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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

1. *United States v. Percevault*, 490 F.2d 126, 130 n.9 (2d Cir. 1974); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1179 (E.D. Pa. 1981). The legislative history makes clear that the exception predates the Rule. *See* S. Rep. No. 1277, 93d Cong., 2d Sess. 26, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7073; Fed. R. Evid. 801(d)(2)(E) advisory committee note. Technically, Fed. R. Evid. 801(d)(2)(E) is not an exception to the hearsay rule, but instead defines coconspirator statements as “not hearsay.” The Rule is still referred to as the coconspirator exception to the hearsay rule. *See, e.g.*, *United States v. Foster*, 711 F.2d 871, 880 (9th Cir. 1983); *United States v. Kiefer*, 694 F.2d 1109, 1111 (8th Cir. 1982); *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 815 (1983); *United States v. Truong Dinh Hung*, 629 F.2d 908, 930 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982); *United States v. DiGregorio*, 605 F.2d 1184, 1189 (1st Cir.), *cert. denied*, 444 U.S. 937 (1979). This terminology will be used throughout this Note.

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, 443-44 (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, 726 (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.³ An underlying conspiracy—an uncharged conspiracy to commit the substantive crime charged—may serve as the basis of admissibility.⁴ 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.⁵

A typical scenario in which a collateral conspiracy issue might arise is as follows:⁶ The defendant is a member of a second conspiracy in

1256-57 (7th Cir. 1977) (per curiam), *overruled on other grounds*, United States v. Read, 658 F.2d 1225, 1236 & n.7 (7th Cir. 1981); *accord* United States v. Jackson, 549 F.2d 517, 534 (8th Cir.) (statements made for the purpose of inducing another to join the conspiracy are in furtherance of the conspiracy), *cert. denied*, 430 U.S. 985 (1977).

3. *See, e.g.*, United States v. Durland, 575 F.2d 1306, 1310 (10th Cir. 1978); United States v. Trowery, 542 F.2d 623, 626 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977); United States v. Doulin, 538 F.2d 466, 471 (2d Cir.), *cert. denied*, 429 U.S. 895 (1976); United States v. Richardson, 477 F.2d 1280, 1283 (8th Cir.), *cert. denied*, 414 U.S. 843 (1973); United States v. Williams, 435 F.2d 642, 645 (9th Cir. 1970), *cert. denied*, 401 U.S. 995 (1971); C. McCormick, Handbook on the Law of Evidence § 267, at 646 (2d ed. 1972); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(E)[01], at 801-166 (1979).

4. *See supra* note 3 and accompanying text. The cases establishing that uncharged conspiracies may provide the basis of admissibility, with very few exceptions, dealt with underlying conspiracies. *See* United States v. Layton, 549 F. Supp. 903, 916 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); *see, e.g.*, United States v. Durland, 575 F.2d 1306, 1310 (10th Cir. 1978); United States v. Trowery, 542 F.2d 623, 627 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977); United States v. Doulin, 538 F.2d 466, 471 (2d Cir.), *cert. denied*, 429 U.S. 895 (1976); United States v. Richardson, 477 F.2d 1280, 1283 (8th Cir.), *cert. denied*, 414 U.S. 843 (1973).

5. *Compare* United States v. Coppola, 526 F.2d 764, 770 (10th Cir. 1975) (the coconspirator exception applies to uncharged conspiracy even though it does not underlie substantive charge) with United States v. Layton, 549 F. Supp. 903, 918 (N.D. Cal. 1982) ("the [coconspirator] exception should be confined to the conspiracy charged or underlying the substantive charge"), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984). In United States v. Cambindo Valencia, 609 F.2d 603 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980), the Second Circuit addressed the collateral conspiracy issue in dictum. *Id.* at 635 n.25. The court expressed a preference for "the narrower construction of the rule," which limits the coconspirator exception to charged and underlying conspiracies. *Id.* at 636 n.25.

