeals court believed, even when the statement was bluntly accusatory and the trial judge issued a limiting instruction. *Id.* Therefore, in *Jenkins*, where the comment generated an inference that was far more subtle, it became even more harmful to the defendant and should have been excluded. *Id.*


201. *Id.* at 531.

202. *Id.* At the first trial, the jury found for the plaintiff against Cooper-Jarrett. Another defendant settled with Baughman, leaving only one remaining defendant company, the Wilson Freight Forwarding Co. A jury verdict resulted in a $25,000 judgment for Baughman, increased by treble damages to $75,000. The trial court subsequently reduced the judgment to the original $25,000 and both Baughman and Wilson appealed. *Id.*

203. *Id.* at 532-33.

204. *Id.* at 532.

205. *Id.* at 533.

206. *Id.*

207. *Id.*
seek the participation of others in the blacklist plot.\textsuperscript{208}

The Third Circuit was definitive in limiting the state-of-mind comments to the intended activity of the speaker, but never mentioned the post-rules debate over the scope of the \textit{Hillmon} doctrine.\textsuperscript{209} It did express qualms over the lack of a limiting instruction restricting the remarks of the declarant only to discern his intent. But the court ruled that enough nonhearsay evidence of a conspiracy existed to render as harmless error the lack of a limiting instruction.\textsuperscript{210}

IV. \textsc{The Implications for the Federal Circuits of Hillmon Uncertainty}

The federal circuits clearly are not acting uniformly when faced with the issue of whether to admit state-of-mind declarations that reflect upon the intended conduct of persons other than the declarant.\textsuperscript{211} The Supreme Court has, to date, refused to become involved in a post-federal rules examination of the reach of the \textit{Hillmon} doctrine.\textsuperscript{212} Surely enough courts have had to face the issue and have ruled in enough different ways to warrant a serious exploration by jurists of post-federal rules analysis of cases involving \textit{Hillmon} statements. Courts should return to the case that spawned the controversy because in so doing they might better understand that the modern-day interpretation of the \textit{Hillmon} doctrine has been clouded by \textit{Alcalde}. As a result, the \textit{Hillmon} doctrine has been stretched far beyond its intended reach by the common law courts. This, consequently, has interfered with the ability of the federal circuits to accept the attempt by Congress, particularly the House Judiciary Committee, to narrow the scope of the \textit{Hillmon} doctrine through rule 803(3).

A. \textsc{Applying the Hillmon Doctrine to Criminal Cases}

The broad-reaching, common-law \textit{Hillmon} doctrine should not be applied in criminal cases. Perhaps because of its bizarre and mysterious fact

\begin{itemize}
\item \textsuperscript{208} Id. Outside evidence of a blacklist existed in a statement made by an agent of the Wilson company to Baughman and in statements made to Baughman by an employee of yet another company sued in the blacklist conspiracy. \textit{Id.} at 532-33. The court also said the vice president's statement should have been admitted with a limiting instruction to the jury. However, the court considered the lack of the instruction harmless error when combined with the other information strongly indicating the existence of the conspiracy. \textit{Id.} at 533.
\item \textsuperscript{209} Id. at 532-33.
\item \textsuperscript{210} Id. at 533.
\item \textsuperscript{211} See, e.g., supra note 7; see also supra note 109.
\end{itemize}
pattern, it is often forgotten that *Hillmon* was a civil case. A recalcitrant group of insurance companies attempted to avoid paying Hillmon's widow the proceeds of the life insurance policies he had purchased. 213 The declarations of letter-writer Walters were used to determine if he had accompanied Hillmon to a campsite. The inference to be drawn was that if Walters made the journey with Hillmon, then perhaps it was Walters' body and not Hillmon's that lay lifeless before the campfire. But if the person whose body was found at the fireside was murdered, the insurance companies did not have to prove John Hillmon was the killer. In order to prevail, the companies only had to show that the body found at the campsite was not one they had insured. Thus, when the Court said that Walters' letters were competent evidence to show the author's intent to travel with Hillmon and to permit the inference that the intent was carried out, it could (and did) ignore the prejudicial impact of that evidence on Hillmon. 214

Had Hillmon been facing criminal charges for the murder of Walters, the Court presumably would have addressed the legal and factual problems with the evidence. It might have expressed concern about the possible intervening factors that rendered this evidence untrustworthy. Bad weather, an argument between the men, and a better job opportunity all could have led Walters to abort his intended trip with Hillmon. 215 Instead, the Supreme Court waited until *Shepard* to acknowledge the prejudicial impact of this evidence on Hillmon. 216

213. 145 U.S. at 285-86.

