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FEDERAL RULE OF EVIDENCE 801(d)(2)(E): ADMISSIBILITY OF STATEMENTS FROM AN UNCHARGED CONSPIRACY THAT DOES NOT UNDERLIE THE SUBSTANTIVE CHARGE

INTRODUCTION

Federal Rule of Evidence 801(d)(2)(E) is the modern codification of the coconspirator exception to the hearsay rule.¹ For a statement, otherwise hearsay, to be admissible under the exception, the statement must be “offered against a party and . . . [be] a statement [made] by a coconspirator of a party during the course and in furtherance of the conspiracy.”² The conspiracy that serves as the basis of


2. Fed. R. Evid. 801(d)(2)(E). A statement is made during the course of a conspiracy when it is made after the conspiracy’s formation and before the conspiracy’s termination. A conspiracy is terminated when its “central criminal purposes” have been accomplished. Grunewald v. United States, 353 U.S. 391, 401-02 (1957); accord United States v. Papia, 560 F.2d 827, 835 (7th Cir. 1977). Furthermore, “a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.” Grunewald, 353 U.S. at 402; accord Krulewitch v. United States, 336 U.S. 440, 442-44 (1949).

A statement is made in furtherance of a conspiracy when it is made “to advance the aims of the alleged conspiracy.” United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979) (per curiam); accord United States v. James, 510 F.2d 546, 550 (5th Cir.), cert. denied, 423 U.S. 855 (1975); United States v. Birnbaum, 337 F.2d 490, 494-95 (2d Cir. 1964). It is not necessary that the statements actually further the goals of the conspiracy provided that was their intended effect. United States v. Hamilton, 689 F.2d 1262, 1270 (6th Cir. 1982), cert. denied, 103 S. Ct. 753 (1983). “[M]erely narrative declarations” by a coconspirator concerning conspiracy activities or culpability are not considered to be in furtherance of the conspiracy. United States v. Fielding, 645 F.2d 719, 728 (9th Cir. 1981) (per curiam); see United States v. Phillips, 664 F.2d 971, 1027 (5th Cir. 1981) (“mere idle conversation . . . is not admissible”), cert. denied, 457 U.S. 1136 (1982); United States v. Lieberman, 637 F.2d 95, 102-03 (2d Cir. 1980) (“idle chatter” not in furtherance of the conspiracy). However, statements made to “prospective co-conspirators for membership purposes are . . . in furtherance of the conspiracy.” United States v. Dorn, 561 F.2d 1252,
admissibility need not be charged in the indictment. An underlying conspiracy—an uncharged conspiracy to commit the substantive crime charged—may serve as the basis of admissibility. Whether a collateral conspiracy—an uncharged conspiracy that does not underlie a substantive charge—can serve as the basis of admissibility is an issue that only recently has come before the federal courts and is as yet unresolved.

A typical scenario in which a collateral conspiracy issue might arise is as follows: The defendant is a member of a second conspiracy in...
addition to the charged or underlying conspiracy. One of the defendant's coconspirators in this collateral conspiracy makes a statement, during the course and in furtherance of the collateral conspiracy, that is relevant to the prosecution's case against the defendant. The prosecutor seeks to admit this statement against the defendant.

If the declarant is also a member of the charged or underlying conspiracy, the prosecutor may argue that the statement was also made during the course and in furtherance of that conspiracy. If this is established, the statement meets the requirements of the coconspirator exception and is admissible without further analysis. If, however, the declarant is not a member of the charged or underlying conspiracy, or the prosecutor cannot make the required showing, the prosecutor must establish a different basis for admitting the evidence. Some prosecutors have argued for a broad construction of the coconspirator exception that would allow collateral conspiracies to serve as the basis of admissibility.

This Note argues that both construction and policy suggest that the extension of this exception to include collateral conspiracies is ill-advised. Although a broad construction of the exception may provide a useful tool for prosecutors, it poses serious dangers to criminal defendants. The coconspirator exception to the hearsay rule is inherently a one-way exception. It allows the prosecution to admit poten-
tially unreliable statements\(^1\) against a conspirator-defendant, but does not permit the defendant to admit such statements on his behalf.\(^1\) A broad construction further unbalances this one-sided exception by vitiating the statutory limitations on the scope of the exception.\(^2\) A new group of potentially unreliable statements, which may be only remotely connected to the issues at trial,\(^3\) becomes admissible against the defendant.

Part I of this Note analyzes the collateral conspiracy issue in light of the theoretical foundations of the coconspirator exception. This part concludes that a narrow construction is the inevitable result of a proper understanding of the rationales underlying the exception. Part II discusses the policies pertinent to interpretation of the exception and concludes that both evidentiary and constitutional policies militate against extending the coconspirator exception to include collateral conspiracies.

I. THE FOUNDATIONS OF THE COCONSPIRATOR EXCEPTION AND THEIR APPLICATION TO COLLATERAL CONSPIRACIES

Hearsay, an out-of-court statement offered for its truth,\(^4\) is inadmissible unless it comes within an enumerated exception to the hear-

\(^{10}\) See C. McCormick, supra note 3, § 262, at 628-29; 4 J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)(01), at 801-170 to 171; Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1384 (1972); Levie, supra note 9, at 1165; Morgan, The Rationale of Vicarious Admissions, 42 Harv. L. Rev. 461, 470-71 (1929) [hereinafter cited as Morgan I].