6. *See* United States v. Coppola, 526 F.2d 764, 770 (10th Cir. 1975) (defendant and declarant were members of collateral drug conspiracy; statements by declarant in furtherance of drug conspiracy offered against defendant to prove murder and murder conspiracy); United States v. Layton, 549 F. Supp. 903, 916 (N.D. Cal. 1982) (defendant and declarant were members of collateral concealment conspiracy; statements by declarant in furtherance of concealment conspiracy offered to prove

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.⁷ 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.⁸

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,⁹ 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-

murder and murder conspiracy). *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3631 (Feb. 24, 1984)

7. See, e.g., *United States v. DeLuca*, 692 F.2d 1277, 1284-85 (9th Cir. 1982); *United States v. Patton*, 594 F.2d 444, 447 (5th Cir. 1979) (*per curiam*); *United States v. Dorn*, 561 F.2d 1252, 1256-57 (7th Cir. 1977) (*per curiam*), *overruled on other grounds*, *United States v. Read*, 658 F.2d 1225, 1236 n.7 (1981). Admissibility in this context refers to satisfaction of the requirements of the coconspirator exception. Before a statement can be admitted in a criminal trial, it also must satisfy the requirements of the confrontation clause. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980); U.S. Const. amend. VI. The Supreme Court in *Roberts* laid down a two-part test to determine whether a hearsay statement is admissible under the confrontation clause. 448 U.S. at 65-66. See *infra* notes 120-26 and accompanying text.

8. *United States v. Coppola*, 526 F.2d 764, 770 (10th Cir. 1975); see *United States v. Layton*, 549 F. Supp. 903, 916 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984).

9. See *United States v. DeRoche*, No. 83-2250, slip op. at 2459 (5th Cir. Feb. 24, 1984); Klein, *Conspiracy—The Prosecutor's Darling*, 24 Brooklyn L. Rev. 1, 9 (1957); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1159-60 (1954). A broad construction expands the exception and thereby expands its usefulness to the prosecutor. He can admit coconspirator statements merely by showing they were made during the course and in furtherance of any conspiracy in which the defendant and declarant are members. See *infra* pt. I(B)(1). He is not limited to charged or underlying conspiracies.

tially unreliable statements¹⁰ against a conspirator-defendant, but does not permit the defendant to admit such statements on his behalf.¹¹ A broad construction further unbalances this one-sided exception by vitiating the statutory limitations on the scope of the exception.¹² A new group of potentially unreliable statements, which may be only remotely connected to the issues at trial,¹³ 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,¹⁴ 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.

13. See *United States v. Coppola*, 526 F.2d 764, 770 (10th Cir. 1975) (statements by murder victim in furtherance of drug conspiracy offered in murder trial); *United States v. Layton*, 549 F. Supp. 903, 916 (N.D. Cal. 1982) (statements in furtherance of conspiracy to cover up broad range of illicit activities offered in trial of discrete murder conspiracy), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984). Collateral or remote evidence is often less probative of the issues at trial. See *United States v. Kahn*, 472 F.2d 272, 279 (2d Cir. 1973), *cert. denied*, 411 U.S. 982 (1973); *Corey v. United States*, 346 F.2d 65, 67 (1st Cir.), *cert. denied*, 382 U.S. 911 (1965); *United States v. Wilson*, 490 F. Supp. 713, 719 n.11 (E.D. Mich. 1980), *aff'd*, 639 F.2d 314 (6th Cir.), *cert. denied*, 454 U.S. 942 (1981); Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220, 264-65 (1975). See *infra* notes 103-06 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

say rule.¹⁵ This rule was formulated because there is no judicial check on the reliability of hearsay statements;¹⁶ 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.¹⁷ 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.¹⁸

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

("Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein and thus resting for its value upon the credibility of the out-of-court asserter."); 5 J. Wigmore, *Evidence* § 1361, at 2 (J. Chadbourn rev. ed. 1974) (hearsay is an "assertion of B reported by A . . . as evidence of the event X, asserted by B to have occurred") [hereinafter cited as J. Wigmore I].

15. Fed. R. Evid. 802 provides: "Hearsay is not admissible except as provided by these rules . . ." Exceptions to the hearsay rule are set forth in Fed. R. Evid. 803, 804(b). Fed. R. Evid. 801(d) exempts certain categories of statements—including conspirator statements under Rule 801(d)(2)(E)—from the definition of "hearsay." See *supra* note 1.