214. Id. at 295-96. One of several cases to which the Court looked for precedential value was *Hunter*, a criminal case. 40 N.J.L. 495 (1878). In *Hunter*, the New Jersey court upheld the admission of statements made by a murder victim to his family that implicated the defendant. The court ignored the possible prejudicial impact of those statements on the defendant. Id. at 545. Perhaps because this prejudice was not a concern of the *Hillmon* Court, it cited *Hunter* without exploring this issue. 145 U.S. at 299.

215. For an extensive view of the problems that accompany the use of the *Hillmon* doctrine in criminal cases, see Note, *Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the Hillmon Doctrine*, 35 VAND. L. REV. 659 (1982). The author states:

Admission of statements of future intent that place the defendant and declarant together at or near the time of declarant's murder endangers the defendant's right to a fair trial if the jury does not restrict the use of this circumstantial evidence only to proof of the declarant's probable conduct. Because of the potential prejudice to the defendant in this situation, the trial court must consider carefully the admissibility of each statement on a case by case basis and avoid perfunctory application of this exception.

Id. at 695 (emphasis in original). The author argues for courts to apply a rule 403 analysis to *Hillmon* statements in criminal cases to ensure they will be examined closely for their prejudicial impact. Id. at 703-05. FED. R. EVID. 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The author urges careful judicial scrutiny to determine if a *Hillmon* statement is in fact genuinely material to the case. He also argues for exclusion of the *Hillmon* statement when there is sufficient corroborating
dicial dangers of some state-of-mind comments. Because Shepard dealt with a declarant's accusations against her husband for her murder, the Court warned a jury might not limit the statement for use solely as an indication of the declarant's state of mind. Indeed, a jury might use the statement as evidence of the husband's criminal conduct, thus drawing an impermissible inference.

Shepard can thus be read as a restriction on the use of Hillmon-type statements against parties other than the declarant particularly in the context of a criminal case. Read in this context, it becomes clear that the California Supreme Court erred in Alcalde when it admitted the statements of a murder victim that implicated the defendant in her murder. If, because of their unreliability and prejudicial impact, a declarant's comments can't be used to show what he or she thought another person had already done in the past, which is the dicta of the Shepard Court, obviously a declarant's comments should not be used to show what he or she thinks another person will do in the future. In essence, Alcalde stretched the Hillmon doctrine to allow just that. Its expansive interpretation of the doctrine became the standard common law application of the doctrine by the courts. But in so doing, Alcalde not only ignored Shepard, but it applied the Hillmon doctrine to the kind of facts that were never included in the original Hillmon case. Issues like the potential prejudice to a criminal defendant implicated by a Hillmon statement in the commission of a crime, or the effectiveness of a limiting instruction to ameliorate that implication, were never relevant to Hillmon.

As a result, in Calvert, a criminal decision in the Eighth Circuit, there was absolutely no discussion of the potential for prejudice in admitting the evidence. Instead, the court merely cited Hillmon, the federal rules, and the views of several commentators to admit a declarant's hearsay statement implicating the defendant in a murder. Thus, the Eighth Circuit erroneously relied on Hillmon for the proposition that the state-of-mind declarations of one person could be admitted without prejudice to a defendant in a criminal case. In doing so, this and other courts have applied circular reasoning. They have said in effect that they will admit the statements because rule 803(3), or the Hillmon doctrine in which the rule is rooted, allowed it. But the Hillmon interpretation on which these courts are relying and on which the rule is based, is the one established by the nonhearsay evidence on the ground that the statement is then no longer necessary to prove a material fact. Id. at 700-03.