\(^{11}\) Fed. R. Evid. 801(d)(2) specifically provides that, to be admissible, a coconspirator statement must be "offered against a party." In criminal trials, therefore, only the prosecutor will have the opportunity to offer coconspirator statements.

\(^{12}\) See infra notes 84-85 and accompanying text.


\(^{14}\) Fed. R. Evid. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See Anderson v. United States, 417 U.S. 211, 219 (1974) ("[o]ut-of-court statements constitute hearsay . . . when offered in evidence to prove the truth of the matter asserted"); C. McCormick, supra note 3, § 246, at 584
This rule was formulated because there is no judicial check on the reliability of hearsay statements; such statements are not made under oath or in the presence of the trier of fact and, most importantly, are not subject to cross-examination. Each exception to the hearsay rule encompasses a class of statements that is deemed worthy of admission despite the absence of these guarantors of reliability.

Most exceptions to the hearsay rule are premised at least in part on the inherent reliability of the out-of-court statements admitted by the
exception. The admission exceptions of Rule 801(d)(2), which include the coconspirator exception, generally are not rationalized on this basis.

A. The Foundations of the Coconspirator Exception

Historically, three rationales have been advanced to support the coconspirator exception: (1) the trustworthiness rationale—a coconspirator's statements are inherently reliable; (2) the criminal agency
rationale—a coconspirator's statements are authorized by all other coconspirators;²³ (3) the necessity rationale—a coconspirator’s statements are such essential evidence that they should be admitted despite their flaws.²⁴ Although none of these rationales is universally accepted, each has been applied to the collateral conspiracy issue.²⁵ A thorough evaluation of each is therefore warranted.

1. The Trustworthiness Rationale

The trustworthiness rationale suggests that coconspirator statements are inherently reliable and therefore should be admitted despite the lack of the usual in-court guarantors of reliability.²⁶ This view likens the coconspirator exception to the declaration against interest exception.²⁷ The latter exception admits hearsay statements contrary to the declarant’s interest on the theory that a reasonable person would not make such statements unless they were true.²⁸ Because all conspirators are deemed to share a joint interest, any statement made during the course of the conspiracy that is against the interest of any conspirator is considered to be against the joint interest of all conspira-

²³. Anderson v. United States, 417 U.S. 211, 218 n.6 (1974); United States v. Avila-Macias, 577 F.2d 1384, 1388 (9th Cir. 1978); see Van Riper v. United States, 13 F.2d 961, 967 (2d Cir.), cert. denied, 273 U.S. 702 (1926); J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)[01], at 801-168 to -169. This is the “classical” rationale for the coconspirator exception. 4 J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)[01], at 801-168 to -169; Levie, supra note 9, at 1163. The exception has its origins in United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469-70 (1827) (statements of agent admissible against principle in criminal case).

²⁴. United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979); United States v. Stipe, 517 F. Supp. 867, 869 (W.D. Okla.), aff'd, 653 F.2d 446 (10th Cir. 1981); J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)[01], at 801-169; Levie, supra note 9, at 1166; see United States v. Cambindo Valencia, 609 F.2d 603, 635 n.25 (2d Cir. 1979) (dictum), cert. denied, 446 U.S. 947 (1980). This rationale was first espoused by Professor Levie, who found the trustworthiness and agency rationales unconvincing. Levie, supra note 9, at 1166.

²⁵. See United States v. Coppola, 526 F.2d 764, 770-71 (10th Cir. 1975) (applying trustworthiness rationale to collateral conspiracy); United States v. Layton, 549 F. Supp. 903, 917-18 (N.D. Cal. 1982) (applying agency and necessity rationales to collateral conspiracy), aff'd in part, rev'd in part on other grounds, 720 F.2d 548 (9th Cir. 1983), cert. denied, 464 U.S. 947 (1980). The reasoning was first espoused by Professor Levie, who found the trustworthiness and agency rationales unconvincing. Levie, supra note 9, at 1166.

²⁶. See United States v. Fielding, 645 F.2d 719, 726 n.13 (9th Cir. 1981); United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979); United States v. Coppola, 526 F.2d 764, 770-71 (10th Cir. 1975); Model Code of Evidence Rule 508 comment b at 251 (1942); 4 J. Wigmore II, supra note 22, § 1080a, at 141; Levie, supra note 9, at 1165.

²⁷. See Model Code of Evidence Rule 508b comment at 252-53 (1942); R. Lempert & S. Saltzburg, supra note 16, at 365, 366-67; 4 J. Wigmore II, supra note 22, § 1080a, at 141; Levie, supra note 9, at 1163.

²⁸. Fed. R. Evid. 804(b)(3) is the modern version of the declaration against interest exception. It provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (3) Statement against interest. A statement
Such a statement therefore is considered reliable and can be admitted against any of the conspirators.

