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## Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Conspirator Hearsay

Georgia J. Hinde

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## NOTES

### FEDERAL RULE OF EVIDENCE 801(d)(2)(E) AND THE CONFRONTATION CLAUSE: CLOSING THE WINDOW OF ADMISSIBILITY FOR COCONSPIRATOR HEARSAY

#### INTRODUCTION

The confrontation clause of the sixth amendment<sup>1</sup> embodies an ancient<sup>2</sup> and lofty<sup>3</sup> principle that every criminal defendant has the right to confront his accusers.<sup>4</sup> The right of confrontation helps guarantee the criminal defendant that only reliable evidence will be admitted against him at trial<sup>5</sup> by ensuring that accusations are made under oath,<sup>6</sup> by a

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1. U.S. Const. amend. VI. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

2. Commentators have noted that the confrontation right derives from the framers' reaction to the prosecutorial abuses that occurred during the trial of Sir Walter Raleigh in 1603. See F. Heller, *The Sixth Amendment to the Constitution of the United States* 104 (1969); see also Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 *Crim. L. Bull.* 99, 100 n.4 (1972) (adhering to the theory because of its quality as a "highly romantic myth"). Sir Walter had the misfortune of being convicted of treason solely on the hearsay evidence of an alleged coconspirator, despite the unreliability of a "saying of some wild Jesuit," Graham, *supra*, at 101, and despite his repeated demands to confront his accusers, Graham, *supra*, at 100.

An even more ancient reference to the right to confrontation acknowledges the Roman practice of providing the accused an opportunity to confront his accusers. See *Acts 25:16* (King James) ("It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself.").

3. See *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (confrontation right is one of the fundamental guarantees encompassed within the right to a trial by jury); Graham, *supra* note 2, at 132-33 (noting the "strong element of folk justice, gut fairness, [and] adversary sportsmanship involved in the confrontation notion . . . [t]he idea that one who accuses another of wrong ought to do so in a forum where he assumes the consequences of his statement has . . . power . . . as an important symbol of fairness").

4. See *California v. Green*, 399 U.S. 149, 157 (1970) ("literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause"). The object of the clause as originally conceived was to prevent the use of *ex parte* affidavits against the accused, and to provide the defendant with opportunities for "testing the recollection and sifting the conscience of the witness, [and for] compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor . . . whether he is worthy of belief." *Id.* at 158 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

The confrontation clause also serves to ensure the reliability of convictions, see *infra* note 5, control prosecutorial misconduct, Fed. R. Evid. art. VIII advisory committee note; see Comment, *Confrontation and the Hearsay Rule*, 75 *Yale L.J.* 1434, 1438-39 (1966) [hereinafter cited as *Confrontation*], and give the defendant "the psychological satisfaction of observing the evidence relie[d] upon to condemn him," Graham, *supra* note 2, at 105.

5. See *California v. Green*, 399 U.S. 149, 158 (1970); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); McCormick on Evidence § 252, at 752 (E. Cleary 3d ed. 1984) [hereinafter cited as McCormick]; see also *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980)

declarant whose demeanor and credibility can be assessed by the trier of fact,<sup>7</sup> when the witness is subject to cross-examination.<sup>8</sup> The framers

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(presence of the accuser at trial "makes it more difficult to lie against someone, particularly if that person is an accused and present at trial") (quoting 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 800[01], at 800-10 (1979)); *Roberts*, 448 U.S. at 66 (clause provides "certainty in . . . conducting criminal trials" by permitting only reliable hearsay to come before the trier of fact). See *infra* notes 6-9 and accompanying text. The Court has long recognized that "[a]n important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968); see, e.g., *Roberts*, 448 U.S. at 66; *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Green*, 399 U.S. at 161.

6. See *California v. Green*, 399 U.S. 149, 158 (1970); Fed. R. Evid. art. VIII advisory committee note; cf. *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945) (rights may not be deprived nor convictions based on statements not made under fear of perjury penalties). The value of the oath, aside from any religious significance, is that it impresses upon the witness "the seriousness of the matter," *Green*, 399 U.S. at 158, by the imposition of penalties for perjury, see *id.* See *infra* note 143 and accompanying text for a discussion whether the oath by itself can be an adequate guarantor of reliability.

7. *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)); see *California v. Green*, 399 U.S. 149, 158 (1970).

8. Cross-examination helps ensure that only reliable evidence will be admitted because it gives the defendant an opportunity to test the sincerity and recollection of the witness and to clarify ambiguities in the witness' testimony. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980) (tests sincerity); *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965) (tests sincerity and recollection) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (tests recollection); *Kirby v. United States*, 174 U.S. 47, 55 (1899) (tests ambiguities in testimony); *Mattox*, 156 U.S. at 242-43 (tests sincerity and recollection). The right to cross-examination is considered the core protection secured by the confrontation clause. See, e.g., *Roberts*, 448 U.S. at 63 (quoting *Douglas*, 380 U.S. at 418 (1965)); *California v. Green*, 399 U.S. 149, 157-58 (1970); *Douglas*, 380 U.S. at 418; *Dowdell*, 221 U.S. at 330; *Mattox*, 156 U.S. at 242-43; cf. *Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1390 (1972) ("Absent sufficient inherent assurances of reliability, the only permissible guarantor of the hearsay declaration's evidentiary value is the defendant's cross-examination of the declarant.").

Effective cross-examination at trial will ensure a defendant of his confrontation right. See *Green*, 399 U.S. at 158 (when hearsay declarant admits making the prior statement and testifies at trial subject to adequate cross-examination, the "out-of-court statement for all practical purposes regains most of the lost [confrontation] protections"); cf. Fed. R. Evid. art. VIII advisory committee note (cross-examination is effective means of removing testimonial infirmities). Professor Wigmore suggested that the constitutional guarantee is simply a "right to the opportunity of cross-examination." 5 J. Wigmore, *Evidence* § 1365, at 28 (J. Chadbourn rev. ed. 1974) [hereinafter cited as *Wigmore*]. Confrontation is arguably a more demanding protection, however, than a simple right to cross-examination. See *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (Court finds that "the right of cross-examination is included in the right . . . to confront the witness"); cf. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (Court, by distinguishing between the rights of cross-examination and confrontation, implies that cross-examination is only a component of the confrontation protection). The Court has nevertheless implied on a number of occasions that if the declarant is adequately cross-examined at trial, no confrontation problem will arise. See, e.g., *Green*, 399 U.S. at 164, 168 (confrontation clause does not require exclusion of prior inconsistent statement when the declarant concedes making the statement and can be cross-examined); *Bruton v. United States*, 391 U.S. 123, 136 (1968) (unreliable evidence is a threat to defendant's confrontation right unless wit-

considered this safeguard to be essential to fair criminal proceedings and therefore a fundamental guarantee of life and liberty.<sup>9</sup>

The rule against hearsay evidence<sup>10</sup> also recognizes that statements that are not made under oath, in the presence of the trier of fact and subject to cross-examination, are generally unreliable.<sup>11</sup> Exceptions to this rule,<sup>12</sup> however, permit certain accusations to be introduced into evidence without affording the defendant the opportunity to confront his accusers,<sup>13</sup> because these statements possess guarantees of reliability generally not present in out-of-court statements.<sup>14</sup> Although these exceptions appear to deny the defendant his right of confrontation,<sup>15</sup> the confrontation clause has never been interpreted as a wholesale exclusion of hearsay evidence.<sup>16</sup> Instead, the Supreme Court has acknowledged

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ness can be cross-examined); *Pointer*, 380 U.S. at 404 (confrontation and cross-examination used almost interchangeably in discussing fair trial guarantees).

9. See *California v. Green*, 399 U.S. 149, 175-76 (1970) (Harlan, J., concurring); *Heller*, *supra* note 2, at 107. The collection of criminal defendant rights that appear in the sixth amendment respond to a number of common law deficiencies in protecting the accused and assuring a fair trial. See *Green*, 399 U.S. at 176 (Harlan, J., concurring); *Confrontation*, *supra* note 4, at 1436 n.10. Prior to the evolution of adversarial requirements in the seventeenth century, a defendant was able to defend against accusations only by showing that the prosecution had not adequately proved its case. See *Green*, 399 U.S. at 176 (Harlan, J., concurring). No assistance of counsel, compulsory process, notice of charges, or confrontation of adverse witnesses was mandatory in a criminal proceeding. See *id.* at 176 n.9 (Harlan, J., concurring). Recognizing the need for these important aspects of a defense, the framers responded with the sixth amendment "package of rights" for criminal defendants. *Id.* at 176. The Court's use of the confrontation standard shows that it is imposing a stricter measure of reliability on admissible hearsay than due process requires. See *infra* note 113.

10. Fed. R. Evid. 802 provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." 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."

11. See, e.g., *McCormick*, *supra* note 5, § 245, at 726-27; *Wigmore*, *supra* note 8, § 1362, at 3, 7; *Morgan, Hearsay Dangers and the Application of the Hearsay Concept*, 62 *Harv. L. Rev.* 177, 183-84 (1948) [hereinafter cited as *Morgan I*]. The advisory committee commented that the oath alone is not sufficient to eliminate hearsay deficiencies, and is less compelling than cross-examination as a device to assure reliability. Fed. R. Evid. 801(d)(1) advisory committee note.

12. See Federal Rules of Evidence 803 and 804 for the current statutory embodiment of the hearsay exceptions, many of which were recognized at common law in similar forms.

13. Availability of the declarant is immaterial to the admission of hearsay under Rule 803 exceptions, see Fed. R. Evid. 803(1)-(24), although unavailability is a condition of hearsay admissibility under Rule 804 exceptions, see Fed. R. Evid. 804(b)(1)-(5). See *infra* note 90 for a definition of unavailability under Fed. R. Evid. 804(a).

14. Fed. R. Evid. art. VIII advisory committee note; see *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) ("hearsay exceptions" rest on "solid foundations" of reliability).

15. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI (emphasis added). Thus, in a criminal case, any hearsay admitted under the exceptions to the hearsay rule listed in the Federal Rules of Evidence violates a literal reading of the confrontation clause when the declarant is not produced.

16. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Dutton v. Evans*, 400 U.S. 74,

that the confrontation clause and the hearsay rule with its exceptions are both "designed to protect [the] similar [value]"<sup>17</sup> of assuring that only reliable evidence will be admitted against a criminal defendant.<sup>18</sup> The two provisions do not, however, represent congruent principles.<sup>19</sup> In most cases, the confrontation clause affords a criminal defendant greater protection than the hearsay rule was intended to offer.<sup>20</sup> Even so, some

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80 (1970); *California v. Green*, 399 U.S. 149, 155-56 (1970); *Pointer v. Texas*, 380 U.S. 400, 407 (1965); Fed. R. Evid. art. VIII advisory committee note; *see also* *United States v. Fielding*, 630 F.2d 1357, 1367 (9th Cir. 1980) ("As the Supreme Court recently explained, the confrontation clause establishes a rule of necessity.").

17. *California v. Green*, 399 U.S. 149, 155 (1970); *see* *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (confrontation clause and hearsay rule protect similar values) (quoting *California v. Green*, 399 U.S. 149, 155 (1970)); *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (confrontation clause and hearsay rule "stem from the same roots"); *United States v. Fielding*, 630 F.2d 1357, 1366 (9th Cir. 1980) ("hearsay rules and Confrontation Clause may protect similar values").