216. 290 U.S. 96, 104-06 & unnumbered footnote at 105.
217. Id. at 104.
218. 523 F.2d 895, 910.
California Supreme Court some fifty years after *Hillmon* in *Alcalde*. The Supreme Court has never sanctioned the *Alcalde* reasoning because it has never addressed directly the issue of *Hillmon* statements in the criminal context.\(^{219}\) In fact, the Supreme Court has only addressed the issue tangentially in *Shepard*, and then it noted with concern the strong prejudicial impact of such evidence in criminal cases.\(^{220}\)

2. **The Limiting Instruction**

Courts admitting *Hillmon*-statement evidence against third parties often look to the limiting instruction as a cure-all for any potential prejudice.\(^{221}\) The limiting instruction has been codified in the federal rules.\(^{222}\) But certainly the *Shepard* Court understood the inadequacy of a limiting instruction in a case where a person's state-of-mind declaration implicates another in a crime.\(^{223}\) Professor McCormick has said that limiting instructions are of limited usefulness in stemming the improper use of evidence at trial.\(^{224}\) Justice Traynor, dissenting in *Alcalde*, said it was clear a limiting instruction would not be effective in that case.\(^{225}\) It is difficult to imagine, for example, how a limiting instruction in *Pheaster* could possibly render harmless Larry Adell's voiced intention to meet "Angelo" shortly before he (Adell) was kidnapped.\(^{226}\) Clearly, the natural inference to be drawn was that "Angelo" was the defendant, that the defendant was in fact present at the parking-lot meeting, and that he certainly had the opportunity, if not the motive, to abduct Adell.

B. **The Confusion Caused by the 803(3) Controversy**

1. **Confusion under a narrow Hillmon Approach**

There is no doubt that the circuit courts are confused about the scope of the *Hillmon* doctrine under the federal rules.\(^{227}\) In some instances when courts have specifically limited the scope of *Hillmon*, they seem to have

\(^{219}\) See supra note 212.

\(^{220}\) 290 U.S. at 94, 104.

\(^{221}\) See, e.g., *Pheaster*, 544 F.2d at 376; *Alcalde*, 24 Cal. 2d 177, 185, 148 P.2d 627, 630.

\(^{222}\) FED. R. EVID. 105 states: "When evidence is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

\(^{223}\) 290 U.S. at 104.

\(^{224}\) MCCORMICK ON EVIDENCE § 59, 136 (2d ed. 1972).

\(^{225}\) 24 Cal. 2d 177, 190, 148 P.2d 627, 633.

\(^{226}\) 544 F.2d 353, 374-75.

\(^{227}\) See supra notes 108-09.
difficulty applying the standard they have chosen.\textsuperscript{228} This was apparent in the decisions of the Third Circuit in \textit{Cooper-Jarrett} and the Fourth Circuit in \textit{Jenkins}. Relying on oft-cited law review criticism of the broad reach of the common law \textit{Hillmon} doctrine, the \textit{Cooper-Jarrett} court said a declarant's state-of-mind comment was not trustworthy evidence of third-party conduct.\textsuperscript{229} But, after expressing its philosophical intention to so limit \textit{Hillmon} statements, the court said the evidence was admissible to depict an intent by the defendant to try to encourage third-party cooperation in a blacklist against the plaintiff.\textsuperscript{230} It approved this use of the evidence even in the absence of a limiting instruction to the jury.\textsuperscript{231} Yet it is difficult, if not impossible, to comprehend how a jury, presumably unschooled in the nuances of evidence, could restrict its use of the statements of the defendant without guidance from the court. Given that independent evidence of the conspiracy existed, the Third Circuit would have better adhered to its philosophy by ruling that the \textit{Hillmon} statement was inadmissible and allowing the jury to rely solely on the independent evidence.