16. See R. Lempert & S. Saltzburg, *A Modern Approach to Evidence* 334-37 (1977); C. McCormick, *supra* note 3, § 245, at 581-84; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 179 (1948) [hereinafter cited as Morgan II]; Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. Pa. L. Rev. 484, 486 (1937).

17. Fed. R. Evid. art. VIII advisory committee note. The lack of these in-court guarantors of reliability is the rationale underlying the hearsay rule. *California v. Green*, 399 U.S. 149, 154 (1970); *United States v. Davis*, 571 F.2d 1354, 1358 n.6 (5th Cir. 1978); see *United States v. Watkins*, 519 F.2d 294, 297 (D.C. Cir. 1975). The modern emphasis is on the need for cross-examination. Fed. R. Evid. art. VIII advisory committee note; 5 J. Wigmore I, *supra* note 14, § 1362, at 10; see Morgan, *Hearsay and Non-Hearsay*, 48 Harv. L. Rev. 1138, 1138 (1935); Strahorn, *supra* note 16, at 500. These guarantors are necessary for a proper evaluation of testimony:

The factors to be considered in evaluating the testimony of [any] witness are perception, memory, and narration. . . . In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

Fed. R. Evid. art. VIII advisory committee note; accord R. Lempert & S. Saltzburg, *supra* note 16, at 333-35; C. McCormick, *supra* note 3, § 245, at 581-82; Morgan II, *supra* note 16, at 177-79; Strahorn, *supra* note 16, at 486.

18. Fed. R. Evid. art. VIII advisory committee note ("Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is."); see R. Lempert & S. Saltzburg, *supra* note 16, at 364; C. McCormick, *supra* note 3, § 245, at 583-84; 5 J. Wigmore I, *supra* note 14, § 1420, at 251.

exception.¹⁹ The admission exceptions of Rule 801(d)(2),²⁰ which include the coconspirator exception, generally are not rationalized on this basis.²¹

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;²² (2) the criminal agency

19. See R. Lempert & S. Saltzburg, *supra* note 16, at 364; C. McCormick, *supra* note 3, § 245, at 583-84; 4 J. Weinstein & M. Berger, *supra* note 3, ¶ 800[02], at 800-11; 5 J. Wigmore I, *supra* note 14, §§ 1420-1422. Professor Wigmore maintains that two considerations support all the hearsay exceptions: (1) a "necessity for the evidence"; and (2) a "circumstantial probability of trustworthiness." 5 J. Wigmore I, *supra* note 14, § 1420, at 251. The necessity for the evidence can arise either from the declarant's unavailability as a witness or the nature of the evidence itself. *Id.* at 253. Exceptions enumerated in Fed. R. Evid. 803 apparently are premised primarily on the theory that the statements they encompass are reliable. Statements within Rule 803 "possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." Fed. R. Evid. 803 advisory committee note. Exceptions enumerated within Rule 804(b) apparently are premised on a combination of reliability and necessity. These statements are admissible only if "the declarant is unavailable as a witness." Fed. R. Evid. 804(b).

20. Fed. R. Evid. 801(d)(2) provides:

A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) his own statement, in either his individual or representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

21. Fed. R. Evid. 801(d)(2) advisory committee note. The Advisory Committee followed the generally held belief that admissions are not excluded from the operation of the hearsay rule because of their trustworthiness. See, e.g., R. Lempert & S. Saltzburg, *supra* note 16, at 365; C. McCormick, *supra* note 3, § 262, at 628-29; E. Morgan, *Basic Problems of Evidence* 266 (1962); Lev, *The Law of Vicarious Admissions—An Estoppel*, 26 U. Cinn. L. Rev. 17, 28-29 (1957). Instead, the Advisory Committee adopted the adversary theory. See *infra* pt. I(A)(2).

22. *United States v. Coppola*, 526 F.2d 764, 770-71 (10th Cir. 1975); 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). This rationale was suggested originally by Professor Wigmore, see 4 J. Wigmore, *Evidence* § 1080a, at 141 (3d ed. 1940) [hereinafter cited as J. Wigmore II], and was adopted by the drafters of the Model Code of Evidence, Model Code of Evidence Rule 508 comment b at 251 (1942) (Conspirator "statements are likely to be true, and are usually made with a realization that they are against the declarant's interest.").