18. The Supreme Court has found that "certain hearsay exceptions rest upon such solid foundations [of reliability] that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (dying declarations and prior testimony) (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)); *Roberts*, 448 U.S. at 66 n.8 (business and public records) (quoting Comment, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 La. L. Rev. 651, 668 (1970)); *see* *Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972) (prior cross-examined testimony); *California v. Green*, 399 U.S. 149, 165 (1970) (preliminary hearing testimony); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (dying declarations and prior testimony); *see also* *Martin, Confrontation Clause and Hearsay Rule*, 188 N.Y.L.J. 1, July 9, 1982, at 26, col. 1 ("Specifically, those [similar] values are related to the reliability of the trial process, promoted either by cross-examination in the presence of the fact finder or by some acceptable substitute.").

19. *California v. Green*, 399 U.S. 149, 155 (1970) (the Court's confrontation decisions "have never established such a congruence"); *see* *Martin, supra* note 18, at 26, col. 1 ("the similarity of underlying purposes does not necessarily establish a congruence"); *cf.* *Graham, supra* note 2, at 103 (confrontation clause "describes a concept; it does not prescribe a set of rules").

20. *United States v. Fielding*, 630 F.2d 1357, 1366 (9th Cir. 1980); *see* *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980); *California v. Green*, 399 U.S. 149, 155-56, 158 (1970); *Confrontation, supra* note 4, at 1437 ("[N]o hearsay rule closely approximates the advantages of confrontation; and no rule accurately distinguishes between reliable and unreliable evidence."). For example, even if the statement satisfies the particular exception under which it is sought to be admitted, the admission of the statement may violate the confrontation clause when the declarant is unavailable. *Green*, 399 U.S. at 155-56; *see id.* at 156 (hearsay may satisfy Rule 803 requirements, under which availability is immaterial, but the prosecution must still demonstrate the unavailability of the declarant—the impossibility or remote utility of production—before the admission of the statement would satisfy the confrontation clause); *Berger v. California*, 393 U.S. 314, 315 (1969) (exclusion of prior recorded testimony that qualified under the hearsay exception when prosecution had not made good faith efforts to produce witness); *Barber v. Page*, 390 U.S. 719, 722-26 (1968) (same); *Motes v. United States*, 178 U.S. 458, 471 (1900) (same). As promulgated in the Federal Rules of Evidence, the exceptions are not cast in positive terms of admissibility, but rather in terms recognizing that they may still fail to satisfy confrontation principles. Fed. R. Evid. art. VIII advisory committee note.

Prior to the enactment of the Federal Rules of Evidence, however, the confrontation clause proved to be less protective than the corresponding hearsay exception as subsequently enacted. *See* *Dutton v. Evans*, 400 U.S. 74, 79, 88 (1970) (admission of coconspirator statement that would not have qualified under Rule 801(d)(2)(E)); *Green*, 399

exceptions to the hearsay rule have been found sufficiently reliable to allow admission of hearsay evidence without violating the defendant's right of confrontation.<sup>21</sup>

When the Federal Rules of Evidence (Federal Rules) were promulgated in 1975,<sup>22</sup> most of the traditional common law exceptions to the hearsay rule were codified as "hearsay exceptions."<sup>23</sup> The admissions exception, however, was classified as "not hearsay"<sup>24</sup> on an adversary theory of admissibility<sup>25</sup> that makes a party's own voluntary statements admissible against him, even though they do not generally contain the same guarantees of reliability<sup>1</sup> as the statements deemed to be "hearsay exceptions."<sup>26</sup> This theory rarely causes confrontation problems when the defendant's direct admissions are admitted into evidence because the defendant can usually take the stand and "confront" his own statements, either by explanation or denial.<sup>27</sup> Moreover, direct admissions are generally reliable: One does not normally make admissions that are false.<sup>28</sup>

U.S. at 165 (admission of preliminary hearing testimony that would not have qualified under Rule 804(b)(1) as former testimony).

21. *See, e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 66 n.8 (1980) (dying declarations, prior testimony, business and public records) (dictum); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (dying declarations and prior testimony); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (dying declarations and documentary evidence); *Motes v. United States*, 178 U.S. 458, 467-74 (1900) (former testimony); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (prior testimony and dying declarations).

22. *See* Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1929 (1975) (codified as amended at Fed. R. Evid. 28 U.S.C. (1982)).

23. Fed. R. Evid. art. VIII advisory committee note. The "hearsay exceptions" appear in Fed. R. Evid. 803(1)-(24) and in Fed. R. Evid. 804(b)(1)-(5).

24. 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 a 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.

This rule codifies the former admissions exception to the hearsay rule. Fed. R. Evid. 801(d)(2) advisory committee note.

25. Fed. R. Evid. 801(d)(2) advisory committee note ("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 the satisfaction of the conditions of the hearsay rule."); *see* D. Binder, *Hearsay Handbook* § 28.13, at 366 (2d ed. 1983); McCormick, *supra* note 5, § 262, at 775; E. Morgan, *Basic Problems of State and Federal Evidence* 241 (J. Weinstein 5th ed. 1976) [hereinafter cited as *Morgan II*]; Lev, *The Law of Vicarious Admissions—An Estoppel*, 26 U. Cinn. L. Rev. 17, 28-30 (1957).

26. *Compare* Fed. R. Evid. 801(d)(2) advisory committee note ("No guarantee of trustworthiness is required in the case of an admission.") with Fed. R. Evid. 803 advisory committee note (hearsay exceptions in Rules 803 and 804 are admissible on theory that "under appropriate circumstances [they] may possess circumstantial guarantees of trustworthiness").

27. *See* *Morgan II*, *supra* note 25, at 241 (a party "can hardly object that he had no opportunity to cross-examine himself").

28. *See* *Morgan II*, *supra* note 25, at 241 (a party "can hardly object . . . that he is

Statements made by authorized spokespersons or bona fide agents of a defendant are also considered to be a defendant's admissions,<sup>29</sup> with the declarant's fiduciary duty to its principal creating a less obvious identity of speakers under a true agency theory. Because such statements arise more often in civil proceedings<sup>30</sup> than in criminal proceedings, they seldom offend confrontation principles even when the agent is not produced.<sup>31</sup> Furthermore, the fiduciary duty owed to the principal infuses a reliability element into such statements because it requires an agent to speak truthfully on his principal's behalf.<sup>32</sup>

When admissions are those of the accused's alleged coconspirators,<sup>33</sup> however, admitting the out-of-court statement is not justified by an identity of speakers,<sup>34</sup> a duty owed by a declarant to a defendant<sup>35</sup> that would create a quasi-identity, or any reliability guarantee.<sup>36</sup> Instead, a fictional

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unworthy of credence"); *cf.* Fed. R. Evid. 804(b)(3) advisory committee note ("persons do not make statements that are damaging to themselves unless satisfied . . . that they are true"); Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159, 162 (1983) ("common sense" that "people will not make a statement that damages their [penal] interests unless they believe the statements to be true") [hereinafter cited as *Inculpatory Statements*].

29. See Fed. R. Evid. 801(d)(2)(C); Fed. R. Evid. 801(d)(2)(D). For agents other than authorized spokespersons, however, the statements must have been made within the scope of the agency relationship. Fed. R. Evid. 801(d)(2)(D); see, e.g., *D. Binder, supra* note 25, § 28.13, at 366-67; *Morgan II, supra* note 25, at 247; *Lev, supra* note 25, at 42-45.

30. See, e.g., *Popham, Haik, Schnobrich, Kaufmann & Doty, Ltd. v. Newcomb Securities Co.*, 751 F.2d 1262, 1264 (D.C. Cir. 1985); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 869 (11th Cir. 1985). For example, these exceptions might arise in civil proceedings when a corporate employee's statement is sought to be admitted against a defendant corporate officer. Use of an employee's statement in a criminal antitrust, fraud or negligence proceeding, however, could raise some confrontation inquiry.

31. The sixth amendment, which by its terms applies "[i]n all criminal prosecutions," U.S. Const. amend. VI, does not protect civil defendants. See Fed. R. Evid. art. VIII advisory committee note.

32. An agent's fiduciary duty requires that he act solely for the benefit of the principal in all matters relating to the agency relationship. *Henn, Agency, Partnership and Other Unincorporated Business Enterprises* 81 (1982). Agents may not act secretly or for the benefit of adverse parties. *Id.*

33. Coconspirator statements are considered to be admissions. See Fed. R. Evid. 801(d)(2)(E).

34. The concert of action element of conspiracies, see, e.g., *Callanan v. United States*, 364 U.S. 587, 593 (1961); *Dennis v. United States*, 341 U.S. 494, 573-74 (1951); *United States v. Dawson*, 576 F.2d 656, 658 (5th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979), does not effect any transubstantiation of identities among the members of the conspiracy. Not even the weakest fictions that rationalize coconspirator admissions have analogized to this extreme.

35. The criminal agency rationale traditionally used to support admission of coconspirator statements supposes that coconspirators authorize each other to speak on matters involving the furtherance of the conspiracy's objectives. E.g., *Morgan II, supra* note 25, at 249; *Lev, supra* note 25, at 40. Comment, *The Hearsay Exception for Co-conspirators' Declarations*, 25 U. Chi. L. Rev. 530, 538-39 (1958) [hereinafter cited as *Hearsay Exception*]. No one has extended the criminal agency fiction, however, to encompass any duty of loyalty among coconspirators.

36. See *infra* notes 125-29 and accompanying text. The drafters of the Federal Rules of Evidence did not accept the trustworthiness rationale for any admissions, see Fed. R.

criminal agency theory<sup>37</sup> is frequently used<sup>38</sup> to justify Rule 801(d)(2)(E)'s admissibility of alleged coconspirator's statements made "during the course and in furtherance of the conspiracy."<sup>39</sup> A more can-

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Evid. 801(d)(2) advisory committee note, and many commentators agree that reliability is the most unsatisfactory rationale for the coconspirator exception, *see, e.g.*, Davenport, *supra* note 8, at 1387-88; Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1165 (1954); Mueller, *The Federal Coconspirator Exception: Action, Assertion and Hearsay*, 12 Hofstra L. Rev. 323, 362 (1984); Note, *Federal Rule of Evidence 801(d)(2)(E): Admissibility of Statements from an Uncharged Conspiracy that Does Not Underlie the Substantive Charge*, 52 Fordham L. Rev. 933, 940 (1984) [hereinafter cited as *Uncharged Conspiracy*].

Justice White views the status of codefendant statements as "intrinsically much less reliable" than other forms of hearsay, *Bruton v. United States*, 391 U.S. 123, 141-42 (1968) (White, J., dissenting), and believes that codefendant hearsay has "traditionally been viewed with special suspicion. . . . [d]ue to [a codefendant's] strong motivation to implicate the defendant and to exonerate himself," *id.* at 141. He further states that "codefendant's admissions cannot enter into the determination of the defendant's guilt or innocence because they are unreliable. . . . for they are not only hearsay but hearsay which is doubly suspect." *Id.* at 142; *see Holmgren v. United States*, 217 U.S. 509, 523-24 (1910) (better practice to "caution juries against too much reliance upon the testimony of accomplices"); *Crawford v. United States*, 212 U.S. 183, 204 (1909) (evidence of confessed accomplice "ought to be received with suspicion, and with the very greatest care and caution"). Because "a joint venturer is considered as a coconspirator for the purposes of this rule [801(d)(2)(E)] even though no conspiracy has been charged," Fed. R. Evid. 801(d)(2)(E) Notes of the Comm. on the Judiciary, S. Rep. No. 1277, 93d Cong., 2d Sess. 26, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7073, Justice White's view on the unreliability of codefendant statements arguably has equal application to coconspirator statements.

