APPENDIX—Continued

examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

. . . . . .

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

UNITED STATES of America, Plaintiff-Appellee,

v.

Gerald Patrick HEMMING, Defendant-Appellant.

No. 78-5113.

United States Court of Appeals, Fifth Circuit.

April 6, 1979.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, William H. Hoeveler, J., of knowingly and intentionally conspiring to import into the United States cocaine and marijuana. Defendant appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) under a judicial ruling then applicable, an instruction given when hearsay statement of a coconspirator was offered by the prosecution and which did not clearly explain to the jury

that the conspiracy itself must be established by independent nonhearsay evidence, beyond reasonable doubt, before hearsay testimony might be considered and that it must be established by independent evidence that defendant and declarant were both members of the conspiracy and that the declaration was made in the course of and in furtherance of the conspiracy was insufficient, and instructions at the end of trial did not adequately correct such insufficiencies; (2) in view of the dearth of nonhearsay evidence supporting existence of the conspiracy and defendant's membership in it, the inadequacy of the cautionary instructions on receipt of hearsay evidence was prejudicial, requiring reversal of defendant's conviction, and (3) nonhearsay evidence was sufficient for the jury.

Reversed and remanded.

1. Courts ⇐100(1)

Where judicial ruling that instruction was incomplete had been criticized and overruled by en banc circuit court, but overruling decision was specifically prospective, case in which trial had occurred before such overruling decision was handed down was subject to requirements of overruled case.

2. Criminal Law ⇐779

Failure to give cautionary instruction when hearsay statement made by alleged coconspirator is first proffered is error, and instruction at end of trial does not necessarily cure error.

3. Criminal Law ⇐779, 823(1)

Under judicial ruling then applicable, instruction given when hearsay statement of coconspirator was offered by prosecution and which did not clearly explain to jury that conspiracy itself must be established by independent nonhearsay evidence before hearsay testimony might be considered and which did not explain that conspiracy must be established beyond reasonable doubt before the hearsay may be considered and that it must be established by independent evidence that defendant and declarant were both members of conspiracy and that declaration was made in course of and in furtherance of the conspiracy was insufficient, and instructions at end of trial did not adequately correct such insufficiencies.

4. Criminal Law ⇐1038.2, 1038.3

Where defendant did not request correct instruction at time hearsay was proffered and did not object to incomplete one given by trial court, conviction could be reversed only if failure to give complete instruction sua sponte constituted plain error which significantly and substantially prejudiced defendant. Fed.Rules Crim. Proc. rule 52(b), 18 U.S.C.A.; Fed.Rules Evid. rule 801(d)(2)(E), 28 U.S.C.A.

5. Criminal Law ⇐1172.2

In view of dearth of nonhearsay evidence supporting existence of conspiracy and defendant's membership in it, inadequacy of cautionary instructions on receipt of hearsay evidence was prejudicial, requiring reversal of defendant's conviction.

6. Federal Courts ⇐950

Although instructions limiting use of hearsay evidence were inadequate and prejudicial under judicial ruling in effect at time of trial, and later judicial ruling was prospective only, new trial required because of such prejudicial error called for application of criteria under new ruling rather than instructing jury as to how to apply them under overruled decision. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.; Fed. Rules Evid. rule 801(d)(2)(E), 28 U.S.C.A.

7. Criminal Law ⇐1134(1)

Before remanding case for new trial because of inadequate instructions, Court of Appeals would rule upon challenge to sufficiency of evidence to sustain conviction.

8. Conspiracy ⇐48.1(4)

Nonhearsay evidence in prosecution for knowingly and intentionally conspiring to import into United States cocaine and marijuana was sufficient for jury. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, 21 U.S.C.A. § 963.

9. Conspiracy ⇐45

In prosecution for knowingly and intentionally conspiring to import into the

United States cocaine and marijuana, in context of evidence presented at trial, including defendant's testimony that his only connection with Drug Enforcement Administration agents was to aid alleged coconspirator in securing loan using his airplane as collateral, evidence relating to defendant's role in presence of agents, in sale of rifle with silencer and telescope was admissible. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1013, 21 U.S.C.A. § 963.