The trustworthiness rationale is not a legitimate basis for the modern coconspirator exception. First, the premise of inherent reliability upon which the rationale rests is unsound. The declaration against interest analogy fails to distinguish between declarations showing that the declarant is a member of a conspiracy and declarations showing the conspiracy's aims and membership. A conspirator's statement will usually be reliable to establish the existence of a conspiracy because it is often against the declarant's interest to make such a statement. A conspirator-declarant's interest is likely to be advanced, however, by deceiving his listener with inaccurate statements concerning the aims and membership of the conspiracy. Such statements therefore should not be considered reliable.

which was at the time of its making so far contrary to the declarant's pecuniary . . . interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Id.; see Donovan v. Crisostomo, 689 F.2d 869, 877 (9th Cir. 1982); United States v. Toney, 599 F.2d 787, 789-90 (6th Cir. 1979); United States v. Thomas, 571 F.2d 285, 288-89 (5th Cir. 1978). It is significant that the declaration against interest exception, unlike the coconspirator exception, requires the declarant to be unavailable. Compare Fed. R. Evid. 804(b)(3) (requires declarant unavailability) with Fed. R. Evid. 801(d)(2)(E) (applicable regardless of declarant's availability).

29. Levie, supra note 9, at 1165; see United States v. Percevault, 490 F.2d 126, 130-31 (2d Cir. 1974); 4 J. Wigmore II, supra note 22, § 1080a, at 143.

30. See United States v. Fielding, 645 F.2d 719, 726 n.13 (9th Cir. 1981); United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979); United States v. Coppola, 526 F.2d 764, 770-71 (10th Cir. 1975); United States v. Percevault, 490 F.2d 126, 131 (2d Cir. 1974); Model Code of Evidence Rule 508 comment b at 251 (1942); 4 J. Wigmore II, supra note 22, § 1080a, at 143-44.


32. See C. McCormick, supra note 3, § 262, at 628-29; 4 J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)[01], at 801-171; Levie, supra note 9, at 1165; Morgan I, supra note 12, 470-71; Strahorn, supra note 16, at 573, 576.

33. Levie, supra note 9, at 1165.

34. Id.


36. Levie, supra note 9, at 1165-66.
Second, the requirement that a statement be made in furtherance of the conspiracy is unnecessary if the rationale for the Rule is reliability.\textsuperscript{37} Merely narrative statements may also be against the joint interest of the conspirators.\textsuperscript{38} Such statements are excluded under the modern exception, however, because they do not satisfy the "in furtherance" requirement of the Rule.\textsuperscript{39} Under the trustworthiness rationale, therefore, the "in furtherance" requirement is merely an arbitrary limitation on the scope of the exception.\textsuperscript{40} Assuming the drafters intended this requirement to have conceptual significance,\textsuperscript{41} its inclusion manifests their rejection of the trustworthiness rationale.

The legislative history of the Rule further undermines reliance on this rationale. The Federal Rules classify the coconspirator exception

\textsuperscript{37} Significantly, the drafters of the Model Code of Evidence Rule 508 (1942), who adopted the trustworthiness rationale, did not include the "in furtherance" requirement. \textit{Id.} \& comment a at 250. The exception under the Model Code admits all statements relating to the conspiracy provided they were made during its pendency. \textit{Id.}

\textsuperscript{38} See, \textit{e.g.}, United States v. Means, 695 F.2d 811, 817-18 (5th Cir. 1983) (prosecution of defendants for illegally using their influence to obtain bank charters for others; statement by one defendant that conspirators would charge $25,000 for a particular charter held not in furtherance of conspiracy); Battle v. Lubrizol Corp., 673 F.2d 984, 990 (8th Cir. 1982) (private antitrust suit; statement by defendant that he intended to conspire to cut off plaintiff held not in furtherance of conspiracy); United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979) (per curiam) (trial for drug offenses; statements by defendant to common-law wife regarding membership of conspiracy held not in furtherance of conspiracy).

\textsuperscript{39} See, \textit{e.g.}, United States v. Means, 695 F.2d 811, 817-18 (5th Cir. 1983); Battle v. Lubrizol Corp., 673 F.2d 984, 990 (8th Cir. 1982); United States v. Lieberman, 637 F.2d 95, 102 (2d Cir. 1980); United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980). See \textit{supra} note 2 and accompanying text.

\textsuperscript{40} Cf. Levie, \textit{supra} note 9, at 1167 (discussing necessity rationale; agency rules—including "in furtherance" requirement—arbitrary). The "in furtherance" limitation makes conceptual sense only under the agency rationale because it is analogous to the limitation that an agent's statement is admissible only if made within the scope of his authority. Anderson v. United States, 417 U.S. 211, 218 & n.6 (1974); United States v. James, 590 F.2d 575, 578 n.2 (5th Cir.), \textit{cert. denied}, 442 U.S. 917 (1979); Carl Wagner & Sons v. Appendancez, Inc., 485 F. Supp. 762, 773-74 (S.D.N.Y. 1980); Levie, \textit{supra} note 9, at 1167. Professor Levie notes that the "in furtherance" requirement is often retained by common-law courts adopting the necessity rationale to provide additional, though arbitrary, protection to defendants from the dangers of unreliable hearsay. Levie, \textit{supra} note 9, at 1166-67. Under the trustworthiness rationale, however, coconspirator statements are considered inherently reliable. See \textit{supra} notes 26-30 and accompanying text. It is difficult, therefore, to envision the purpose of the "in furtherance" requirement under the latter rationale.