In an attempt to ensure some reliability, courts have added a requirement that there be independent evidence of the conspiracy in order for the coconspirator statement to be admitted; although helping to identify the existence of the conspiracy, this requirement does little to ensure the reliability of the statement implicating the defendant in the conspiracy. *See infra* notes 202-03.

37. Fed. R. Evid. 801(d)(2)(E) advisory committee note ("the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established"); *see United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); Levie, *supra* note 36, at 1165.

The Supreme Court's adoption of the coconspirator exception in *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 470 (1827), may have given special vitality to the agency rationale. The coconspirators in *Gooding* were involved in an actual agency relationship. *See id.*; Oakley, *From Hearsay to Eternity: Pendency and the Co-Conspirator Exception in California—Fact, Fiction, and a Novel Approach*, 16 Santa Clara L. Rev. 1, 14-15 (1975) ("*Gooding* involved a business venture which was every bit as commercial as it was illicit, and which was . . . operated along conventional business lines."). This "classic civil agency relationship," *id.* at 14, made adoption of the exception under the agency rationale justifiable. If *Gooding* had been decided under the current Federal Rules, the declarant's statement could have been admitted as "a statement by [an] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship," Fed. R. Evid. 801(d)(2)(D), without raising the specters of coconspirator hearsay admissibility.

38. *See, e.g.*, *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, 868-69 (W.D. Okla.), *aff'd*, 653 F.2d 446 (10th Cir. 1981).

39. Fed. R. Evid. 801(d)(2)(E). This Rule adopts the common law form of the cocon-

did explanation for the coconspirator exception is that coconspirator statements are necessary tools for prosecuting conspiracies,<sup>40</sup> which are inherently covert and therefore difficult to prove.<sup>41</sup> The pendency and furtherance requirements were intended to limit the admissible class of coconspirator statements,<sup>42</sup> indicating the Supreme Court's disfavor of "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."<sup>43</sup> Trustworthiness problems with coconspirator statements, however, remain manifold.<sup>44</sup> When the coconspirator is available for cross-examination at trial, the declarant at least has an opportunity to expose unreliable elements in the accuser's previous statements; the admission of the prior statements therefore does not violate the defendant's confrontation rights.<sup>45</sup> Serious constitutional problems arise, however, when Rule 801(d)(2)(E) is used to admit accusations against the defendant when the declarant is not produced at

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spirator exception to the hearsay rule. *See, e.g.*, *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); S. Rep. No. 1277, 93d Cong., 2d Sess. 26, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7073. When the exception was first adopted by the Supreme Court, the statement was required to be "connected with acts in furtherance of the [conspiracy]." *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 470 (1827).

40. *See United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979) (the exception is used as a result of necessity when "proof would otherwise be very difficult and the evidence largely circumstantial"); Davenport, *supra* note 8, at 1385 (noting the special need for "lax rules of evidence in prosecutions for such a traditionally secret and inchoate crime"); Levie, *supra* note 36, at 1166 (existence of the exception answers the prosecutor's need to prove conspiracies); *Hearsay Exception*, *supra* note 35, at 540-41 (same); *Uncharged Conspiracy*, *supra* note 36, at 944 (same). Because the necessity rationale has nothing to do with reliability, *see California v. Green*, 399 U.S. 149, 167 n.16 (1970), its use is unsatisfactory because it might result in convictions based on unreliable evidence, *id.* ("[T]he [only] 'necessity' [that exists] . . . is the State's 'need' to introduce relevant evidence . . ."); *id.* at 201 (Brennan, J., dissenting) ("'necessity' that justifies the admission of pretrial statements is not the prosecution's need to convict, but the factfinder's need to be presented with reliable evidence to aid its determination of guilt or innocence").

41. *See United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979); Davenport, *supra* note 8, at 1384-85.

42. *See Fed. R. Evid. 801(d)(2)(E) advisory committee note* (limitation on admissibility of coconspirator statements "is in the accepted pattern"); *id.* (advisory committee did not wish to expand admissibility beyond already established parameters); Levie, *supra* note 36, at 1167-68 (furtherance and pendency requirements intended to afford criminal defendants some protection from unreliable coconspirator admissions). For a discussion on whether the pendency and furtherance requirements in fact limit the class of coconspirator hearsay, *see Davenport, supra* note 8, at 1385-88 (concluding that the requirements neither add to reliability, nor are used to exclude much coconspirator hearsay); Levie, *supra* note 36, at 1167 (requirements do not realistically guarantee much protection in the ways they are applied). Even prior to the enactment of the Federal Rules, the Court reasoned that coconspirator statements should be limited to a narrow field of admissibility. *See Wong Sun v. United States*, 371 U.S. 471, 490 (1963).

43. *Grunewald v. United States*, 353 U.S. 391, 404 (1957).

44. *See supra* note 36 and accompanying text, *infra* notes 126-29 and accompanying text.

45. *California v. Green*, 399 U.S. 149, 161 (1970). The Supreme Court has found that a defendant's opportunity to cross-examine a hearsay declarant at trial makes hearsay admissible for confrontation purposes, whether the hearsay was a "casual, off-hand remark to a stranger, [or] carefully recorded testimony at a prior hearing." *Id.* at 168.

trial.<sup>46</sup>

In their attempts to comply with the Supreme Court's guidance on the admissibility of hearsay testimony by unproduced declarants, the circuit courts have approached the admissibility of coconspirator statements with "substantial confusion"<sup>47</sup> and from different vantage points, but they have almost always permitted the introduction of the testimony.<sup>48</sup> This Note argues that the circuit courts, in routinely admitting this evidence, are misreading Supreme Court pronouncements, which permit only reliable hearsay evidence to be admitted at trial.<sup>49</sup> Because coconspirator admissions by unproduced declarants, unlike many "hearsay exceptions," can rarely be sufficiently reliable under any standards enunciated by the Court for general hearsay admissibility satisfying the confrontation clause, a coconspirator declarant must be produced at trial in order to satisfy the constitutional requirement.<sup>50</sup> In cases in which obtaining the declarant's presence at trial is impossible, the hearsay should still be excluded if it adds crucial weight to the prosecution's case, or is devastatingly prejudicial to the defendant.<sup>51</sup>

Part I of this Note reviews the standards developed by the Supreme Court in the past two decades for determining the circumstances under which the admission of hearsay evidence satisfies confrontation principles. Although announced in somewhat broad terms, the standards represent narrow principles that focus on the necessity of admitting hearsay declarations and the reliability of the statements. They therefore require both the production of the declarant whenever possible and the exclusion of unreliable evidence. Part II surveys the application of the Supreme Court's standards in cases involving coconspirator admissions and shows that the courts, in admitting coconspirator statements, are either too broadly applying those standards or finding excuses to avoid them altogether. Part III demonstrates the rationale for and feasibility of making coconspirator statements admissible only when the declarant is produced at trial, or when production is impossible and the evidence is not crucial or devastating. Only then can Rule 801(d)(2)(E) be applied with constitutional adequacy, assuring the defendant of his fundamental protections and providing the trier of fact with a reliable basis on which to determine guilt or innocence.

## I. HEARSAY THAT DOES NOT AFFRONT THE RIGHT TO CONFRONT

There rarely was any tension between the admission of hearsay evi-

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46. See *infra* Pts. II. & III.

47. *Sanson v. United States*, 104 S. Ct. 3559, 3560 (1984) (White, J., dissenting from denial of certiorari).

48. See *infra* Pt. II.

49. See *infra* Pt. III.

50. See *infra* notes 204-08 and accompanying text.

51. Prejudicial evidence is evidence likely to influence a jury to convict a defendant for improper reasons. See *infra* notes 208-18 and accompanying text.

dence and the confrontation clause prior to the Supreme Court's extension of confrontation protections to state defendants in 1965.<sup>52</sup> Since that time, the Court has found some hearsay to violate the defendant's confrontation right,<sup>53</sup> and other hearsay to offer satisfactory substitutions for the guarantees of confrontation.<sup>54</sup> The recent evolution in confrontation theory has centered on the reliability of the proffered hearsay,<sup>55</sup> and confrontation-based challenges to sufficiently reliable hearsay have been rebuffed.<sup>56</sup>

Although the Supreme Court has not addressed the constitutional problems that arise when Rule 801(d)(2)(E) is used to admit coconspirator statements by unproduced declarants,<sup>57</sup> it has laid out a fairly workable set of general rules governing the constitutional admissibility of hearsay, despite the absence of a witness to cross-examine.<sup>58</sup> These rules, which limit the use of statements made by unproduced declarants, require both that the use of hearsay evidence be necessary due to the de-

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52. The Court extended the confrontation right to the states through the fourteenth amendment's due process clause in *Pointer v. Texas*, 380 U.S. 400, 403 (1965). In *Pointer*, the Court found that the introduction of a preliminary hearing transcript of the testimony of a subsequently unavailable principal witness, *see id.* at 401, violated the defendant's confrontation right because the defendant had not been represented by counsel at the preliminary hearing, and thus lost the confrontation guarantee of adequate cross-examination of his accuser, *id.* at 403, 406.

53. *See, e.g., Bruton v. United States*, 391 U.S. 123, 127-28 (1968) (use of codefendant's confession implicating defendant denied defendant his confrontation right when declarant was unavailable for cross-examination); *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (use of a witness' preliminary hearing transcript violated a defendant's confrontation right when the state had not made a good faith effort to produce the declarant at trial); *Brookhart v. Janis*, 384 U.S. 1, 3 (1966) (using codefendant's confession against accused, and denying defendant opportunity to cross-examine any witnesses held to be confrontation violations—the latter, a “constitutional error of the first magnitude”) (quoting respondent's brief); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (use of an alleged accomplice's confession implicating the accused denied defendant his confrontation right when the declarant could not be cross-examined).

54. *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 70-71 (1980) (admission into evidence of prior cross-examined testimony of a subsequently unavailable witness did not violate defendant's confrontation right); *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972) (same); *California v. Green*, 399 U.S. 149, 165, 170 (1970) (admission into evidence of preliminary hearing transcript containing testimony that was cross-examined did not violate a defendant's confrontation right when the declarant, due to memory failure, was unavailable at trial).

55. *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 158, 161 (1970). *See infra* notes 111-12 and accompanying text.

56. *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 72-73 (1980); *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 164 (1970).

57. In *Dutton v. Evans*, 400 U.S. 74 (1970), the Court considered the confrontation issue in a case involving the admission of coconspirator hearsay under a state statute. *See id.* at 78-79. That case, however, was decided in 1970, prior to the enactment of the Federal Rules of Evidence in 1975, and involved a state coconspirator exception of much broader scope than Rule 801(d)(2)(E). *See infra* note 63.