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); 4 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. 940 (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*, 104 S. Ct. 1423 (1984).

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

tors.²⁹ Such a statement therefore is considered reliable³⁰ and can be admitted against any of the conspirators.

The trustworthiness rationale is not a legitimate basis for the modern coconspirator exception.³¹ First, the premise of inherent reliability upon which the rationale rests is unsound.³² 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.³³ 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.³⁴ 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.³⁵ Such statements therefore should not be considered reliable.³⁶

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.

31. *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. Supp. 903, 917 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); see Fed. R. Evid. 801(d)(2) advisory committee note; *Levie*, *supra* note 9, at 1165-66.

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.*

35. *Id.* at 1165-66; see, e.g., *United States v. Piccolo*, 696 F.2d 1162, 1169 (6th Cir. 1983) (statement made to alleviate drug buyer's fears), *vacated on other grounds*, 705 F.2d 800 (1983); *United States v. Mason*, 658 F.2d 1263, 1268-70 (9th Cir. 1981) (same); *United States v. Jackson*, 549 F.2d 517, 534 (8th Cir.) (statement made to recruit new member), *cert. denied*, 430 U.S. 985 (1977).

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.³⁷ Merely narrative statements may also be against the joint interest of the conspirators.³⁸ Such statements are excluded under the modern exception, however, because they do not satisfy the "in furtherance" requirement of the Rule.³⁹ Under the trustworthiness rationale, therefore, the "in furtherance" requirement is merely an arbitrary limitation on the scope of the exception.⁴⁰ Assuming the drafters intended this requirement to have conceptual significance,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

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. *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. *Id.*

38. *See, 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).

39. *See, 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 supra* note 2 and accompanying text.

40. *Cf. Levie, 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.), *cert. denied*, 442 U.S. 917 (1979); *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 773-74 (S.D.N.Y. 1980); *Levie, 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, supra* note 9, at 1166-67. Under the trustworthiness rationale, however, coconspirator statements are considered inherently reliable. *See supra* notes 26-30 and accompanying text. It is difficult, therefore, to envision the purpose of the "in furtherance" requirement under the latter rationale.

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); *accord* *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *see In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) (quoting C. Sands, *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).⁴² 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."⁴³

2. The Criminal Agency Rationale

The criminal agency rationale for the coconspirator exception is an extension of the adversary theory,⁴⁴ which is the basis for all the admission exceptions.⁴⁵ The adversary theory begins with the idea that it is fair to admit a party's own statement against him.⁴⁶ A party is estopped from objecting to the absence of the traditional judicial checks of reliability when his statements are voluntarily made.⁴⁷ 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."⁴⁸ Moreover, the party retains the right to take the stand in his own behalf and explain or deny the statement.⁴⁹

This theory also supports the admission of statements made by a party's agent during the pendency and within the scope of his authority.⁵⁰ The criminal agency rationale suggests that coconspirators are

42. Fed. R. Evid. 801(d)(2)(E).

43. Fed. R. Evid. 801(d)(2) advisory committee note (citations omitted).

44. *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir.), cert. denied, 104 S. Ct. 344 (1983); see Fed. R. Evid. 801(d)(2) advisory committee note; D. Binder, *Hearsay Handbook* § 28.13, at 366-67 (2d ed. 1983); Lev, *supra* note 21, at 29-30, 39-40.

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.

50. See Fed. R. Evid. 801(d)(2) advisory committee note; D. Binder, *supra* note 44, § 28.13, at 366-67; E. Morgan, *supra* note 21, at 272-73; Lev, *supra* note 21, at 42-45.

the criminal equivalent of co-agents.⁵¹ The act of joining the conspiracy therefore constitutes authorization of all statements made during the pendency and in furtherance of the conspiracy.⁵²

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.⁵³ Both requirements seek to ensure that the party-opponent authorized the declarant's statement.⁵⁴ 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.⁵⁵ Most significantly, the Committee Note to Rule 801(d)(2)(E) expressly refers to the "agency theory of conspiracy."⁵⁶

The criminal agency rationale is not conceptually persuasive. It is a fiction;⁵⁷ the nature of criminal conspiracies belies the claim that conspirators authorize or ratify each other's statements.⁵⁸ 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.⁵⁹ The

51. See *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974); *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Stipe*, 517 F. Supp. 867, 869 (W.D. Okla.), *aff'd*, 653 F.2d 446 (10th Cir. 1981).