\textsuperscript{41} It is a basic rule of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." 2A C. Sands, Sutherland Statutes and Statutory Construction § 46.06, at 63 (4th ed. 1973); \textit{accord} United States v. Menasche, 348 U.S. 528, 538-39 (1955); see \textit{In re Surface Mining Regulation Litig.}, 627 F.2d 1346, 1362 (D.C. Cir. 1980) (quoting C. Sands, \textit{supra}); Donaldson, Hoffman & Goldstein v. Gaudio, 260 F.2d 333, 336 (10th Cir. 1958).
as an admission by a party opponent under Rule 801(d)(2). The Advisory Committee Note to that Rule indicates that the Committee did not base the exceptions of that Rule on a rationale of trustworthiness: "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission."  

2. The Criminal Agency Rationale

The criminal agency rationale for the coconspirator exception is an extension of the adversary theory, which is the basis for all the admission exceptions. The adversary theory begins with the idea that it is fair to admit a party's own statement against him. A party is estopped from objecting to the absence of the traditional judicial checks of reliability when his statements are voluntarily made. He "can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." Moreover, the party retains the right to take the stand in his own behalf and explain or deny the statement. 

This theory also supports the admission of statements made by a party's agent during the pendency and within the scope of his authority. The criminal agency rationale suggests that coconspirators are

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43. Fed. R. Evid. 801(d)(2) advisory committee note (citations omitted).
45. Fed. R. Evid. 801(d)(2) advisory committee note; D. Binder, supra note 44, § 28.13, at 366; R. Lempert & S. Saltzburg, supra note 16, § 262, at 366; C. McCormick, supra note 3, § 262, at 628-29; E. Morgan, supra note 21, at 266; see Lev, supra note 21, at 28-29.
46. See D. Binder, supra note 44, § 28.13, at 366; E. Morgan, supra note 21, at 266; Lev, supra note 21, at 29.
47. 2 C. Chamberlayne, The Modern Law of Evidence § 1292, at 1636 (1911); see E. Morgan, supra note 21, at 266; Lev, supra note 21, at 29-30.
48. E. Morgan, supra note 21, at 266.
49. D. Binder, supra note 44, § 28.13, at 366; E. Morgan, supra note 21, at 266; see 2 C. Chamberlayne, supra note 47, § 1292, at 1636.
the criminal equivalent of co-agents. The act of joining the conspiracy therefore constitutes authorization of all statements made during the pendency and in furtherance of the conspiracy.

The structure and background of Rule 801(d)(2)(E) suggest that the criminal agency rationale was influential in the formation of the rule. The "in furtherance" requirement is analogous to the requirement of Rule 801(d)(2)(D) that an agent's statement be within the scope of the agent's employment. Both requirements seek to ensure that the party-opponent authorized the declarant's statement. Furthermore, the rule is classified as an admission, and the Advisory Committee's Note to Rule 801 specifically provides that the adversary rationale supports all the admission exceptions. Most significantly, the Committee Note to Rule 801(d)(2)(E) expressly refers to the "agency theory of conspiracy."

The criminal agency rationale is not conceptually persuasive. It is a fiction; the nature of criminal conspiracies belies the claim that conspirators authorize or ratify each other's statements. A particular coconspirator may not know the actual scope and membership of the conspiracy of which he is a part, nor even its intended goal.

54. 4 J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)[01], at 801-169 to -171; see E. Morgan, supra note 21, at 275; Lev, supra note 21, at 40.
55. Fed. R. Evid. 801(d)(2) advisory committee note.
58. Hearsay Exception, supra note 52, at 539-42; see Levie, supra note 9, at 1165.
59. Klein, supra note 9, at 8; Hearsay Exception, supra note 52, at 539; cf. Pinkerton v. United States, 328 U.S. 640, 646-47 (1946) (conspirator responsible for offenses of other conspirators even when not aware of offenses); United States v. Michel, 588 F.2d 986, 999 (5th Cir.) (same), cert. denied, 444 U.S. 825 (1979); United States v. Murray, 492 F.2d 178, 187 (9th Cir. 1973) (same), cert. denied, 419 U.S. 854 (1974).
elements of control and supervision, so evident in a civil agency situation, therefore are lacking in a criminal conspiracy.60

3. The Necessity Rationale

The necessity rationale suggests that the coconspirator exception exists because of the great need for the evidence in proving the crime of conspiracy.61 Under this view, the pendency and furtherance requirements are arbitrary limitations on the scope of the exception that were intended to meet the countervailing need to protect defendants from the dangers of hearsay.62 The necessity rationale is most persuasive when a charged conspiracy serves as the basis of admissibility.63 Even then, however, it is not without flaws. Although coconspirator statements may be necessary to prove the crime of conspiracy, the prosecutor must prove the existence of the conspiracy with evidence other than the hearsay statement at issue before he can introduce the coconspirator statements.64 The hearsay statements therefore are not the only evidence available to prove the conspiracy.65 Of course, proving the conspiracy to the judge for admissibility purposes usually requires independent evidence meeting a preponderance standard,66 while proving the crime of con-

60. See Hearsay Exception, supra note 52, at 539; Note, The Coconspirator Exception to the Hearsay Rule: The Limits of its Logic, 37 La. L. Rev. 1101, 1106 (1977) [hereinafter cited as Coconspirator Exception].

61. United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979); United States v. Stipe, 517 F. Supp. 867, 869 (W.D. Okla.), aff'd, 653 F.2d 446 (10th Cir. 1981); 4 J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)(01), at 801-169; Levie, supra note 9, at 1166; Hearsay Exception, supra note 52, at 540-41.