58. *See infra* Pt. I.B.

clarant's unavailability,<sup>59</sup> and that the evidence be reliable.<sup>60</sup>

### A. *The Dutton Legacy*

Prior to the enactment of the Federal Rules of Evidence,<sup>61</sup> the Supreme Court in *Dutton v. Evans*<sup>62</sup> considered the confrontation issue in a case involving admission of coconspirator hearsay under a state statute more broadly drawn than Rule 801(d)(2)(E).<sup>63</sup> A plurality of four justices<sup>64</sup> found that the admission of an unproduced<sup>65</sup> coconspirator's post-custodial statement implicating the defendant<sup>66</sup> did not violate the defendant's confrontation right.<sup>67</sup> Not only was the Court unable to reach more than a plurality consensus, but the meaning and application of the decision have puzzled scholars ever since.<sup>68</sup> The plurality held that

59. See *infra* Pt. I.B.1.

60. See *infra* Pt. I.B.2. As used to admit some forms of hearsay, the rules permit the introduction of evidence because the hearsay offers a rational substitute for the confrontation guarantees. When coconspirator hearsay is examined, however, the missing keystone of reliability often makes admission premised on a highly unstable construction of the requirement, well capable of collapsing to the detriment of a defendant's fundamental rights. See *infra* Pt. III.

61. The Federal Rules of Evidence were promulgated on January 2, 1975. See Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at Fed. R. Evid. 28 U.S.C. (1982)).

62. 400 U.S. 74 (1970).

63. Compare *id.* at 83 & n.15 (Georgia coconspirator exception permits admission of statements made during concealment phase of conspiracy, even though no conspiracy charged) with Fed. R. Evid. 801(d)(2)(E) and accompanying advisory committee note (Rule 801(d)(2)(E) prohibits statements made after the conclusion of the conspiracy's goals; statement must be "during the course and in furtherance of the conspiracy").

64. See *Dutton*, 400 U.S. at 76 (plurality opinion of Stewart, J.).

65. *Id.* at 100 (Marshall, J., dissenting). It appears that the declarant in this case was available to be called as a witness, but that for unspecified reasons, the prosecution did not produce him. *Id.* at 102 n.4. The defense did not subpoena the declarant, believing that he would assert his privilege against self-incrimination, which would have been detrimental to the defense. *Id.*

66. *Id.* at 77 ("If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now.")

67. See *id.* at 88. For a discussion of the facts of *Dutton*, see *infra* note 75.

68. See, e.g., Davenport, *supra* note 8, at 1382; Read, *The New Confrontation—Hearsay Dilemma*, 45 S. Cal. L. Rev. 1, 2 (1972); Westen, *The Future of Confrontation*, 77 Mich. L. Rev. 1185, 1185 (1979); Younger, *Confrontation and Hearsay: A Look Backward, a Peek Forward*, 1 Hofstra L. Rev. 32, 39-41 (1973); Note, *Hearsay and the Confrontation Guaranty*, 38 La. L. Rev. 858, 862 (1978).

Even for a plurality decision, *Dutton* was especially fragmented. Justice Stewart wrote for the plurality, see *Dutton*, 400 U.S. at 76, in which two Justices joined with a separate concurring opinion, *id.* at 90 (Blackmun, J., concurring, joined by Burger, C.J.), and one Justice concurred only in the result, *id.* at 93 (Harlan, J., concurring). Justice Blackmun's concurrence objected to the plurality's characterization of the coconspirator statement's admission, see *id.* at 87 (evidence was neither "crucial" [n]or "devastating"), as something other than harmless error, "if it was error at all," *id.* at 90. Justice Harlan's concurrence emphasized that the question was more appropriately tested under the aegis of due process than under confrontation principles. *Id.* at 96-97. Justice Marshall's dissent, finding a clear violation of the defendant's confrontation right, was the most unified section of the whole opinion, with the four dissenters in full agreement. *Id.* at 100.

Besides it being unclear why the plurality made little inquiry into the testimony's relia-

no confrontation violation occurred because the statement was neither "crucial" nor "devastating" and was "of peripheral significance at most."<sup>69</sup> It then formulated a series of factors to be applied against hearsay statements to determine whether admission would violate a defendant's confrontation right. These factors, which focus on the reliability of the hearsay evidence and presage the Court's later formulation of what constitutes admissible hearsay,<sup>70</sup> instruct that no denial of confrontation occurs when: 1) the statement contains no express assertions about past facts;<sup>71</sup> 2) the declarant's personal knowledge of the recited facts is established by independent evidence;<sup>72</sup> 3) the statement is not likely to have been based on faulty perception;<sup>73</sup> and 4) the circumstances surrounding the statement tend to show that the declarant had no motive to falsify the content of the statement.<sup>74</sup> After stating these factors, however, the plurality did not conduct a substantial inquiry into the testimony's reliability.<sup>75</sup>

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bility, see *infra* note 75, it is also unclear why the plurality overlooked the prosecution's complete lack of effort to produce an apparently available declarant, see *supra* note 65, especially after holding in *Barber v. Page*, 390 U.S. 719 (1968), that the prosecution has a duty to make good faith efforts to produce available declarants at trial, *id.* at 724-25. The plurality simply indicated that confrontation of the declarant under the facts presented would have been of small use to the defendant. See *Dutton*, 400 U.S. at 89. This aside was later adopted by the Court as the "remote utility" exception to the prosecution's duty to produce apparently available declarants. See *Ohio v. Roberts*, 448 U.S. 56, 65 & n.7 (1980).

69. *Dutton*, 400 U.S. at 87.

70. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (only hearsay marked with sufficient "indicia of reliability" can be admitted without an available declarant).

71. *Dutton*, 400 U.S. at 88.

72. *Id.*

73. *Id.* at 89.

74. *Id.*

75. In *Dutton*, the declarant was lying on his bed in the prison hospital facing the wall, *Dutton*, 400 U.S. at 91, and was alleged to have stated, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now," *id.* at 77. The witness who reported the statement was outside the declarant's closed door and claimed to have spoken with the declarant "in a normal voice" through a window in the door, completely covered by glass and heavy steel mesh. See *id.* at 91. Prison personnel testified that talking through closed doors was not customary. See *id.*

The plurality found that the declarant's post-custodial statement was not an express assertion about a past fact, *id.* at 88—a type of statement that is usually deemed unreliable; see Fed. R. Evid. 803(3) advisory committee note—and that the declarant's knowledge of the defendant's identity and role in the murder had been established by independent evidence, see *Dutton*, 400 U.S. at 88. It found further that the possibility of the statement being based on faulty perception was "remote in the extreme," *id.* at 89, that the circumstances under which the statement was made implied that the declarant was sincere, see *id.*, and finally, that the statement was a spontaneous utterance and a declaration against penal interest, *id.* Based on these factors, the plurality concluded that the statement was reliable. See *id.*

In his dissent, Justice Marshall pointed out the shallowness of the plurality's search for reliability. See *id.* at 103-04 (Marshall, J., dissenting). In reversing the conviction on grounds of a violation of the defendant's confrontation right, the Court of Appeals had concluded that there was considerable doubt whether the statement was reliable or in fact had ever been made. See *Evans v. Dutton*, 400 F.2d 826, 828 n.4 (5th Cir. 1968), *rev'd*,

A fairly liberal admissibility standard for coconspirator statements might be construed from a broad reading of *Dutton*.<sup>76</sup> The *Dutton* factors offer no special guidance for the admission of a coconspirator statement, however, because they simply parallel the traditional tests for when hearsay is deemed reliable.<sup>77</sup> A statement satisfying each factor will therefore probably fall within other hearsay exceptions<sup>78</sup> and will

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400 U.S. 74 (1970). Justice Marshall noted the basic ambiguity in the meaning of the purported statement and the potential insincerity of the declarant. *Dutton*, 400 U.S. at 104 (Marshall, J., dissenting). Such questions leave gaping holes in the plurality's reliability inquiry that could only have been filled by cross-examination of the declarant. *Id.* (Marshall, J., dissenting). As Justice Marshall aptly noted:

If "indicia of reliability" are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant. . . . [T]he Confrontation Clause has been sunk if any out-of-court statement bearing an indium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination.

*Id.* at 110.

76. For a discussion of the problems arising from the fact that such a liberal standard has been construed, see *infra* notes 161-65 and accompanying text. One commentator cites *Dutton* as a case standing for the proposition that modern procedures might achieve results similar to those in the Raleigh trial, see *supra* note 2, if of less draconian dimensions, by admitting unreliable declarations against interest or coconspirator statements against the accused when the declarant is unavailable for cross-examination. See Graham, *supra* note 2, at 101. Recognizing that the hearsay evidence in the Raleigh trial was of the "rankest sort," it was hoped, but not concluded, that this sort of "political prosecution" would be unthinkable in today's enlightened age. *Id.*; see *id.* at 144 ("contrary to some lower court expressions, *Green* and *Dutton* did not repeal the Sixth Amendment").

77. The generally recognized elements for reliability in hearsay or any testimony are the quality of the declarant's memory, clarity of expression, perception and sincerity. See Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958-61 (1974). A weakness in the reliability of a declarant's statement occurs when there is a deficiency in one of these qualities. See *id.*

The first *Dutton* factor—prohibition of express assertions about past facts, see *supra* text accompanying note 71—looks to the guarantee of accurate memory. This memory factor is also somewhat specific to coconspirator statement requirements, as accurate memory is partially assured by Rule 801(d)(2)(E)'s furtherance and pendency requirements. The personal knowledge requirement, see *supra* text accompanying note 72, looks to the guarantee of clarity; personal knowledge makes the recited facts less likely to be ambiguous. First-hand knowledge is generally required of all witnesses, whether they are available or not, unless admissions or expert testimony is being offered. Fed. R. Evid. 803 advisory committee note. The third *Dutton* factor, see *supra* text accompanying note 73, is a mere recital of the accurate perception guarantee, which serves to lend validity to the personal knowledge that the declarant is reporting. See Fed. R. Evid. 803 advisory committee note (importance of personal knowledge). The fourth factor, see *supra* text accompanying note 74, is the sincerity element of the traditional tests for reliability. This factor, which was considered optional by the advisory committee, see Fed. R. Evid. art. VIII advisory committee note, has been construed by some commentators to be guaranteed by the furtherance and pendency requirements of Rule 801(d)(2)(E), see McCormick, *supra* note 5, § 267, at 793. Even statements in furtherance of the goals of the conspiracy, however, can be unreliable. See Davenport, *supra* note 8, at 1387.

78. This is true because the "hearsay exceptions" are premised on reliability, see *supra* note 14 and accompanying text, and the factors measure reliability, see *supra* note 77 and accompanying text. For example, a statement that would qualify under Rule 804(b)(1)'s former testimony exception would meet the *Dutton* factors: 1) the testimony at the prior hearing would not have been an express assertion about past fact; 2) Rule 602

usually be reliable enough to satisfy the confrontation clause.<sup>79</sup> In fact, the Court found that the statement at issue in *Dutton* satisfied all four factors<sup>80</sup> and fell within other hearsay exceptions.<sup>81</sup> Thus, because the *Dutton* factors are enunciated as a group,<sup>82</sup> and because the statement in *Dutton* was found to satisfy all four factors, there is no indication that satisfying some of the requirements would make the coconspirator hearsay sufficiently reliable.<sup>83</sup>

### B. Roberts to the Rescue?

The Supreme Court made its most recent statement on when hearsay does not infringe a defendant's confrontation right in *Ohio v. Roberts*,<sup>84</sup> a case involving the prior recorded testimony of a witness who was unproduced at trial.<sup>85</sup> Unlike *Dutton*, *Roberts* gives a reasonably manageable

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would enforce the requirement that the witness have personal knowledge about the facts to which he testifies to eliminate ambiguity; 3) any question about the witness' perception of the reported facts would be tested by cross-examination at the prior hearing; and 4) sincerity would likewise have been tested by cross-examination at the prior hearing.