Similarly, in \textit{Jenkins},\textsuperscript{232} the Fourth Circuit bluntly asserted that the House Judiciary Committee's narrow \textit{Hillmon} approach was controlling. But like the common law court decisions that preceded the federal rules, the \textit{Jenkins} court ruled that the declarant's statement was admissible to infer the rationale behind another's conduct to determine that the statement did not violate the post-rules approach to the \textit{Hillmon} doctrine advocated by the House Judiciary Committee.\textsuperscript{233} In \textit{Jenkins}, the defendant lied to a grand jury about the reason he chauffered the declarant to the neighborhood of her drug supplier.\textsuperscript{234} By using the statements to show only why Jenkins made the trip rather than to prove he actually travelled with the declarant, the court believed it was keeping well within its \textit{Hillmon} philos-
The trial judge had issued an instruction to the jury limiting the statement to showing only the declarant's state-of-mind as she got in the vehicle with Jenkins. From this use, the jury was to have drawn the inference that Jenkins was asked by the declarant for a ride to the narcotics dealer's residence, and thus that he lied to a grand jury when he offered different reasons for making the trip. But, as more properly reasoned in the Jenkins dissent, the majority undercut the trustworthiness guarantees implicit in a narrow reading of rule 803(3). It did so by allowing the prosecutor to prove by inference that which could not be proved explicitly under the House Judiciary Committee's interpretation of the rule, which the majority professed to adopt. Faithfulness to a narrow interpretation of the rule should have led the court to uphold the admission of the evidence in any prosecution of the declarant for any alleged role in narcotics trafficking but to exclude it for any possible use against Jenkins.

The application of the state-of-mind theory espoused by the Cooper-Jarrett and Jenkins courts is inexplicable given their assertion of allegiance to a narrow Hillmon reach. Because the Third Circuit ignored the current 803(3) controversy, looking instead to a critic of a broad Hillmon scope for support, it can be assumed that its sympathies were with the critic. In Cooper-Jarrett, however, the practical effect of the court's decision to admit the statement, particularly without a limiting instruction, was to place the circuit in the same camp as the opponents of the House Judiciary Committee's view of Hillmon. Perhaps in the criminal context, where the potential for prejudice carries much higher stakes, this court would be less likely to do this.

In Jenkins, the court appears to have been enticed by a false reason/conduct dichotomy. Yet there is simply no way of showing the reason one did an act without also showing that the act was done. Given that the Fourth Circuit was definitive about adopting the House Judiciary Committee's 803(3) limitation, it certainly must be placed among the minority of courts taking a narrow Hillmon approach. Looking solely to its application of the doctrine, however, one would have to be skeptical of its asserted position. Unfortunately, because the precise nature of the information be-

235. Id. at 842-44.
236. Id. at 842.
237. Id.
238. Id. at 845.
239. Id.
240. Ironically, perhaps it is a poet who best understands the futility of this distinction. William Butler Yeats in his poem Among School Children asks, "How can we know the dancer from the dance?" THE NORTON ANTHOLOGY OF POETRY, 917-18 (W.W. Norton & Co. 1970).
ing sought at trial through the 803(3) exception is so subtle in Jenkins, it may not be indicative of the court's future applications of this rule. But it may have been this very subtle reason/conduct distinction that caused the court to apply a faulty 803(3) analysis. The court stated that this evidence could not be used to show Jenkins' conduct, but in so stating, demonstrated that it failed to comprehend the intricacies of the rule.\footnote{241} Certainly the rule demands that all 803(3) statements be offered to show state-of-mind; thus when offered to infer conduct, such a statement is also being used to explain why that conduct will be undertaken. When Larry Adell said he was going to the parking lot to meet "Angelo" in order to obtain drugs, he was also explaining \textit{why} he was going. The inferences are closely linked. A person intends certain conduct for a particular reason and that reason leads the person to undertake the conduct. By way of another example, in Cicale, when the drug intermediary told the undercover agent he would be meeting his supplier in a variety of places, those statements could be viewed as his explanation for \textit{why} he was meeting the person with whom he was later seen. Through that explanation, one may draw the reasonable inference that Cicale completed his intended conduct by meeting the dealer and consummating the narcotics deals.

2. The relationship between 803(3) and 801(d)(2)(E)

Indicating uncertainty over the post-rules scope of the \textit{Hillmon} doctrine, some courts have apparently sought to avoid controversy by upholding the admission of evidence against third parties on alternative grounds. This was the method used by the Second Circuit in \textit{Mangan} after it admitted utter confusion by the post-rules \textit{Hillmon} doctrine.\footnote{242} Although statements by one brother implicating another in a tax fraud scheme were introduced by the government under 803(3) and under 801(d)(2)(E), the coconspirator exception to the hearsay rule, the \textit{Mangan} court opted to uphold their admission under the latter rule.\footnote{243} The court wrestled with the issue, however, because it was not clear that the statements, which were made to a third accomplice, were actually uttered with the requisite intent to further the conspiracy.\footnote{244}