52. E. Morgan, *supra* note 21, at 275; Lev, *supra* note 21, at 40; Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. Chi. L. Rev. 530, 538-39 (1958) [hereinafter cited as *Hearsay Exception*]; see *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir.) (L. Hand, J.), *cert. denied*, 273 U.S. 702 (1926).

53. *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.), *cert. denied*, 442 U.S. 917 (1979); *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 773-74 (S.D.N.Y. 1980); Levie, *supra* note 9, at 1167.

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.

56. Fed. R. Evid. 801(d)(2)(E) advisory committee note.

57. *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Fielding*, 645 F.2d 719, 726 (9th Cir. 1981); *United States v. Layton*, 549 F. Supp. 903, 917 & n.5 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); Fed. R. Evid. 801(d)(2)(E) 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.

62. *United States v. Stipe*, 517 F. Supp. 867, 869 (W.D. Okla.), *aff'd*, 653 F.2d 446 (10th Cir. 1981); see 4 J. Weinstein & M. Berger, *supra* note 3, ¶ 801(d)(2)(E)[01], at 801-169 to -171; Levie, *supra* note 9, at 1167.

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.

64. See, e.g., *United States v. Thompson*, 621 F.2d 1147, 1152-53 (1st Cir. 1980); *United States v. Provenzano*, 620 F.2d 985, 999 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States v. Baykowski*, 615 F.2d 767, 771 (8th Cir. 1980); *United States v. McPartlin*, 595 F.2d 1321, 1357-58 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *United States v. Geaney*, 417 F.2d 1116, 1119-20 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

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

66. See e.g., *United States v. Kendricks*, 623 F.2d 1165, 1167-68, 1168 n.5 (6th Cir. 1980); *United States v. Thompson, Inc.*, 621 F.2d 1147, 1153 & n.8 (1st Cir. 1980); *United States v. Provenzano*, 620 F.2d 985, 1000 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States v. Grassi*, 616 F.2d 1295, 1300-01 (5th Cir.), *cert. denied*, 449 U.S. 956 (1980); *United States v. Baykowski*, 615 F.2d 767, 770-71 (8th Cir. 1980); *United States v. Peterson*, 611 F.2d 1313, 1330-31 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); *United States v. McPartlin*, 595 F.2d 1321, 1356-57 (7th Cir.) (Pell, J., concurring), *cert. denied*, 444 U.S. 833 (1979); *United States v. Jones*,

spiracy to the jury requires proof beyond a reasonable doubt.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.

B. Application of the Rationales to Collateral Conspiracies

Collateral conspirator statements are not within the established scope of the coconspirator exception;⁶⁸ there is no mention of them in the legislative history of the Rule,⁶⁹ nor was the issue addressed by the courts prior to the Rule's enactment.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.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

542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976); *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). See generally Note, *Inconsistencies in the Federal Circuit Courts' Application of the Coconspirator Exception*, 39 Wash. & Lee L. Rev. 125, 137-46 (1982) (comparing different standards of proof used by federal circuits). To date, no circuit has adopted a standard as high as beyond a reasonable doubt, although it has been suggested. 1 J. Weinstein & M. Berger, *supra* note 3, ¶ 104[05], at 104-44.

67. *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980); *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *In re Winship*, 397 U.S. 358, 361, 364 (1970).

68. See *United States v. Layton*, 549 F. Supp. 903, 916 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984).

69. See Fed. R. Evid. 801(d)(2)(E) advisory committee note; S. Rep. No. 1277, 93d Cong., 2d Sess. 41, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7073; H.R. Rep. No. 650, 93d Cong., 2d Sess. 65, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7075, 7086; H.R. Rep. No. 1597, 93d Cong., 2d Sess. 88, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7098, 7103-04.

70. See *United States v. Layton*, 549 F. Supp. 903, 916-17 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984).

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-

72. *Wong Sun v. United States*, 371 U.S. 471, 490 (1963).