79. See *California v. Green*, 399 U.S. 149, 160 (1970) for an example of former testimony, see *supra* note 78, admitted when the unavailability of the declarant was due to memory failure.

80. See 400 U.S. at 88-89.

81. The plurality found that the statement in *Dutton* also fell under the exceptions for spontaneous utterances, Fed. R. Evid. 803(2), and declarations against interest, Fed. R. Evid. 804(b)(3). See 400 U.S. at 89.

82. See *id.* at 88-89.

83. Because coconspirator statement admissibility is not based on a theory of the statement's circumstantial guarantees of trustworthiness, see *supra* note 36 and accompanying text, it would appear reasonable to expect the statement to satisfy all four factors before it is admitted. Other hearsay based on circumstantial guarantees of trustworthiness, however, might be reliably admitted with a lesser showing because of the greater strength of the remaining factors. For example, an excited utterance, Fed. R. Evid. 803(2), may fall short of the ideal for accurate perception, because the excitement of the moment could potentially blur the declarant's perceptions, Fed. R. Evid. 803(2) advisory committee note. The exception more than makes up for this deficiency, however, in the strength of its assurances of sincerity and accurate memory. See *id.* In *United States v. Eaglin*, 571 F.2d 1069, 1078-79 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978), and *United States v. Snow*, 521 F.2d 730, 734-35 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976), however, the Ninth Circuit found that confrontation had been satisfied when only three and two of the factors, respectively, had been satisfied by the coconspirator statement.

84. 448 U.S. 56 (1980).

85. The preliminary hearing transcript at issue featured the declarant, Anita Isaacs, as the only witness for the defense—a poor choice, as things turned out, because Anita's statements were adverse to the defendant's interests, rather than exculpatory. See *id.* at 58. Because Anita was never declared hostile, the defense attorney's questioning at the preliminary hearing was technically not "cross-examination." See *id.*

Before the trial, Anita departed Ohio for parts unknown and even her parents could not reach her. *Id.* at 60. Thus, the prosecutor introduced Anita's testimony at trial through the preliminary hearing transcript, and the defendant was convicted. *Id.* The Ohio Court of Appeals reversed, finding the transcript inadmissible because Anita was not "cross-examined" per se at the preliminary hearing. *Id.* at 61.

The Supreme Court found no confrontation violation because the prior questioning of Anita, although not characterized as cross-examination under state procedural rules, was

test for determining when hearsay can be admitted without violating a defendant's confrontation rights. The elements of the test, however, still require clarification.

### 1. The Unavailability Requirement

The *Roberts* opinion gave concrete expression to the always-implicit complementary concepts that the confrontation clause establishes a rule of necessity,<sup>86</sup> and that using hearsay in lieu of an available witness violates confrontation principles.<sup>87</sup> The prosecution therefore has an affirmative burden of producing the declarant or demonstrating his unavailability before the admission of hearsay can be considered.<sup>88</sup> The prosecution can satisfy this burden by showing a "good faith effort" to produce the declarant.<sup>89</sup> Although unavailability can take many forms,<sup>90</sup> and although the procedural hurdles of demonstrating a "good faith effort" apparently require no superhuman efforts to produce the witness,<sup>91</sup> this requirement nevertheless serves to help safeguard the de-

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sufficient cross-examination in form and in substance to satisfy the defendant's confrontation right. *See id.* at 70-71.

86. 448 U.S. at 65.

87. *See id.* ("[T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."). In his concurrence in *California v. Green*, 399 U.S. 149, 172-73 (1970), Justice Harlan warns against indiscriminate equation of confrontation and cross-examination, however, because such a constitutionalizing of the hearsay rule would have a "stultifying effect . . . upon . . . the law of evidence." *Id.* at 173 (Harlan, J., concurring). Such a rule would always prohibit the admission of any hearsay of an unproduced declarant, a result that has generally been considered too extreme an interpretation. *See Roberts*, 448 U.S. at 63; *Dutton v. Evans*, 400 U.S. 74, 80 (1970); *Green*, 399 U.S. at 175; Fed. R. Evid. art. VIII advisory committee note.

88. *Roberts*, 448 U.S. at 65.

89. *Id.* at 74 (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968)).

90. Federal Rule of Evidence 804(a) lists the acceptable reasons for the unavailability of a witness, including a declarant's: 1) declaration of a valid privilege; 2) persistent refusal to testify; 3) claimed lack of memory; 4) death or physical or mental impairment; or 5) remaining absent from the trial despite reasonable effort to procure his attendance. The viability of these various forms of unavailability is reviewed in Fed. R. Evid. 804(a) advisory committee note.

In his dissent to *California v. Green*, 399 U.S. 149, 202 (1970) (Brennan, J., dissenting), Justice Brennan draws a sensible distinction between the types of unavailability for confrontation purposes. The first three categories are classified as a "failure to testify because of unwillingness to do so or inability to remember," and would not serve as a sufficient showing of unavailability for confrontation purposes. *Id.* This is because of the impact these circumstances have on the jury's consideration of the proffered hearsay. *Id.* at 201-02; *see Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (witness' reliance on his fifth amendment privilege against self-incrimination as a form of unavailability worked against the defendant by "creat[ing] a situation in which the jury might improperly infer both that the statement has been made and that it was true"). Physical unavailability, however, is a neutral factor, incapable of being cured or caused, *see Green*, 399 U.S. at 202 (Brennan, J., dissenting) and would be an adequate type of unavailability for confrontation purposes.

91. In *Roberts*, delivering five subpoenas to Anita's parents' home, three of which were issued after it was known that she no longer lived there, and taking no other action to locate or contact Anita during the four months preceding the trial when the prosecu-

fendant's confrontation right.

The "good faith effort" standard may require no effort to produce the witness if there is no possibility of success.<sup>92</sup> In addition, the Court adopted from *Dutton* a "remote utility" exception<sup>93</sup> that excuses production of the declarant whenever production would be unduly inconvenient for the prosecution or of such small benefit to the defendant that the possibility of cross-examination showing the hearsay statement to be unreliable is "wholly unreal."<sup>94</sup>

## 2. The Reliability Requirement

The *Roberts* Court held that when the unavailability of the declarant or the remote utility of cross-examination is demonstrated, the confrontation clause requires that hearsay bear "adequate 'indicia of reliability'"<sup>95</sup> before it can be admitted. Reliability will be inferred without separate exploration for such indicia if the statement falls within a "firmly rooted hearsay exception."<sup>96</sup> If the statement does not satisfy a "firmly rooted" exception, it must be excluded unless it contains "particularized guarantees of trustworthiness."<sup>97</sup>

### a. "Firmly Rooted Exceptions"

If the "good faith efforts to produce" standard is uncertain,<sup>98</sup> even less clear is which of the many exceptions to the hearsay rule are among the

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tion knew of her absence, might reasonably be classified as less than a "good faith effort." 448 U.S. at 80 (Brennan, J., dissenting).

92. See *id.* at 74. Because of the "reasonable" level of effort required to produce a declarant under Federal Rule of Evidence 804(a)(5), it would seem prudent to take the Court's example of the intervening death of a witness, see *Roberts*, 448 U.S. at 74, as the only situation in which there is "no possibility," *id.*, of producing the declarant, and therefore requiring no effort to produce. In all other situations, some effort to produce the witness should be undertaken to meet the good faith standard.

93. See *id.* at 65 n.7; *Dutton*, 400 U.S. at 89.

94. *Dutton*, 400 U.S. at 89. The remote utility exception would be best confined to a small set of hearsay exceptions, such as those for public records, official statements, learned treatises, and trade reports. See *Dutton*, 400 U.S. at 96 (Harlan, J., concurring). Admission without production of the declarant in these situations would be acceptable because the statements contained in these documents are usually made without contemplation of the litigation and would not be likely to have been manufactured insincerely. The remote utility exception should not, however, be extended to other potentially less sincere forms of hearsay such as coconspirator statements through unfounded conclusions that the value of cross-examination would be minimal.

95. 448 U.S. at 66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970))).

96. *Roberts*, 448 U.S. at 66.

97. *Id.*

98. That the standard is uncertain can quickly be gathered from a comparison of what efforts the *Roberts* Court held to establish constitutional unavailability, see *id.* at 75-77, with what efforts Justice Brennan would have required on the same facts, see *id.* at 79 (Brennan, J., dissenting). Clearly, reasonable Justices differ on the standard of good faith effort.

"firmly rooted."<sup>99</sup> The vintage of the exception does not seem to be the most important consideration because the Court mentions in illustration the very reliable business records exception,<sup>100</sup> which is a relative newcomer to the forest of hearsay exceptions.<sup>101</sup> The Court also acknowledges that this group includes the dying declarations exception<sup>102</sup> and the former testimony exception,<sup>103</sup> both of which have had traditional Supreme Court recognition as reliable forms of hearsay,<sup>104</sup> and both of which have been acknowledged to satisfy the confrontation clause.<sup>105</sup> These illustrations, coupled with the fact that the "firmly rooted" concept is expressed as a way of showing "indicia of reliability," dictate that the Court meant "firmly rooted" to encompass only those statements that it believes to be reliable.<sup>106</sup> Unfortunately, some lower courts have seemed to equate "firmly rooted" with "long used."<sup>107</sup> This equation offends common sense because the vintage of an exception has little to do with the "indicia of reliability" of the exception.<sup>108</sup>

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99. The Court recites only four hearsay exceptions as "firmly rooted," but its citation form leads one to assume that there may be others. See *Roberts*, 448 U.S. at 66 n.8 (Court states, "See, e.g., . . . dying declarations, . . . cross-examined prior trial testimony, . . . business and public records") (citations omitted).

100. *Roberts*, 448 U.S. at 66 n.8. See Fed. R. Evid. 803(6) advisory committee note and McCormick, *supra* note 5, §§ 304-314, for a discussion of the reliability of the business records exception.

101. The business records exception to the hearsay rule was not recognized at common law. See, e.g., *Johnson v. Lutz*, 253 N.Y. 124, 126, 170 N.E. 517, 519 (1930) (discussion of early common law exclusion of business records). Congress adopted the first statutory recognition of the business records exception in 1936. Fed. R. Evid. 803(6) advisory committee note. Several other hearsay exceptions, however, may even have existed at the time that the sixth amendment was ratified in the late eighteenth century. See *Green*, 399 U.S. at 178 n.12 (Harlan, J., concurring).

102. *Roberts*, 448 U.S. at 66 n.8.

103. *Id.*

104. See, e.g., *California v. Green*, 399 U.S. 149, 165 (1970) (preliminary hearing testimony); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (dying declarations and preliminary hearing testimony); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (dying declarations); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (dying declarations and prior testimony); *Motes v. United States*, 178 U.S. 458, 472-74 (1900) (prior testimony); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (dying declarations and prior testimony).

105. See, e.g., *California v. Green*, 399 U.S. 149, 165 (1970) (preliminary hearing testimony); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (dying declarations) (dictum); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (dying declarations and prior testimony) (dictum).