In Cicale, also decided by the Second Circuit, the court blurred the lines

\footnote{241. 579 F.2d at 843.}
\footnote{242. 575 F.2d at 43 n.12.}
\footnote{243. Id. at 44.}
\footnote{244. Id. at 43-44. In the end, the court accepted the statements under 801(d)(2)(E) without having to answer the tough question of whether the statements really met the 801(d)(2)(E) "in furtherance" test. It was able to avoid it because the defense apparently failed to make a timely objection on the matter at trial. Id. at 44.}
between 801(d)(2)(E) and 803(3) by admitting state-of-mind declarations against a third party to support the inference that he was a member of the drug conspiracy. The court, however, bolstered its argument for admission of the 803(3) statements by noting that the defendant, Cicale, was also shown to be a member of the conspiracy by independent, nonhearsay evidence. There are several problems inimical to meshing these two rules. These rules were tailored to meet particular factual situations. Rule 801(d)(2)(E), for example, is designed to allow the admission of statements against other persons who are shown by independent evidence to have been part of a conspiracy and who act to further that conspiracy. Rule 803(3) is limited to comments that reflect upon a declarant's frame of mind from which his intended conduct can be inferred. Courts which interchange these rules avoid grappling with the thornier aspect of each.

In Mangan, by admitting the evidence under 801(d)(2)(E) solely because the defendant failed to object, the court was able to avoid dealing with both rules. Thus, the Mangan court was able to side-step the issue that was implicit in Cicale: namely, whether state-of-mind hearsay that may be of questionable admissibility against a third party directly can nonetheless be used against that party to show he was a member of the conspiracy. The Mangan court was able to avoid dealing with both rules. The Cicale court was able to avoid the issue as well by asserting that sufficient independent eye-witness nonhearsay evidence showed the defendant was part of a drug-sale conspiracy. Thus, the 803(3) statements should have been unnecessary. The Cicale court, however, did not address whether these statements were really needed in light of the eyewitness evidence and by failing to do so, the court also failed to analyze the possible result of admitting the statements. Admitting 803(3) statements against a third party to support the existence of a conspiracy would appear to generate a type of circular ring of evidence. In other words, 803(3) statements regarding one declarant's intended conduct that relied on the cooperation of another could be used to support the inference that both completed that conduct, which in turn could be used as evidence of the existence of a conspiracy. This would open up the door to the 801(d)(2)(E) statements that could be used

245. 691 F.2d at 95, 103-05.
246. Id. at 104.
247. 4 Weinstein's Evidence, supra note 29, at 800-03, 800-15.
248. See supra note 36.
249. See supra note 6.
250. 691 F.2d at 95, 103-04. For an examination by a court, Professor McCormick, and a student author of the issue of necessity for state-of-mind declarations under the hearsay rule, see supra notes 11 & 215.
by one conspirator against another.\textsuperscript{251}

In a circuit where the courts firmly adhere to a broad, common-law view of the \textit{Hillmon} doctrine, admission of 803(3) statements against a third party to demonstrate the existence of a conspiracy would not pose any problem. As clearly stated by even the dissent in \textit{Cicale}, admissible hearsay outside the 801(d)(2)(E) rule can fully and fairly support an initial finding that a conspiracy exists.\textsuperscript{252} If the Second Circuit were to rule squarely in favor of supporting a broad reach for \textit{Hillmon} statements, it is conceivable that prosecutors would rely on it heavily. The government could use it to admit state-of-mind declarations against members of a conspiracy without having to demonstrate the existence of, or the intent to, further that conspiracy. Nor would the government have to gather non-hearsay evidence. Instead, it could use the 803(3) evidence to support the existence of the conspiracy and then get subsequent statements of conspirators admitted under rule 801(d)(2)(E). But in relying on a failure to make an objection at trial in \textit{Mangan} or on independent evidence in \textit{Cicale}, these courts have avoided articulating a definite philosophy about the scope of \textit{Hillmon} in the post-rules era, thereby affording scant guidance to litigators.