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.

81. Fed. R. Evid. 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Such evidence, however, is potentially admissible for other purposes, including "proof of motive." *Id.* The trial judge determines admissibility based upon the factors set forth in Fed. R. Evid. 403. Fed. R. Evid. 404(b) advisory committee note; S. Rep. No. 1277, 93d Cong., 2d Sess. 24-25, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7071; 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5240, at 471 (1978). *See infra* note 101.

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.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 *some* conspiracy. As the construction of conspiracy becomes broader, the "in furtherance" requirement becomes less meaningful and is readily manipulated by creative prosecutors.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.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.⁸⁶ The great need for this evidence is most probably the practical reason for the exception,⁸⁷ while the criminal agency

83. *Id.* at 770.

84. *United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979), illustrates the risk of manipulation of the requirements created by a broad construction of the Rule. In *Postal*, the defendants were charged with conspiracy to import marijuana. *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. *Id.* at 866 & n.41. Although there was insufficient independent evidence of the criminal conspiracy, the court admitted the evidence. *Id.* at 866 n.41. The court identified the voyage itself as a non-criminal joint venture. *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.

85. J. Weinstein & M. Berger, *supra* note 3, ¶ 801(d)(2)(E)[01], at 801-173.

86. *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. Supp. 903, 917-18 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); *United States v. Stipe*, 517 F. Supp. 867, 868-69 (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 801-168 to -171.

87. 4 J. Weinstein & M. Berger, *supra* note 3, ¶ 801(d)(2)(E)[01], at 801-169; *Levie*, *supra* note 9, at 1166.

theory is the means of rationalizing it.⁸⁸ As demonstrated above,⁸⁹ 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*,⁹⁰ 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.⁹¹ 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.⁹² This cover-up conspiracy was not charged in the indictment.⁹³ 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.⁹⁴ The court held the statements inadmissible because they were not made in furtherance of a charged or underlying conspiracy.⁹⁵

The *Layton* court noted that the coconspirator exception, "[u]nlike 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 Levie, *supra* note 9, at 1163.

89. See *supra* notes 61-67 and accompanying text.

90. 549 F. Supp. 903 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984).

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.”⁹⁶ The court concluded that these rationales “suggest” a narrow construction of the exception regarding collateral conspiracies.⁹⁷ 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.”⁹⁸ The court relied primarily on the Advisory Committee Note to 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.”⁹⁹

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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

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

96. *Id.* at 917-18 (footnote omitted).

97. *Id.* at 918.

98. *Id.*

99. Fed. R. Evid. 801(d)(2)(E) advisory committee note.

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.¹⁰³ 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.¹⁰⁴ The inquiry into collateral issues required to determine admissibility therefore may result in an inordinate consumption of time and resources.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ Evidence of a defendant's prior crimes is usually scrutinized under Rule 404(b),¹⁰⁸ which requires a Rule 403 balancing of the probative value of the evidence against its prejudicial effect.¹⁰⁹ 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 *substan-*

Supp. 903, 917 (N.D. Cal. 1982), *aff'd in part, rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984).

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. 982 (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").

105. *United States v. Cambindo Valencia*, 609 F.2d 603, 636 n.25 (2d Cir. 1979) (dictum), *cert. denied*, 446 U.S. 940 (1980); see *Miller v. Poretzsky*, 595 F.2d 780, 783 (D.C. Cir. 1978); *United States v. Johnson*, 558 F.2d 744, 747 (5th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *Dolan*, *supra* note 13, at 262.

106. *United States v. Cambindo Valencia*, 609 F.2d 603, 636 n.25 (2d Cir. 1979) (dictum), *cert. denied*, 446 U.S. 940 (1980).

107. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (evidence of crimes not charged inherently prejudicial); *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978) (same). See *supra* note 81.

108. Fed. R. Evid. 404(b).

109. See *supra* note 81.

tially outweighs their probative value.¹¹⁰ 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.¹¹¹ 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.¹¹² 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.¹¹³

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.¹¹⁴ They are derived from the same roots;¹¹⁵ the foundation of

110. Fed. R. Evid. 403; see *United States v. Guerrero*, 667 F.2d 862, 867 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); 22 C. Wright & K. Graham, *supra* note 81, § 5221, at 308 (1978).