106. In this analysis of the meaning of "firmly rooted," a plain meaning of the term is eschewed because the Court has planted the term in the contextual soil of reliability, not longevity. *Roberts*, 448 U.S. at 66. Until the Court announces what other exceptions "rest upon such solid foundations," *id.*, it would be best to treat reliability of exceptions as a proposition to be proved, not presumed, under the aegis of "firmly rooted."

107. See *infra* notes 122-23 and accompanying text.

108. The dying declaration exception, for example, has features besides its longevity to recommend it. Psychological pressures faced by the dying declarant, as well as limits on the content of the statement and circumstances surrounding its making, provide some

b. "Particularized Guarantees of Trustworthiness"

After stating some reasons to admit hearsay evidence,<sup>109</sup> the *Roberts* Court reiterated the exclusionary nature of its hearsay policy. For confrontation clause purposes, unless a witness can be shown to be unavailable, and unless the hearsay exception falls among the "firmly rooted," the statement must be *excluded* absent a showing of "particularized guarantees of trustworthiness."<sup>110</sup>

The kinds and the quantity of guarantees that will suffice are questions left to the laboratories of the lower courts. A collective reading of the Supreme Court's confrontation clause decisions, however, shows that the hearsay, the admission of which was deemed not to have violated the defendant's confrontation rights, was usually some form of cross-examined testimony of a witness who was unproduced at trial.<sup>111</sup> In such cases, even though the declarant is unproduced at a later phase of the proceeding, the defendant has been provided with at least minimal confrontation protections.<sup>112</sup> The Court's focus therefore has been on the

guarantees of reliability and are more reasonable explanations for its inclusion among the "firmly rooted" exceptions than its vintage.

It is arguable that firmly rooted exceptions might be those that were recognized when the constitution was ratified, inferring the framers' implicit approval of these exceptions. This theory is unsatisfactory, however, because it is unclear how many exceptions were recognized when the sixth amendment was ratified. See *California v. Green*, 399 U.S. 149, 178 & n.12 (1970) (Harlan, J., concurring). More importantly, it is unclear whether the framers intended such exceptions to be admitted as reliable; the confrontation clause may have been designed to exclude statements falling under exceptions whenever they were unreliable. See *supra* note 20 and accompanying text, *infra* note 220 text accompanying.

109. *Roberts*, 448 U.S. at 66.

110. *Id.* (emphasis added). Had the court wished to make the "particularized guarantees of trustworthiness" inquiry stand for a policy of admissibility, it could instead have stated that hearsay evidence can be admitted on a "showing of particularized guarantees of trustworthiness."

111. See *id.* at 70 (declarant was cross-examined "as a matter of form" at the preliminary hearing) (emphasis in original); *Mancusi v. Stubbs*, 408 U.S. 204, 215-16 (1972) (adequate cross-examination of declarant at preliminary hearing); *California v. Green*, 399 U.S. 149, 168 (1970) (prior cross-examined recorded testimony held admissible when declarant claimed lack of memory at trial); *West v. Louisiana*, 194 U.S. 258, 260, 265 (1904) (prior cross-examined written testimony held admissible), *overruled on other grounds*, *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (prior cross-examined recorded testimony held admissible when declarant died prior to trial); *Reynolds v. United States*, 98 U.S. 145, 160 (1879) (prior cross-examined recorded testimony held admissible when defense causes declarant's absence from trial); *cf.* *Stevens v. Bordenkircher*, 746 F.2d 342, 348-49 (6th Cir. 1984) (admission of corroborating document without producing the declarant for cross-examination violated the confrontation clause).

112. Of course, the effectiveness of the preliminary hearing cross-examination will affect whether the prior confrontation aided the defendant's probe for truth. See, e.g., *United States v. Touchstone*, 726 F.2d 1116, 1123 (6th Cir. 1984) (cross-examination cannot be so limited that it prevents a defendant from exposing a witness' testimonial motive and bias); *United States v. Baker*, 494 F.2d 1262, 1266-67 (6th Cir. 1974) (limiting cross-examination to expose witness bias and motive to falsify is an abuse of trial court discretion when the information developed is not corroborated by other evidence); Spaeth

reliability of the statement, because only reliable hearsay can substitute for a defendant's right to confront his accusers.<sup>113</sup> It does not appear that the Court, in announcing this "particularized guarantees" standard, meant to open the floodgates to hearsay testimony. Greater than garden variety reliability is therefore still required to satisfy the confrontation clause, and unreliable hearsay should be excluded under the "particularized guarantees" standard.

## II. APPLYING THE SUPREME COURT'S STANDARDS TO ADMIT COCONSPIRATOR STATEMENTS

The circuit courts' search for "adequate indicia of reliability" in coconspirator statements by unproduced declarants follows either the "firmly rooted exceptions" approach<sup>114</sup> or the "particularized guarantees of trustworthiness" inquiry,<sup>115</sup> but almost always results in the admission of the coconspirator's statement.<sup>116</sup> Some courts avoid the search altogether.<sup>117</sup> All seem to have fallen prey to the rationale that cocon-

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v. United States, 232 F.2d 776, 779 (6th Cir. 1956) (conviction reversed due to an abuse of discretion in limiting cross-examination—a denial of "a substantial right" and withdrawal of "one of the safeguards essential to a fair trial") (quoting *Alford v. United States*, 282 U.S. 687, 692 (1931)).

The right to confrontation is violated when the defendant has been denied any opportunity to cross-examine the witnesses against him, *Brookhart v. Janis*, 384 U.S. 1, 3-4 (1966), or when the defendant is denied the right of effective cross-examination because of a state interest less compelling than the confrontation right, *Davis v. Alaska*, 415 U.S. 308, 319 (1974), or when the defendant was not represented by counsel at the preliminary hearing, *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

113. Justice Harlan viewed the need for reliability primarily as part of the broader due process guarantee that convictions must be based only on trustworthy evidence. See *California v. Green*, 399 U.S. 149, 186 n.20 (1970) (Harlan, J., concurring). Thus, his confrontation inquiry ends when the witness is shown to be unavailable, and the due process inquiry begins to determine whether the hearsay is reliable enough to admit without an available declarant. See *id.* at 174, 186 n.20. Whether that reliability is measured under a confrontation or a due process approach matters little, as long as the defendant is assured that only reliable evidence will be weighed by the trier of fact in determining his guilt or innocence.

By announcing this standard under the auspices of confrontation, the Court is imposing a stricter standard of reliability than due process would require. Due process would exclude evidence only when it is very likely to be false. See *Dutton v. Evans*, 400 U.S. 74, 99-100 (1970) (Harlan, J., concurring) (exclusion of evidence that is "unduly inflammatory" is a commendable practice, but not "essential to a fair trial" under principles of due process); *California v. Green*, 399 U.S. 149, 187 (1970) (Harlan, J., concurring) (right of cross-examination is an element of "broader due process requirement that a conviction cannot be founded on no evidence"); *Simmons v. United States*, 390 U.S. 377, 384 (1968) (convictions based on critical pretrial identification will not be set aside unless procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"). Confrontation, however, demands an affirmative search for guarantees; if they are not found, the hearsay must be excluded. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

114. See *infra* notes 122-23, 154 and accompanying text.

115. See *infra* note 153 and accompanying text.

116. See *infra* notes 122-23, 154.

117. See *infra* Pt. II.C.

spirator hearsay is a necessary prosecutorial tool<sup>118</sup> in this murky area of criminal activity.<sup>119</sup> The prosecution's need, however, is to present reliable evidence to the trier of fact, not to amass unreliable evidence to convict.<sup>120</sup> Both schools of thought have failed to recognize the Supreme Court's concern that hearsay be reliable before it is admitted,<sup>121</sup> and have applied *Roberts* and *Dutton* too broadly in admitting coconspirator statements.

#### A. *The Coconspirator Exception as "Firmly Rooted"*

Many of the circuit courts hold, presumably because of its longevity, that the coconspirator exception is firmly rooted.<sup>122</sup> At most, these courts look only to the prosecution's satisfaction of the unavailability requirement before admitting the hearsay, and make no inquiry into its reliability.<sup>123</sup> As demonstrated, however, because the *Roberts* Court used

118. See *supra* note 40 and accompanying text.

119. See *supra* note 41 and accompanying text.

120. See *California v. Green*, 399 U.S. 149, 167 n.16 (1970).

121. See *supra* notes 18, 55, 111-12 and accompanying text.

122. This categorization of the coconspirator exception as "firmly rooted"—or its *Roberts* equivalent that satisfying the coconspirator exception or Rule 801(d)(2)(E) satisfies the confrontation clause—has repeatedly allowed courts to dismiss confrontation challenges with at most a mere statement of the "firmly rooted" doctrine. See, e.g., *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Chappell*, 698 F.2d 308, 312 (7th Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States v. Bruner*, 657 F.2d 1278, 1285 & n.8 (D.C. Cir. 1981); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), *vacated per curiam in part on other grounds*, 686 F.2d 356 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 404 (1983); *cf. Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972) (pre-*Roberts* court finding no merit in the confrontation claim because the statement was admissible under a recognized exception to the hearsay rule), *cert. denied*, 409 U.S. 1128 (1973).

The coconspirator exception can be traced to its use in seventeenth century England, where it facilitated the prosecution of alleged treason. See *Mueller*, *supra* note 36, at 325-26. The exception was later adopted by the Supreme Court in 1827, permitting coconspirator hearsay to be used as substantive evidence when made "in furtherance of the objects of the [conspiracy]." *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 470 (1827). See *supra* note 37 for a discussion of the facts in *Gooding* that distinguish it from the usual modern-day coconspirator issue.

The presumption that longevity underlies the courts' reasoning in admitting coconspirator hearsay is not based on direct statements by the courts, because they do not linger over the issue once they announce that the statements are "firmly rooted," or state the equivalent concept from the days before *Roberts*—that satisfying Rule 801(d)(2)(E) defeats the confrontation challenge. See cases cited *infra* note 123. The presumption seems to be a reasonable inference from the lack of discussion about admitting the evidence. Certainly a rationale based on the evidence's reliability would require further exploration.

123. See *United States v. Chiavola*, 744 F.2d 1271, 1276 (7th Cir. 1984) (evidence admitted under Rule 801(d)(2)(E) satisfies the confrontation clause); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984) (same); *United States v. Licavoli*, 725 F.2d 1040, 1051-52 (6th Cir.) (same), *cert. denied*, 104 S. Ct. 3535 (1984); *United States v. Bernal*, 719 F.2d 1475, 1479 (9th Cir. 1983) (court holds that coconspirator hearsay is admissible as "firmly rooted" even though the Ninth Circuit usually conducts search for reliability, see *infra* notes 153-54, 157, 161-62 and accompanying text); *United States v.*

the term "firmly rooted" as a component of "adequate indicia of reliability," the term must connote reliability in order to satisfy confrontation principles: It cannot simply mean old or long-used.<sup>124</sup> When measuring the reliability of coconspirator statements in terms of sincerity, ambiguity, perception and memory,<sup>125</sup> it becomes obvious that the coconspirator statement is not "firmly rooted." Because they have a special incentive to shift blame to one another, coconspirators are likely to bend the truth of their statements.<sup>126</sup> They are also likely to speak in code words or names that make the identification of their meaning or subject matter ambiguous.<sup>127</sup> Because the nature of conspiracy requires sharing of information only on a "need-to-know" basis, a coconspirator may be unaware of facets of a conspiracy beyond his own particular role, and may

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*Xheka*, 704 F.2d 974, 987 n.7 (7th Cir.) (satisfying Rule 801(d)(2)(E) satisfies the confrontation clause), *cert. denied*, 104 S. Ct. 486 (1983); *United States v. Chappell*, 698 F.2d 308, 312 (7th Cir.) (same), *cert. denied*, 461 U.S. 931 (1983); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981) (same), *cert. denied*, 455 U.S. 1005 (1982); *United States v. Bruner*, 657 F.2d 1278, 1285 & n.8 (D.C. Cir. 1981) (confrontation clause not violated by admission of coconspirator hearsay) (citing *Dutton v. Evans*, 400 U.S. 74 (1970)); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981) (coconspirator exception is "firmly rooted"), *vacated per curiam in part on other grounds*, 686 F.2d 356 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 404 (1983); *cf. Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972) (pre-*Roberts* court finding no merit in the confrontation claim because the statement was admissible under a recognized exception to the hearsay rule), *cert. denied*, 409 U.S. 1128 (1973).