63. See United States v. Gil, 604 F.2d 546, 548-49 (7th Cir. 1979); United States v. Stipe, 517 F. Supp. 867, 869 (W.D. Okla.), aff'd, 653 F.2d 446 (10th Cir. 1981); Levie, supra note 9, at 1166.


65. See Hearsay Exception, supra note 52, at 540-41; Coconspirator Exception, supra note 60, at 1108.

spiration to the jury requires proof beyond a reasonable doubt.\textsuperscript{67} Nevertheless, it is perhaps too strong to say that conspirator statements are always necessary to prove conspiracy.

When an uncharged conspiracy serves as the basis of admissibility, the necessity rationale falls of its own weight. When there is no need to prove the conspiracy to the jury, the admission of coconspirator statements cannot be justified on this basis. The necessity rationale therefore does not support even the established admissibility of statements from underlying conspiracies. Certainly, this rationale cannot, by itself, support extension of the coconspirator exception to include collateral conspiracies.

\textbf{B. Application of the Rationales to Collateral Conspiracies}

Collateral conspirator statements are not within the established scope of the coconspirator exception;\textsuperscript{68} there is no mention of them in the legislative history of the Rule,\textsuperscript{69} nor was the issue addressed by the courts prior to the Rule's enactment.\textsuperscript{70} The drafters of Rule 801(d)(2)(E), however, expressly intended to admit only those statements within the scope of the exception at the time the Rule was adopted.\textsuperscript{71} Furthermore, the Supreme Court, prior to the adoption of the Federal Rules, indicated that the coconspirator exception should be limited: "We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a


\textsuperscript{71} Fed. R. Evid. 801(d)(2)(E) advisory committee note.
codefendant made in furtherance of a conspiracy or joint undertaking." 72 A broad construction therefore should not be adopted lightly.

1. The Trustworthiness Rationale—A Broad Construction

In United States v. Coppola, 73 the Tenth Circuit adopted a broad construction of the coconspirator exception and allowed a collateral conspiracy to serve as the basis of admissibility. 74 This holding was necessitated by the court's adoption of the unsound and inapplicable trustworthiness rationale. 75 If coconspirator statements are viewed as inherently reliable, it makes no difference that such statements were made during the course and in furtherance of a collateral conspiracy as opposed to a charged or underlying conspiracy. 76 Statements of a coconspirator made in the course of any collateral conspiracy, no matter how attenuated the connection with the charged or underlying conspiracy, will be admitted. 77

The Coppola decision illustrates the problematic results of this broad interpretation of the rule. In Coppola, the defendant was charged with murder and conspiracy to commit murder. 78 Both the defendant and the murder victim were shown to have been members of a collateral drug conspiracy. 79 Allegedly, the victim, rather than delivering a drug shipment as he had agreed with the defendant, retained a portion of the shipment for his personal benefit. 80 In an attempt to establish the defendant's motive for the murder, 81 the prosecution sought to admit statements of the victim that were made during the course and in furtherance of the drug conspiracy. 82 The court held that the statements were admissible under the coconspira-

73. 526 F.2d 764 (10th Cir. 1975).
74. Id. at 770.
75. See id. at 770-71.
76. See id. at 770.
77. Although such statements theoretically may be excluded under Fed. R. Evid. 403, reliance on this Rule would be ill-founded. See infra notes 108-12 and accompanying text.
78. 526 F.2d at 766-67.
79. Id. at 770.
80. Id. at 766-67.
82. 526 F.2d at 766-67, 770. Significantly, the prosecution could not argue that this conspiracy was an underlying conspiracy because it was highly unlikely that the victim was a conspirator to his own murder.
tor exception.\textsuperscript{83} Thus, potentially unreliable statements, only remotely connected to the issues at trial, came before the jury.

The Tenth Circuit’s broad construction of the exception to include collateral conspiracies usurps the “in furtherance” requirement of the Rule. The prosecution is permitted to introduce statements that were not made in furtherance of any conspiracy related to the substantive charge merely because they were made in furtherance of \textit{some} conspiracy. As the construction of conspiracy becomes broader, the “in furtherance” requirement becomes less meaningful and is readily manipulated by creative prosecutors.\textsuperscript{84} Such a construction is inconsistent with the intended scope of the coconspirator exception:

The adoption of Rule 801(d)(2)(E) and the rejection of the Model Code-Uniform Rule approach should be viewed as mandating a construction of the “in furtherance” requirement protective of defendants, particularly since the Advisory Committee was concerned lest relaxation of this standard lead to the admission of less reliable evidence.\textsuperscript{85}

2. The Criminal Agency and Necessity Rationales—A Narrow Construction

The true foundation of the modern coconspirator exception is apparently a combination of the criminal agency rationale and the necessity rationale.\textsuperscript{86} The great need for this evidence is most probably the practical reason for the exception,\textsuperscript{87} while the criminal agency

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\textsuperscript{83} Id. at 770.

\textsuperscript{84} United States v. Postal, 589 F.2d 862 (5th Cir.), \textit{cert. denied}, 444 U.S. 832 (1979), illustrates the risk of manipulation of the requirements created by a broad construction of the Rule. In \textit{Postal}, the defendants were charged with conspiracy to import marijuana. \textit{Id.} at 865. The prosecution sought to admit the logbook from the defendants’ ship, which contained statements by one or more unidentified persons making the voyage. \textit{Id.} at 866 \& n.41. Although there was insufficient independent evidence of the criminal conspiracy, the court admitted the evidence. \textit{Id.} at 866 n.41. The court identified the voyage itself as a non-criminal joint venture. \textit{Id.} On the basis of this collateral joint venture, the court admitted hearsay that could not be shown by a preponderance of evidence to have been made in the course or in furtherance of a charged or underlying conspiracy.