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).

112. See *United States v. Cambindo Valencia*, 609 F.2d 603, 636 n.25 (2d Cir. 1979) (dictum), *cert. denied*, 446 U.S. 940 (1980); cf. *Palermo v. United States*, 360 U.S. 343, 355 (1959) (should "avoid needless trial of collateral and confusing issues"); *Miller v. Poretsky*, 595 F.2d 780, 783 (D.C. Cir. 1978) (inquiry into collateral issues a "waste of time"); *United States v. Johnson*, 558 F.2d 744, 747 (5th Cir. 1977) (same), *cert. denied*, 434 U.S. 1065 (1978); Dolan, *supra* note 13, at 262 ("evidence that is remote or collateral can . . . confuse the issues . . . or consume too much time").

113. See *United States v. Somers*, 496 F.2d 723, 740 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

114. See, e.g., Davenport, *supra* note 10, at 1405 (case-by-case approach); Graham, *The Confrontation Clause, the Hearsay Rule and the Forgetful Witness*, 56 Tex. L. Rev. 151, 204-05 (1978) (favors relaxed standard); Read, *The New Confrontation—Hearsay Dilemma*, 45 S. Cal. L. Rev. 1, 48 (1972) (case-by-case approach); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 Geo. Wash. L. Rev. 76, 91-92 (1971) (pro-defendant approach); Westen, *The Future of Confrontation*, 77 Mich. L. Rev. 1185, 1203 (1979) (favors relaxed standard); *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 236-37 (1968) (pro-defendant approach).

115. Dutton v. Evans, 400 U.S. 74, 86 (1970); see *California v. Green*, 399 U.S. 149, 155 (1970).

both is the need to exclude unreliable out-of-court statements and preserve the right to cross-examine adverse witnesses.¹¹⁶ The hearsay rule, however, is applicable in both civil and criminal cases,¹¹⁷ while the confrontation clause is applicable only when the evidence is introduced against a criminal defendant.¹¹⁸ The Supreme Court has made clear that the confrontation clause extends beyond the scope of the hearsay rule.¹¹⁹ 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.¹²⁰

The test for admissibility of a hearsay statement under the confrontation clause is set forth in *Ohio v. Roberts*.¹²¹ The test, which presumes the statement's inclusion within an enumerated hearsay exception,¹²² has two requirements. First, the proponent of the statement must produce any available witnesses, unless producing the witness would be of remote utility.¹²³ Second, there must be sufficient indicia that the statement is reliable.¹²⁴ If the statement is within a "firmly rooted" hearsay exception,¹²⁵ such indicia of reliability may be presumed.¹²⁶ If not, the court may admit the statement only if it passes a particularized inquiry into its reliability.¹²⁷

The first requirement of the *Roberts* test is satisfied if the prosecution shows that the declarant is unavailable.¹²⁸ Alternatively, if the evidence appears reliable and is relatively insignificant, the prosecution is relieved of its obligation to produce the declarant.¹²⁹ Once the

116. See *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *California v. Green*, 399 U.S. 149, 157-58 (1970); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); Fed. R. Evid. art. VIII advisory committee note.

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.*

119. See *Ohio v. Roberts*, 448 U.S. 56, 65 (1980); *Dutton v. Evans*, 400 U.S. 74, 80-82 (1970); *California v. Green*, 399 U.S. 149, 155-57 (1970).

120. See *Ohio v. Roberts*, 448 U.S. 56, 65 (1980); *Dutton v. Evans*, 400 U.S. 74, 80-82 (1970); *California v. Green*, 399 U.S. 149, 155-57 (1970).

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.*

128. See, e.g., *United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Chappell*, 698 F.2d 308, 312 (7th Cir.), *cert. denied*, 103 S. Ct. 2095 (1983); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 404 (1983).

129. See *Ohio v. Roberts*, 448 U.S. 56, 65 n.7 (1980); *Dutton v. Evans*, 400 U.S. 74, 87, 89 (1970); *United States v. Gibbs*, No. 82-1096, slip op. at 20-21 (3d Cir. 1983).