These courts also do not address the availability prong of the *Roberts* requirements in their abbreviated inquiries. See, e.g., *Chiavola*, 744 F.2d at 1276; *McLernon*, 746 F.2d at 1106; *Licavoli*, 725 F.2d at 1051; *Xheka*, 704 F.2d at 987 n.7; *Lurz*, 666 F.2d at 81; *Bruner*, 657 F.2d at 1285 & n.8. One court does acknowledge the existence of the requirement, however, when it excuses the prosecution from any effort to produce a deceased declarant. *Peacock*, 654 F.2d at 349.

124. See *supra* notes 99-106 and accompanying text.

125. These are the elements that guarantee reliability. See *supra* note 77.

126. *Cf. Bruton v. United States*, 391 U.S. 123, 141 (1968) (White, J., dissenting) (statements of a codefendant are especially suspect because of their potential for insincerity). The pendency and furtherance requirements of Rule 801(d)(2)(E) usually will not adequately assure sincerity. See *Davenport*, *supra* note 8, at 1385-88. If bending the truth does not take the form of shifting blame to other members of the conspiracy, coconspirators may instead fabricate statements about the goals or members of the conspiracy in order to further its goals. *Levie*, *supra* note 36, at 1165-66; see, e.g., *United States v. Piccolo*, 696 F.2d 1162, 1169 (6th Cir.) (untruthful statement to allay participant's anxiety), *vacated on other grounds*, 705 F.2d 800 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 2342 (1984); *United States v. Jackson*, 549 F.2d 517, 534 (8th Cir.) (recruiting hyperboles), *cert. denied*, 430 U.S. 985 (1977).

127. See *Dutton v. Evans*, 400 U.S. 74, 104 (1970) (Marshall, J., dissenting); *Davenport*, *supra* note 8, at 1388; *Levie*, *supra* note 36, at 1165-66. A caption in a federal conspiracy opinion typifies the difficulty in determining the identity of coconspirators. See *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). The full caption is a maze of potential for mistaken meaning: "United States . . . v. Leroy BARNES, a/k/a 'Nicky', Steven Baker, a/k/a 'Jerry', Steven Monsanto, a/k/a 'Fat Stevie', John Hatcher, a/k/a 'Bo', Joseph Hayden, a/k/a 'James Hayden', a/k/a 'Freeman Hayden', a/k/a 'Jazz', . . . Leon Johnson, a/k/a 'J.J.', Waymin Hines, a/k/a 'Wop', Leonard Rollock, a/k/a 'Petey', . . . Walter Centeno, a/k/a 'Chico Bob' . . ." *Id.* at 121. Who is to say which alias might be invoked by whom in a particular conversation in furtherance of the conspiracy?

misperceive the roles of others.<sup>128</sup> Only the memory factor of reliability is somewhat ensured by Rule 801(d)(2)(E), because the rule requires that the statement have been made during the course of the conspiracy.<sup>129</sup> Given the large potential for faulty perception, however, even accurate memory is no guarantee of reliability.

The "firmly rooted" courts assume that satisfying the furtherance and pendency requirements of Rule 801(d)(2)(E) is equivalent to satisfying the confrontation clause.<sup>130</sup> None of the Federal Rules, however, presumes to supplant basic constitutional guarantees.<sup>131</sup> As noted, the confrontation clause usually affords a criminal defendant greater protection than the hearsay rule was ever designed to provide.<sup>132</sup> The hearsay exceptions are merely procedural rules that must be applied within the appropriate constitutional limitations.<sup>133</sup> They do not assure constitu-

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128. See Davenport, *supra* note 8, at 1388; Levie, *supra* note 36, at 1173. In *United States v. Gibbs*, 739 F.2d 838 (3d Cir.) (en banc), *cert. denied*, 105 S. Ct. 779 (1984), Stephen Gibbs was convicted of conspiracy to distribute marijuana on the testimony of a coconspirator, Quintiliano, *see id.* at 839, who was indicted but not produced at trial, *id.* at 847-48. Two unindicted coconspirators reported at trial Quintiliano's statement that "Jake" had agreed to purchase the smuggled marijuana. *Id.* at 841. Aside from the double hearsay problem, the witnesses had no personal knowledge, beyond what Quintiliano told them, of "Jake's" identity or his role in the conspiracy. *See id.* If Gibbs had ever used the name "Jake," it was not clear that he continued to identify with the alias, or whether another person might have been using the alias as well. Thus, the testimony was riddled with potential for unreliable, misconstrued, second-hand inferences that should hardly serve as the basis on which to convict a defendant.

Although the Third Circuit looks for guarantees of reliability, *see United States v. Ammar*, 714 F.2d 238, 256-57 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983), and requires independent evidence connecting the defendant to the conspiracy before it will admit the coconspirator statements under Rule 801(d)(2)(E), *see Ammar*, 714 F.2d at 256-57; *United States v. Trotter*, 529 F.2d 806, 811-12 (3d Cir. 1976), it nevertheless admitted the coconspirator statement in *Gibbs* without significant debate. *See 739 F.2d at 839-40*. The court found that "the independent evidence . . . while not weighty, was nevertheless sufficient." *Id.* at 843.

129. *See Fed. R. Evid. 801(d)(2)(E)*.

130. *See, e.g., United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir. 1984); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Xheka*, 704 F.2d 974, 987 n.7 (7th Cir.), *cert. denied*, 104 S. Ct. 486 (1983); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982).

131. *See, e.g., Fed. R. Evid. art. VIII advisory committee note* (to avoid "collisions" between the confrontation clause and the hearsay rule, hearsay exceptions are couched in terms of exemptions from the hearsay exclusionary principles rather than in positive terms of admissibility); *Fed. R. Evid. 803 advisory committee note* (same); *Fed. R. Evid. 804(b)(3) advisory committee note* (declarations against interest "rule does not purport to deal with questions of the right of confrontation"); *Inculpatory Statements, supra* note 28, at 178 ("Federal Rules of Evidence speak only to evidentiary principles, and do not concern the constitutional admissibility of evidence").

132. *See supra* note 20 and accompanying text.

133. For example, the confrontation clause would require the prosecution to produce or demonstrate the unavailability of a Rule 803 declarant, unless there were no possibility of production or production would be of remote utility to the defendant. *See supra* notes 87-94 and accompanying text. Availability is immaterial, however, under Rule 803. *Fed. R. Evid. 803; see Fed. R. Evid. 803 advisory committee note.*

tionality in and of themselves.<sup>134</sup>

It is arguable that just as the *Roberts* Court and older Supreme Court cases found statements made within the dying declaration exception—an exception much criticized for its unreliable basis<sup>135</sup>—to be constitutionally admissible,<sup>136</sup> so too may the coconspirator statement be numbered among the “firmly rooted.” This argument does not stand up to close scrutiny, however, because even dying declarations—the least reliable of the firmly rooted exceptions recognized by the Court<sup>137</sup>—are more reliable<sup>138</sup> and necessary than coconspirator statements for a number of reasons. First, early Supreme Court cases cast the dying declaration exception in its current limited form, allowing admission only of statements by a homicide victim that relate to the fact and the perpetrator of the homicide<sup>139</sup>—a very narrow field of comment. The more narrow the field of admissible statements, the more likely the exception attempts to guarantee reliability.<sup>140</sup> In contrast, the subject matter of coconspirator

134. See *California v. Green*, 399 U.S. 149, 156 (1970) (“[H]earsay rules . . . for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant’s constitutional right to confrontation.”). See *supra* note 20 and accompanying text.

135. See *Mattox v. United States*, 146 U.S. 140, 152 (1892) (recognizing that dying declarations must be admitted with care); Fed. R. Evid. 804(b)(2) Notes of Comm. on the Judiciary, H.R. Rep. No. 650, 93d Cong., 2d Sess. 26, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7089 (“Committee did not consider dying declarations as among the most reliable forms of hearsay”); McCormick, *supra* note 5, § 281, at 828 (the dying declarations exception is “the most mystical in its theory and traditionally the most arbitrary in its limitations”); *Confrontation*, *supra* note 4, at 1435 n.9 (criticizing the reliability of dying declarations); Martin, *supra* note 18, at 26, col. 1 (same).

Despite these misgivings, the advisory committee not only retained the exception, but expanded its application to civil matters, with the only retort to the critics that “[w]hile the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present” to induce the truth in dying declarations. Fed. R. Evid. 804(b)(2) advisory committee note.

136. See *Ohio v. Roberts*, 448 U.S. 56, 66 & n.8 (1980) (finding dying declarations to be constitutionally admissible); accord *Pointer v. Texas*, 380 U.S. 400, 407 (1965); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895).

137. Compare *supra* note 100 and accompanying text (reliability of business records) and *supra* note 111 (Supreme Court’s many holdings that prior testimony can be sufficiently reliable) with *supra* note 135 (unreliability of dying declarations).

138. See *supra* note 108.

139. See *Motes v. United States*, 178 U.S. 458, 472-73 (1900); *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897); *Mattox v. United States*, 146 U.S. 140, 151-52 (1892). Fed. R. Evid. 804(b)(2) permits admission of dying declarations in “a prosecution for homicide [when] . . . a statement [was] made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.” Fed. R. Evid. 804(b)(2).

140. See Fed. R. Evid. 803(2) advisory committee note (limitations on the subject matter a factor in assuring reliability in spontaneous utterances); cf. Fed. R. Evid. 803(1) (present sense impression exception limits statements to descriptions or explanations of perceived events); Fed. R. Evid. 803(2) (spontaneous utterance exception limits statements to those that relate to the startling event); Fed. R. Evid. 803(4) (medical diagnosis or treatment exception limits statements to those for the purpose of and pertinent to

statements is limited only by the "furtherance" and "pendency" requirements, leaving a wide field of comment and consequently more room for error or falsehood.<sup>141</sup> Second, the dying declarant's statement is considered to have reliability guarantors similar to those in an oath,<sup>142</sup> and until the value of the oath as a source of reliability is rejected,<sup>143</sup> the dying declaration's rationale will doubtless live on. Coconspirators' statements, on the other hand, are not similarly sacred,<sup>144</sup> so these statements cannot be analogized to an oath.<sup>145</sup> Finally, the death of the declarant adds an element of necessity in admitting dying declarations,<sup>146</sup> which the Court recognizes in its admonition to receive such evidence with the "utmost caution."<sup>147</sup> There is no similar caution applied to the receipt of coconspirator statements,<sup>148</sup> nor is the necessity element similar unless

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medical diagnosis and treatment); Fed. R. Evid. 803(6) (records of regularly conducted activities exception limits statements to records made near the time of a regularly conducted business activity by a person with knowledge, where such records are routinely maintained); Fed. R. Evid. 804(b)(1) (former testimony exception limits statements to testimony from another proceeding at which the producing party had a similar opportunity and motive to develop the evidence through direct or cross-examination). It is likely that the narrowing of these exceptions contributes to their being premised on guarantees of trustworthiness.