\textsuperscript{85} J. Weinstein \& M. Berger, \textit{supra} note 3, \& 801(d)(2)(E)[01], at 801-173.


\textsuperscript{87} 4 J. Weinstein \& M. Berger, \textit{supra} note 3, \& 801(d)(2)(E)[01], at 801-169; Levie, \textit{supra} note 9, at 1166.
theory is the means of rationalizing it. As demonstrated above, the necessity rationale alone cannot be relied on to support an extension of the exception to include collateral conspiracies. It simply does not apply to statements from uncharged conspiracies. If the exception is to be extended to admit collateral conspirator statements, it must be through an extension of the criminal agency rationale.

In United States v. Layton, the United States District Court for the Northern District of California applied the criminal agency and necessity rationales to a collateral conspiracy. In Layton, the defendant was charged with conspiracy to commit murder. Both the defendant and his alleged coconspirator in the murder conspiracy were shown to have been members of a broader conspiracy to conceal a wide range of illicit activities. This cover-up conspiracy was not charged in the indictment. The prosecution sought to admit statements made by the defendant's coconspirator in furtherance of the broad cover-up conspiracy, but not in furtherance of the murder conspiracy. The court held the statements inadmissible because they were not made in furtherance of a charged or underlying conspiracy.

The Layton court noted that the coconspirator exception, "[u]nlke many other exceptions to the hearsay rule, . . . is not based upon the inherent reliability of [the] statements. Rather, it is based on the legal fiction of [criminal] agency . . . supported by the realization that

88. 4 J. Weinstein & M. Berger, supra note 3, ¶ 801(d)(2)(E)(01), at 801-168 to -170; see Levine, supra note 9, at 1163.
89. See supra notes 61-67 and accompanying text.
91. Id. at 906.
92. Id. at 916.
93. Id.
94. Id. at 918. The statements in question were in one of four groups of statements the prosecution sought to admit. 720 F.2d at 554-55; 549 F. Supp. at 907. This group was designated "[statements by] Jim Jones to the members of the Peoples Temple shortly before and during the mass suicide at Jonestown, commonly known as the 'Last Hour Tape.' " 549 F. Supp. at 907; accord 720 F.2d at 561. The prosecution offered seven different grounds for admitting the statements, including the declaration against penal interest exception of Fed. R. Evid. 804(b)(3), 549 F. Supp. at 914, and the coconspirator exception of Fed. R. Evid. 801(d)(2)(E), id. at 915-16. Although the district court held that the statements were declarations against penal interest, it excluded them because they did not satisfy the reliability requirement of the confrontation clause. Id. at 914. See infra notes 120-23 and accompanying text. The Ninth Circuit reversed, holding that the confrontation clause was satisfied and the statements were admissible under Rule 804(b)(3). 720 F.2d at 562-63. The circuit court did not address the collateral conspiracy issue.
95. 549 F. Supp. at 918.
without such evidence it would be difficult to prove conspiracy.”

The court concluded that these rationales “suggest” a narrow construction of the exception regarding collateral conspiracies. Such a construction “will result in the inclusion of co-conspirator statements relating directly to the criminal conspiracy in question, and the exclusion of a broader swath of potentially unreliable testimony.” The court relied primarily on the Advisory Committee Note to Rule 801(d)(2)(E), which states: “[T]he agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established.”

The analysis in Layton is preferable to that in Coppola. The Layton court’s narrow construction mandated that the prosecution show the statement in question was made in furtherance of a charged or underlying conspiracy. By starting with the legitimate rationales for the rule, the Layton court arrived at a narrow construction of the exception that best gives substance to the “in furtherance” requirement.

II. POLICY CONSIDERATIONS

A. Policies Underlying the Federal Rules of Evidence

Two pertinent policies that underlie the Federal Rules of Evidence are: (1) minimization of confusion and waste in the evidentiary process; and (2) exclusion of prejudicial evidence. A narrow construction of the coconspirator exception serves these policies by eliminating both the procedural burdens involved in determining the admissibility of collateral conspirator statements and the inherently prejudicial statements themselves.

Before a coconspirator statement may be admitted under Rule 801(d)(2)(E), the prosecutor must prove the existence and member-