\section*{C. The Fairness of expanded \textit{Hillmon}}

The cardinal precept surrounding all trial testimony, as explicitly stated in Federal Rule of Evidence 602, is that it be given by a person with first-hand knowledge of the facts.\textsuperscript{253} This is true of statements offered at trial under one of the exceptions to the hearsay rules.\textsuperscript{254} The declarant is the only person with first-hand knowledge of his own mind. Unless the declarant is clairvoyant, he does not have any certainty that his own intended conduct will come to pass. Such statements are admissible, however, under the theory that they make it somewhat probable that the conduct that was intended was carried out. But once these statements venture into

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{251} This circular ring of evidence theory is somewhat akin to the traditional "bootstrapping" argument against using statements by one conspirator against another to indicate the actual existence of the conspiracy. \textit{See} \textit{Glasser v. United States}, 315 U.S. 60 (1942). There the Court said that without some source of evidence, that a conspiracy existed beyond just the comments of an alleged fellow conspirator, "hearsay would lift itself by its own bootstraps to the level of competent evidence." \textit{Id.} at 75.
\item \textsuperscript{252} \textit{691 F.2d} at 109.
\item \textsuperscript{253} \textit{FED. R. EVID.} 602 states in relevant part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter . . . ." The only exception to the first-hand knowledge rule is in the case of expert witnesses who may testify without first-hand knowledge of the event. \textit{FED. R. EVID.} 602, advisory committee note, and \textit{FED. R. EVID.} 703, which concerns expert witnesses.
\item \textsuperscript{254} \textit{FED. R. EVID.} 803, advisory committee's note.
\end{itemize}
\end{footnotesize}
the realm of another person’s intended conduct, the first-hand knowledge is gone. The declarant has no way of knowing whether the other party shares his intention regarding the planned conduct, and thus without that first-hand knowledge component that is explicit in the federal rules, the courts, in both compliance with the federal rules and in fairness, should not admit it.

Some would argue that Federal Rule of Evidence 403, which calls for the exclusion of overly prejudicial evidence, should be relied upon by counsel to protect litigants from the adverse impact of state-of-mind declarations that can be used to infer third party conduct.\textsuperscript{255} Certainly in circuits where courts have adhered to the view that state-of-mind declarations may reach third parties, this is one method of guarding against unfair inferences. But the optimum response to the issue of fairness regarding 803(3) admissions should reside in the rule itself. Each exception to the rule against hearsay was codified because the collective experience of the judges, scholars, and litigators rendered it trustworthy.\textsuperscript{256} Clearly 803(3) statements are most reliable when they are offered as commentary about what is on the mind of the declarant. Courts should permit them to be stretched no further.

V. CONCLUSION

The scope of the \textit{Hillmon} doctrine was greatly broadened by the California Supreme Court in \textit{Alcalde}. That expansion of the doctrine was very influential with the common law courts. Congress was certainly aware of the manner in which the \textit{Hillmon} doctrine was being applied in the courts at the time of the drafting of the Federal Rules of Evidence.

These rules were designed to unite, not fragment the courts’ approach to evidentiary issues. The circuit courts, however, seem unable to determine if the Congress meant to narrow the \textit{Hillmon} doctrine that was broadened by \textit{Alcalde} when it adopted the rules. In the name of the fairness that is supposed to be the foundation of the federal rules, the \textit{Hillmon} doctrine should be narrowed to include only a declarant’s comments about his own future conduct. The House Judiciary Committee certainly has said as much. Some would argue that Congress, by inference, has said the same. Perhaps it is time for Congress to say as much directly. But resorting to the lengthy process for reshaping the federal rules of evidence may be unnecessary.

The courts can look for guidance to those few circuits that have accepted

\textsuperscript{255} For a student author’s outline of the Rule 403 argument, see \textit{supra} note 215.

\textsuperscript{256} \textit{4 Weinstein’s Evidence, supra} note 29, at 800-03, 800-15.
a narrow *Hillmon* scope which limits state-of-mind declarations to the intended behavior of the declarant. If more circuits adopt this approach, perhaps the federal courts will struggle less with the different *Hillmon* options, and thereby be less likely to become confused in their analysis and application of them. If the purpose of the rules is to facilitate the search for truth in litigation, then the line should be drawn on *Hillmon* statements where the knowledge and, consequently, the truth stop.257

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