Theodore J. Sakowitz, Federal Public Defender, Miami, Fla., for defendant-appellant.

Jack V. Eskenazi, U. S. Atty., Linda C. Hertz, Asst. U. S. Atty., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, TUTTLE and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Gerald Patrick Hemming appeals from a judgment of conviction entered after a jury trial. Hemming was charged, along with Benton Franklin Thomas, Joseph Thomas Oliveti, and Jacob Cochran, in a one-count indictment with knowingly and intentionally conspiring to import into the United States cocaine and marijuana in violation of 21 U.S.C. § 963. The District Court severed the defendants for trial, and the convictions of Thomas and Oliveti have been affirmed on appeal.[1] *United States v. Thomas*, 567 F.2d 638 (5th Cir. 1978). Hemming, who was tried alone, now complains that (1) a cautionary instruction explaining the limited use of hearsay in a conspiracy case was fatally defective; (2) the legally competent evidence was insufficient to support his conviction; and (3) the District Court committed plain error in admitting into evidence prejudicial testimony from Government witnesses pertaining to the ownership and sale of a rifle with a silencer and telescope when the only crime charged against him was that of conspiracy to import drugs. Finding merit in his first argument, we reverse his conviction and remand for a new trial.

I. *The Facts*

The Drug Enforcement Administration (DEA) began a narcotics investigation, with agents posing as individuals interested in purchasing large quantities of cocaine, in November of 1975. Ten months later, the investigation culminated in the return of the indictment against Hemming, Thomas, Oliveti, and Cochran. During this ten-month period, there were numerous meetings and a lot of talk, usually by Thomas, about supplying contraband and planes and boats transporting kilos of cocaine and tons of marijuana, but no contraband was ever produced by any of the men charged in the indictment. There were approximately fifteen or sixteen meetings between DEA undercover agents and Thomas, with Oliveti in attendance at three of them and Cochran present at four. The agents had only one meeting with Thomas where Hemming was present, although Thomas repeatedly referred to Hemming during other meetings as his closest associate in the drug smuggling operation. There is a conflict between Hemming's testimony and the DEA agents' testimony as to the substance of the single conversation in which Hemming participated. Hemming testified that he was present for the sole purpose of helping Thomas, his acquaintance of seven years,[2] secure a loan with his airplane as collateral. He claims to have been perplexed by the DEA agents' references to drug smuggling. The agents, on the other hand, recalled the gist of the conversation as being drug related, with Hemming offering assurances of the quality of the security and contacts in his and Thomas' drug smuggling operation.

1. Cochran was to have been tried with Thomas and Oliveti, but he failed to appear and apparently remains a fugitive from justice.

2. There is no indication that Hemming knew Oliveti or Cochran prior to their indictment.

The only other nonhearsay evidence offered against Hemming by the Government related to his alleged participation in the sale of a high powered rifle with a silencer and telescope. In the course of the investigation, the agents discussed with Thomas, as they stood in the parking lot of a bar, their interest in purchasing such a weapon. When one of the agents asked to see the rifle and silencer, Thomas stated he would first have to go inside and speak with his partner. Shortly thereafter, Hemming came out of the bar, took something that was wrapped in a white sheet out of his car and placed it in the trunk of Thomas' car. Thomas then drove the agents to a test site to fire the weapon, where he removed from the trunk a .22 caliber rifle and a silencer that was wrapped in a white sheet.

Our brief review of the facts reveals that a great majority of the evidence concerning the drug smuggling conspiracy and Hemming's participation therein came from extrajudicial hearsay statements of alleged coconspirators. The agents repeatedly testified, over Hemming's objection, to statements made by Thomas concerning the drug smuggling operation and the major role Hemming played in it. The District Court recognized that the statements were hearsay, but admitted the evidence conditionally, subject to prima facie proof of the conspiracy, and gave an accompanying limiting instruction.