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.¹³⁰ Consequently, these courts have held without further inquiry that statements within the exception satisfy the requirements of the confrontation clause.¹³¹ 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.¹³² 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.¹³³ Extending the coconspirator exception beyond its established scope¹³⁴ to include collateral conspiracies therefore would also extend the presumption of reliability that does not reflect the true nature of coconspirator statements.¹³⁵ The cocon-

130. *United States v. Chappell*, 698 F.2d 308, 312 (7th Cir.), *cert. denied*, 103 S. Ct. 2095 (1983); *United States v. Peacock*, 654 F.2d 339, 349 & n.1 (5th Cir. 1981), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982). Other circuits have equated satisfaction of Fed. R. Evid. 801(d)(2)(E) with satisfaction of the confrontation clause without expressly finding the exception "firmly rooted." See *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States v. Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), *cert. denied*, 454 U.S. 1037 (1981); *United States v. Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978).

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).

131. See *United States v. Chappell*, 698 F.2d 308, 312 (7th Cir.), *cert. denied*, 103 S. Ct. 2095 (1983); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States v. Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978).

132. See *United States v. Ordonez*, 722 F.2d 530, 535 (9th Cir. 1983); *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Singer*, 660 F.2d 1295, 1307 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); *United States v. Roberts*, 583 F.2d 1173, 1176 (10th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979). In *Ammar*, the Third Circuit held that Rule 801(d)(2)(E) could not be considered a "firmly rooted hearsay exception" because it is technically not an exception. 714 F.2d at 255 (emphasis in original).

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-

136. Cf. *United States v. Hale*, 422 U.S. 171, 181 (1975) (Burger, C.J., concurring) (desirable to avoid basing decision on constitutional grounds); *McElroy v. Guagliardo*, 361 U.S. 281, 283 (1960) (same); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947) (same); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (same).

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.

Hearsay may be admitted under Rule 803(24) "despite having failed the requirements of one of the other exceptions [T]he residual exceptions are not dependent on the other exceptions for their meaning." *In re Japanese Elec. Prods. Litig.*, 723 F.2d 238, 302 (3d Cir. 1983); see, e.g., *Moffett v. McCauley*, 724 F.2d 581, 583-84 (7th Cir. 1984) (prison report inadmissible under Fed. R. Evid. 803(6); admissible under Rule 803(24)); *Karme v. Commissioner*, 673 F.2d 1062, 1064-65 (9th Cir. 1982) (bank reports inadmissible under Fed. R. Evid. 803(6); admissible under Rule 803(24)); *United States v. American Tel. & Tel. Co.*, 516 F. Supp. 1237, 1238-39, 1241-42 (D.D.C. 1981) (reports inadmissible under Fed. R. Evid. 801(d)(2)(B); admissible under Rule 803(24)).

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.¹³⁹ Of course, the court in a criminal case must still measure such statements against the *Roberts* standard.¹⁴⁰ This constitutional inquiry, however, is mandated whenever a hearsay statement is admitted in a criminal trial.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.

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, *supra* note 107, at 585; *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, *supra* note 44, § 40.05, at 446.

139. Fed. R. Evid. 803(24), 804(b)(5); *see* United States v. Friedman, 593 F.2d 109, 118-19 (9th Cir. 1979); United States v. Barnes, 586 F.2d 1052, 1055-56 (5th Cir. 1978); United States v. Thevis, 84 F.R.D. 57, 69-70 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982). Courts differ regarding whether the reliability inquiry should consider the reliability of the in-court witness who reports the statement. *Compare* United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978) (considers reporting witness reliability) *and* United States v. Medico, 557 F.2d 309, 315-16 (2d Cir.) (same), *cert. denied*, 434 U.S. 986 (1977) *with* Huff v. White Motor Corp., 609 F.2d 286, 293 (7th Cir. 1979) (does not consider reliability of reporting witness).

140. *See* Ohio v. Roberts, 448 U.S. 56, 62-63 (1980); *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.), *cert. denied*, 103 S. Ct. 2095 (1983); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982).

141. *See 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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142. *United States v. Cambindo Valencia*, 609 F.2d 603, 636 n.25 (2d Cir. 1979) (dictum), *cert. denied*, 446 U.S. 940 (1980).