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96. Id. at 917-18 (footnote omitted).
97. Id. at 918.
98. Id.
100. 549 F. Supp. at 917.
101. See Fed. R. Evid. 403 advisory committee note; Dolan, supra note 13, at 226. Fed. R. Evid. 102 requires that the rules “be construed to secure fairness in administration [and] elimination of unjustifiable expense and delay . . . to the end that the truth may be ascertained and proceedings justly determined.” Similarly, Fed. R. Evid. 403 provides for the exclusion of evidence “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.” See 22 C. Wright & K. Graham, supra note 81, § 5212, at 250 n.1 (1978) (“[T]he importance of Rule 403 in the scheme of the rules . . . has led some to refer to it as ‘the cornerstone’ on which the rules are built.”).
102. See United States v. Cambindo Valencia, 609 F.2d 603, 635 n.25 (2d Cir. 1979) (dictum), cert. denied, 446 U.S. 940 (1980); United States v. Layton, 549 F.
ship of the conspiracy by independent evidence. When a collateral conspiracy is the basis for admission, however, much if not all of the evidence required to prove the collateral conspiracy is irrelevant to the issues at trial. The inquiry into collateral issues required to determine admissibility therefore may result in an inordinate consumption of time and resources. In addition, the Second Circuit has noted that such an inquiry might confuse the trial judge regarding the distinction between relevant trial evidence and irrelevant evidence relating only to the existence of a collateral conspiracy. Moreover, collateral conspirator statements often are highly prejudicial to the defendant because they point out his involvement in a conspiracy or crime not charged in the case at trial. Evidence of a defendant's prior crimes is usually scrutinized under Rule 404(b), which requires a Rule 403 balancing of the probative value of the evidence against its prejudicial effect. Collateral conspirator statements, however, are more dangerous than typical prior crimes evidence; these statements are potentially unreliable as well as prejudicial. Rules 404(b) and 403 therefore are insufficient protection against this unique danger.

A narrow construction of the exception is a superior method of protecting against the admission of these prejudicial statements. Rule 403, by its terms, favors admissibility of probative evidence; it will not exclude prejudicial statements unless the danger of prejudice substantial.

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103. See supra note 52 and accompanying text.
104. Cf. United States v. Kahn, 472 F.2d 272, 279 (2d Cir.) ("proffered evidence seems...collateral and of doubtful probative value"), cert. denied, 411 U.S. 922 (1973); Corey v. United States, 346 F.2d 65, 67 (1st Cir.) (collateral evidence was properly rejected as "insufficiently probative"), cert. denied, 382 U.S. 911 (1965); United States v. Wilson, 490 F. Supp. 713, 719 n.11 (E.D. Mich. 1980) (extrinsic evidence which is highly probative is "therefore, not 'collateral'"), aff'd, 639 F.2d 314 (6th Cir.), cert. denied, 454 U.S. 942 (1981); Dolan, supra note 13, at 264 ("[s]ome use collateralness to denote immateriality or irrelevancy").
109. See supra note 81.
tially outweighs their probative value. Moreover, even when this high standard is met, Rule 403 does not mandate exclusion—the trial judge, within his discretion, may still admit the evidence. Finally, reliance on Rules 404(b) and 403 to determine the admissibility of collateral conspirator statements will require a case-by-case inquiry into collateral issues of fact, increasing the potential for confusion or waste. If a class of potentially unreliable statements is inherently prejudicial, it is not sound policy to rely on a pro-admission case-by-case analysis to determine whether such prejudice exists in sufficient force to warrant exclusion.

B. The Confrontation Clause, the Coconspirator Exception and Collateral Conspiracies

The relationship between the confrontation clause of the sixth amendment and the hearsay rule has long been a topic of discussion. They are derived from the same roots; the foundation of

111. S. Saltzburg & K. Redden, supra note 107, at 101; 22 C. Wright & K. Graham, supra note 81, § 5221, at 309; see Farage, Critique of Proposed Federal Rules of Evidence, 1970 A.B.A. Sec. Ins., Neg. & Comp. L. 433, 436. The trial court's decision may be reversed only if there is an abuse of this discretion. United States v. Schiff, 612 F.2d 73, 80 (2d Cir. 1979); United States v. Frick, 588 F.2d 531, 537-38 (5th Cir.), cert. denied, 441 U.S. 913 (1979); United States v. Calhoun, 544 F.2d 291, 294-95 (6th Cir. 1976).
both is the need to exclude unreliable out-of-court statements and preserve the right to cross-examine adverse witnesses. The hearsay rule, however, is applicable in both civil and criminal cases, while the confrontation clause is applicable only when the evidence is introduced against a criminal defendant. The Supreme Court has made clear that the confrontation clause extends beyond the scope of the hearsay rule. If it is determined that a hearsay statement is admissible under an exception, the statement must still clear this second hurdle before it can be admitted.

The test for admissibility of a hearsay statement under the confrontation clause is set forth in Ohio v. Roberts. The test, which presumes the statement's inclusion within an enumerated hearsay exception, has two requirements. First, the proponent of the statement must produce any available witnesses, unless producing the witness would be of remote utility. Second, there must be sufficient indicia that the statement is reliable. If the statement is within a "firmly rooted" hearsay exception, such indicia of reliability may be presumed. If not, the court may admit the statement only if it passes a particularized inquiry into its reliability.

The first requirement of the Roberts test is satisfied if the prosecution shows that the declarant is unavailable. Alternatively, if the evidence appears reliable and is relatively insignificant, the prosecution is relieved of its obligation to produce the declarant. Once the

117. Fed. R. Evid. 1101(b). "These rules apply generally to civil actions and proceedings [and] to criminal cases and proceedings . . . ." Id.
118. U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Id.
121. 448 U.S. 56 (1980).
122. Id. at 65.
123. Id. at 65 & n.7.
124. Id. at 65-66.
125. Id. at 66.
126. Id.
127. Id.
prosecution satisfies this requirement, the issue becomes whether there are sufficient indicia of reliability to satisfy the second Roberts requirement.