II. *The Instruction in Light of Apollo*

Though he did not object at trial to the content of the instruction given, Hemming now contends that the instruction was incomplete under *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973).

[1] Although *Apollo* has recently been criticized and overruled by the *en banc* Circuit Court in *United States v. James*, 590 F.2d 575 (5th Cir. 1979), *James* is specifically prospective. This case is thus subject to the requirements of *Apollo*.

[2] In *Apollo*, we recognized

> a minimum obligation on the trial judge in a conspiracy case in which extrajudicial statements of alleged coconspirators are proffered to give a cautionary instruction on the limited uses of hearsay testimony, explaining clearly to the jury the requirement that the conspiracy itself and each defendant's participation in it must be established by independent nonhearsay evidence which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony.

476 F.2d at 163. The failure to give such a cautionary instruction when the hearsay is first proffered is error, and instruction at the end of trial does not necessarily cure the error. *United States v. Brown*, 555 F.2d 407, 423 (5th Cir. 1977); *United States v. Apollo*, 476 F.2d at 163–64.

[3] When the Government first sought to introduce hearsay statements of alleged coconspirators, Hemming objected and the District Court instructed the jury as follows:

> Ladies and gentlemen of the jury, let me say this to you at this point: Mr. Hemming has made what is called a hearsay objection. I am sure some of you are familiar with that term.
>
> The charge in this case is conspiracy. Now, under our rules of law, if a conspiracy is at some point in this case established, at least from a prima facie standpoint, there is sufficient evidence to go to you to decide the matter, it is permissible to offer the statements of other parties to the alleged conspiracy, even though they may be hearsay.
>
> Now, in the event that prerequisite, that is, presenting sufficient evidence to establish a prima facie case of conspiracy, is not met by the Government, then, I will strike all hearsay testimony that's been presented by the alleged conspirators.
>
> If the Government does establish, at least prima facie evidence so that you may decide that issue, then, I am going to permit such testimony.
>
> I am going to permit it now, even though it is hearsay, subject to the possibility of it being stricken at a later time

or not stricken, depending on how the case develops.

So, we will receive this testimony conditionally at the moment, but we will receive it.

Go ahead, sir.

We agree with the appellant that this instruction did not clearly explain to the jury, in accord with *Apollo*, that the conspiracy itself must be established by *independent nonhearsay evidence before* the hearsay testimony may be considered in the case against the defendant. Neither does the instruction explain that the conspiracy must be established beyond a reasonable doubt before the hearsay may be considered. It must also be established by independent evidence that the defendant and declarant were both members of the conspiracy and that the declaration was made in the course of and in furtherance of the conspiracy. *United States v. Brown*, 555 F.2d at 423. The shortcomings of the instruction given are even more apparent when one considers the total lack of reference to these latter requirements. Furthermore, the instructions at the end of the trial do not adequately correct these insufficiencies.

[4–6] Our inquiry does not end here, however, for Hemming neither requested a correct *Apollo* instruction at the time the hearsay was proffered nor objected to the incomplete one given by the District Court. Thus, we can reverse only if the District Court's failure to give a complete instruction *sua sponte* constitutes plain error which significantly and substantially prejudiced Hemming. *United States v. Ashley*, 569 F.2d 975, 985–86 (5th Cir. 1978); *United States v. Rixner*, 548 F.2d 1224, 1227–28 (5th Cir. 1977); *United States v. Moore*, 505 F.2d 620, 624 (5th Cir. 1974); Fed.R.Crim.P. 52(b). This record reveals that nonhearsay evidence supporting the existence of a conspiracy and Hemming's membership in it was far less than the other evidence under consideration in this discussion. Indeed, the vast amount of evidence in this trial would have been inadmissible hearsay unless it met the strict standards of admissibility under the old coconspirator exception to the hearsay rule, now Rule 801(d)(2)(E) of the Federal Rules of Evidence.[3] Under such circumstances, this defendant was particularly entitled to have the jury clearly instructed on the criteria for consideration of these statements. In the context of this case, we must conclude that the District Court's effort to give *Apollo* instructions fell short of the mark and subjected the appellant to manifest prejudice. As we noted earlier, this Circuit has since recognized *Apollo*'s deficiencies as a guide for the trial courts and has replaced its approach to determining admissibility with that set forth in *James*. In a new trial, the judge will apply the same criteria under *James* rather than instructing the jury as to how to apply them under *Apollo*.

III. *The Sufficiency of the Evidence*

[7, 8] We reach Hemming's argument that there was insufficient evidence. *See Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Viewing the nonhearsay evidence against Hemming in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), there is sufficient evidence in the record to support the conviction.[4]

IV. *The Weapons Testimony*

[9] Counted among the nonhearsay evidence reviewed in the preceding portion of this opinion is that testimony which relates to the sale of the rifle with the silencer and telescope. Hemming contends that the admission of this evidence, without objection at trial, was prejudicial and amounted to plain error. In the context of the evidence presented at trial, including Hemming's testimony that his only connection with the DEA agents was to aid Thomas in securing

3. Statements meeting those standards are actually considered not hearsay by virtue of the Federal Rules.

4. Our conclusion does not mean, of course, that a jury would necessarily credit the Government's version of the facts and convict Hemming on the nonhearsay evidence alone.

a loan using his airplane as collateral, we find that the evidence relating to Hemming's role in the sale of the weapon was admissible. Upon retrial, the District Court should determine the relevance of the weapons testimony in light of the evidence then in the record.

V. *Conclusion*

Having found Hemming's contention regarding the insufficient *Apollo* instruction to be meritorious and his contention regarding the insufficiency of the evidence to be without merit, we reverse and remand for a new trial.

REVERSED and REMANDED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Harold McMAHON, Defendant-Appellant.

No. 78-5292.

United States Court of Appeals, Fifth Circuit.

April 6, 1979.

Defendant was convicted before the United States District Court for the Western District of Texas, John H. Wood, Jr., J., of conspiracy to transport aliens, and he appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) admission of evidence of approximately three-year-old misdemeanor conviction on guilty plea to aiding and abetting an alien to elude examination, which plea was entered in reduction of charge of transporting illegal aliens, was not abuse of discretion, where Government's case was in substantial need of evidence bearing on intent issue and extrinsic offense evidence was not otherwise unfairly prejudicial; (2) defendant, complaining that his intent had not yet been placed at issue at time the Government introduced the evidence of the extrinsic offense, had waived any objection he might have had to the Government's order of proof when he took the stand and denied his intent to become involved in the conspiracy, and (3) since no objection was made at trial to erroneous portion of instruction that prior conviction could be considered for impeachment purposes reversal was not required absent showing of plain error.

Affirmed.

1. Criminal Law ⇐369.1

Resolution of questions determinative of admissibility of extrinsic offense evidence is committed to the sound discretion of the trial judge.

2. Criminal Law ⇐673(5)

It was not abuse of discretion, in prosecution for conspiring to transport aliens, to admit evidence of three-year-old conviction on guilty plea to aiding and abetting an alien to exclude examination, which plea was made in reduction of charge of transporting illegal aliens, where Government's case was in substantial need of objective facts tending to prove defendant's intent to become involved in the conspiracy, such evidence was limited to intent issue and defendant's intent was at issue and introduction of such extrinsic evidence was not otherwise unfairly prejudicial. Immigration and Nationality Act, § 274(a)(2), 8 U.S.C.A. § 7324(a)(2), 18 U.S.C.A. §§ 371, 1623; Fed. Rules Evid. rules 403, 404(b), 28 U.S.C.A.

3. Criminal Law ⇐371(1)

Similarity and intent required between extrinsic and charged offenses only means that defendant indulge himself in the same state of mind in the perpetration of both. Fed.Rules Evid. rules 403, 404(b), 28 U.S.C.A.

4. Criminal Law ⇐371(1)

For purpose of admitting extrinsic offense evidence to establish intent, probative value of such evidence is ascertained by