Some courts have categorized the coconspirator exception as a firmly-rooted hearsay exception. Consequently, these courts have held without further inquiry that statements within the exception satisfy the requirements of the confrontation clause. Other courts, recognizing that the coconspirator exception is not premised on reliability, have concluded that a particularized reliability inquiry is required to determine if statements within the exception satisfy the Roberts test. Regardless of the view espoused, important policy considerations mandate a narrow construction of the coconspirator exception.

If a court accepts the coconspirator exception as firmly rooted, coconspirator statements within the scope of the exception automatically pass through the confrontation clause analysis on a mere presumption of reliability. Extending the coconspirator exception beyond its established scope to include collateral conspiracies therefore would also extend the presumption of reliability that does not reflect the true nature of coconspirator statements.


In United States v. Coppola, 526 F.2d 764 (10th Cir. 1975), the Tenth Circuit did not undertake a separate reliability inquiry after determining that the collateral conspirator statement was admissible under Fed. R. Evid. 801(d)(2)(E). See id. at 769-70. Three years after Coppola, the Tenth Circuit held that a particularized reliability inquiry was necessary before admitting statements under Rule 801(d)(2)(E). United States v. Roberts, 583 F.2d 1173, 1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979).


133. See supra note 130 and accompanying text.
134. See supra notes 68-72 and accompanying text.
135. See supra notes 31-36 and accompanying text.
spirator exception should not lightly be extended when it may undermine a fundamental pillar of constitutional protection.

For those courts that undertake a particularized reliability inquiry, the narrow construction of the exception provides a fundamentally better method of dealing with the collateral conspiracy issue. When there are no independent indicia of a collateral conspirator's statement's reliability, a narrow construction of the exception allows a court to avoid basing the statement's inadmissibility on broad constitutional grounds. 136

If particular collateral conspirator statements do appear reliable, they are potentially admissible under Rule 803(24) 137 or Rule 804(b)(5). 138 These Rules provide for the admission of hearsay state-

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137. Fed. R. Evid. 803(24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

. . . A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.


Federal courts differ as to their enforcement of the notice requirement. Compare United States v. Atkins, 618 F.2d 366, 372 (5th Cir. 1980) (strictly enforced) and United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979) (same) and United States v. Oates, 560 F.2d 45, 73 n.30 (2d Cir. 1977) (same) with United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978) (lack of notice not determinative unless prejudicial to defendant) and United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976) (requirement "should not be an inflexible and imposing barrier"), cert. denied, 431 U.S. 914 (1977).

138. Fed. R. Evid. 804(b)(5). This Rule is identical to Fed. R. Evid. 803(24) except it requires the declarant to be unavailable. This difference, however, may be merely textual.
ments that do not fall within an enumerated exception but do have equivalent indicia of reliability.\textsuperscript{139} Of course, the court in a criminal case must still measure such statements against the Roberts standard.\textsuperscript{140} This constitutional inquiry, however, is mandated whenever a hearsay statement is admitted in a criminal trial.\textsuperscript{141} Therefore, in the rare case when a collateral conspirator statement is reliable, it can be admitted without broadening the scope of the coconspirator exception. Collateral conspirator statements that are unreliable, however, can be excluded without unduly invoking constitutional grounds.

\section*{Conclusion}

Collateral conspiracies should not be permitted to serve as the basis of admissibility under the coconspirator exception to the hearsay rule. Allowing collateral conspirator statements to be admitted involves an unnecessary extension of the exception without any theoretical or practical justification. Such an extension would provide for the admission of a new group of potentially unreliable coconspirator statements and thereby further unbalance an already one-sided exception.

A narrow construction of the exception is more in line with the exception's true rationales and best satisfies the dictates of its statutory

Despite the fact that the heading of Rule 803 indicates that it covers hearsay exceptions where the availability of a declarant is immaterial, the fact that Rule 803(24) requires a Court to look at the availability of other evidence that can be produced in Court signifies that the availability of a declarant may be important when the residual hearsay exception is invoked.

S. Saltzburg & K. Redden, \textit{supra} note 107, at 585; \textit{see} United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977) (declarant available; hearsay not admissible under 803(24) because "live testimony . . . more probative"). It has been suggested that Fed. R. Evid. 804(b)(5) is meaningless because of Rule 803(24). D. Binder, \textit{supra} note 44, § 40.05, at 446.


\textsuperscript{140} \textit{See} Ohio v. Roberts, 448 U.S. 56, 62-63 (1980); \textit{see}, e.g., United States v. Ordonez, 722 F.2d 530, 535 (9th Cir. 1983); United States v. Chappell, 698 F.2d 308, 312 (7th Cir.), \textit{cert. denied}, 103 S. Ct. 2095 (1983); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981), \textit{vacated in part on other grounds}, 686 F.2d 356 (5th Cir. 1982).

\textsuperscript{141} \textit{See} \textit{supra} note 139 and accompanying text.
language. In addition, this construction is mandated by important evidentiary and constitutional policies. Finally, the narrow construction of the coconspirator exception does not preclude the admission of truly reliable collateral conspirator statements.

Of course, under a narrow construction of the exception, a prosecutor may be tempted to charge any conspiracy that may provide coconspirator statements useful in the principal case. As one court noted, however, "careful trial court supervision, coupled with proper appellate review, should be sufficient to guard against this event."142 A narrow construction, when combined with close scrutiny by the courts and the good faith exercise of prosecutorial discretion, will confine a potentially oppressive hearsay exception to the fair and efficient use for which it was intended.

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