141. For example, a conspirator might fabricate about the goals or members of a conspiracy in order to entice new recruits to join the venture. The statements would be in furtherance of a pending conspiracy if the new members would be necessary to its actual goals, but would remain fabrication. For a discussion of how little the furtherance and pendency requirements add to the reliability of coconspirator admissions, see Davenport, *supra* note 8, at 1385-88.

142. The Supreme Court found that the imminence of death enforced "as strict [an] adherence to the truth as the obligation of an oath could impose." *Mattox v. United States*, 146 U.S. 140, 152 (1892).

143. Like the "religious justification" for dying declarations, Fed. R. Evid. 804(b)(2) advisory committee note, the oath as a guarantor of trustworthiness has lost some of its vitality over the years, although it too may exert some level of "psychological [pressure]," *id.*, presumably in the form of a witness' fear of penalties for perjury.

The advisory committee acknowledged that the oath is "perhaps less effective than in an earlier time," Fed. R. Evid. art. VIII advisory committee note, and that the mere presence of an oath has never been sufficient to remove the statement from a hearsay category, Fed. R. Evid. 801(d)(1) advisory committee note. The oath is, however, an express requirement for the admission of prior inconsistent statements as substantive evidence under Fed. R. Evid. 801(d)(1)(A). Thus its value apparently has not been completely eroded.

144. See *supra* notes 36, 125-29 and accompanying text.

145. Coconspirator statements do not share with dying declarations either the religious or psychological inducement for truth. See *supra* note 143.

146. *Mattox v. United States*, 146 U.S. 140, 152 (1892).

147. *Id.*

148. For examples of cases admitting coconspirator statements without any caution or mention of their unreliability, see *United States v. Chiavola*, 744 F.2d 1271, 1274-76 (7th Cir. 1984); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Licavoli*, 725 F.2d 1040, 1051-52 (6th Cir.), *cert. denied*, 104 S. Ct. 3535 (1984); *United States v. Bernal*, 719 F.2d 1475, 1479 (9th Cir. 1983); *United States v. Xheka*, 704 F.2d 974, 987 & n.7 (7th Cir.), *cert. denied*, 104 S. Ct. 486 (1983); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States v. Bruner*, 657 F.2d 1278, 1285 n.8 (D.C. Cir. 1981); *United States v. Peacock*, 654 F.2d 339, 349-50 (5th Cir. 1981), *vacated per curiam in part on other grounds*, 686 F.2d 356

the coconspirator declarant is deceased. Thus, procedurally and philosophically, the dying declaration exception has been narrowed to a range that can be reliable if used with care. Coconspirator statements, however, share no features with even this weakest of the "firmly rooted" exceptions recognized by the Court.

Because the Supreme Court has gone through some effort to indicate that only reliable hearsay can be admitted without violating a defendant's confrontation rights,<sup>149</sup> and because the coconspirator exception has long been recognized as founded in principles other than reliability,<sup>150</sup> coconspirator hearsay by an unavailable declarant cannot be admitted with only a simple finding that it is long-used or presumptively constitutional, and therefore reliable. Despite the Court's current belief that some of the exclusionary rules designed to protect criminal defendants should be eliminated,<sup>151</sup> it has always maintained that only reliable evidence should underlie convictions.<sup>152</sup> Bringing Rule 801(d)(2)(E) within the requirements of the confrontation clause therefore requires a search for, rather than an irrefutable presumption of, reliability.

### B. *Searching for Indicia of Reliability on a Case-by-Case Basis*

Recognizing the need for greater assurances of reliability than the procedural requirements of Rule 801(d)(2)(E) provide, other circuits are taking the better approach by conducting searches, with varying levels of intensity, for "particularized guarantees of trustworthiness" in coconspirator statements.<sup>153</sup> These searches have proved to be remarkably

(5th Cir. 1982), *cert. denied*, 104 S. Ct. 404 (1983); *United States v. Papia*, 560 F.2d 827, 836 & n.3 (7th Cir. 1977); *United States v. McManus*, 560 F.2d 747, 750 (6th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *United States v. Swainson*, 548 F.2d 657, 661 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973).

149. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); see *supra* notes 18, 55, 111-12 and accompanying text.

150. See *supra* notes 26, 36-44 and accompanying text.

151. In the 1983-84 Term, the Court made a pronounced retreat from many of the previously sacred exclusionary protections for criminal defendants. See, e.g., *United States v. Leon*, 104 S. Ct. 3405, 3419-20 (1984) (objectively reasonable reliance on a defective search warrant will not require exclusion of evidence obtained prior to realization of the defect); *New York v. Quarles*, 104 S. Ct. 2626, 2632 (1984) ("public safety" exception to *Miranda v. Arizona*, 384 U.S. 436 (1966): Statements of a suspect in custody, although made prior to the suspect's receipt of "Miranda" warnings, are admissible if the delay was due to "overriding concerns of public safety"); *Nix v. Williams*, 104 S. Ct. 2501, 2509-10 (1984) (illegally obtained evidence is admissible if the prosecution can prove that it would "inevitably" have been discovered by lawful means).

The Ninth Circuit, however, has not viewed these Supreme Court decisions as giving carte blanche to begin convicting defendants with evidence supplied by anonymous accusers or *ex parte* affidavits. See *United States v. Ordonez*, 737 F.2d 793, 802 (9th Cir. 1984) (ledger entries by unknown declarants, admissible under Rule 801(d)(2)(E), violated the defendant's confrontation rights; prosecutor cannot satisfy the unavailability showing without knowing who the declarants are).

152. See *supra* notes 18, 55, 111-12 and accompanying text.

153. See, e.g., *United States v. Alfonso*, 738 F.2d 369, 372 (10th Cir. 1984); *United*

successful,<sup>154</sup> given both the high standard of reliability needed to overcome the exclusionary presumption underlying the reliability requirement,<sup>155</sup> and the generally unreliable nature of coconspirator hearsay.<sup>156</sup> The searches are also notable for their abbreviated level of inquiry, making it doubtful whether the reliability issue has been adequately addressed.<sup>157</sup> Furthermore, before conducting their abridged searches for reliability, many of these courts have failed to examine whether the declarant is in fact unavailable, or is available but not produced.<sup>158</sup> Be-

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States v. Tille, 729 F.2d 615, 621 (9th Cir.), *cert. denied*, 105 S. Ct. 156 (1984); United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3543 (1984); United States v. Layton, 720 F.2d 548, 561 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); United States v. Ammar, 714 F.2d 238, 256-57 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); United States v. Fleishman, 684 F.2d 1329, 1340 (9th Cir. 1981), *cert. denied*, 459 U.S. 1044 (1982); United States v. Perez, 658 F.2d 654, 661-62 (9th Cir. 1981); *cf.* United States v. Wright, 588 F.2d 31, 38 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979) (pre-*Roberts* case in which court looks for guarantees of trustworthiness); United States v. Rogers, 549 F.2d 490, 500 (8th Cir. 1976) (pre-*Roberts* court deciding on admissibility of hearsay on a case-by-case basis), *cert. denied*, 431 U.S. 918 (1977).

154. See United States v. Alfonso, 738 F.2d 369, 372 (10th Cir. 1984) (holding that coconspirator statement contained sufficient indicia of reliability and was not crucial to the prosecution's case); United States v. Tille, 729 F.2d 615, 621 (9th Cir.) (statement held to be reliable because four reliability factors from *Dutton* were satisfied), *cert. denied*, 105 S. Ct. 156 (1984); United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1983) (statement held to be reliable because part of an ongoing transaction about which the declarant had personal knowledge), *cert. denied*, 104 S. Ct. 3543 (1984); United States v. Layton, 720 F.2d 548, 561 (9th Cir. 1983) (statements sufficiently reliable under a *Dutton* analysis), *cert. denied*, 104 S. Ct. 1423 (1984); United States v. Ammar, 714 F.2d 238, 256-57 (3d Cir.) (sufficient indicia of reliability), *cert. denied*, 104 S. Ct. 344 (1983); United States v. Fleishman, 684 F.2d 1329, 1340 (9th Cir.) (same), *cert. denied*, 459 U.S. 1044 (1982); United States v. Perez, 658 F.2d 654, 661-62 (9th Cir. 1981) (testimony reliable because of surrounding circumstances); *cf.* United States v. Wright, 588 F.2d 31, 38 (2d Cir. 1978) (pre-*Roberts* case in which testimony was found to be reliable and neither crucial nor devastating), *cert. denied*, 440 U.S. 917 (1979); United States v. Rogers, 549 F.2d 490, 500-02 (8th Cir. 1976) (same), *cert. denied*, 431 U.S. 918 (1977).

155. See *supra* notes 18, 55, 110-12 and accompanying text.

156. See *supra* notes 36, 126-29 and accompanying text.

157. See, e.g., United States v. Alfonso, 738 F.2d 369, 372 (10th Cir. 1984) (reliability search consists of brief recitation of *Dutton* factors and conclusion that the statement at issue is reliable, without analysis of its attributes); United States v. Tille, 729 F.2d 615, 621 (9th Cir.) (although acknowledging *Roberts* availability and reliability requirements, court merely recites *Dutton* factors and finds statement reliable without analysis), *cert. denied*, 105 S. Ct. 156 (1984); United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1983) (court finds statement reliable simply because it occurred during an ongoing transaction about which the declarant had personal knowledge of the participants' identities; no inquiry into declarant's sincerity or clarity of expression), *cert. denied*, 104 S. Ct. 3543 (1984); United States v. Ammar, 714 F.2d 238, 256-57 (3d Cir.) (although the source and reality of declarant's personal knowledge were unclear, court finds statement reliable without further inquiry), *cert. denied*, 104 S. Ct. 344 (1983); United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980) (court cites *Dutton* factors and finds statement reliable simply because it is not an express assertion about a past fact).

158. The courts searching for particularized guarantees often give short shrift to the availability inquiry, much like the "firmly rooted" courts do, see *supra* note 123. For examples of courts overlooking the availability inquiry, and thus the necessity for the coconspirator statements, see United States v. Alfonso, 738 F.2d 369, 372 (10th Cir. 1984); United States v. Ammar, 714 F.2d 238, 256-57 (3d Cir.), *cert. denied*, 104 S. Ct.

cause coconspirator statements do not typically contain the guarantees of trustworthiness contained in the "hearsay exceptions,"<sup>159</sup> it is especially important to first examine the necessity for admitting out-of-court coconspirator statements in place of an available declarant.<sup>160</sup>

After permitting the prosecutor to skirt the availability issue, some of these circuits have resurrected the *Dutton* tests for reliability of hearsay statements and have applied them to the coconspirator admissions.<sup>161</sup> Two circuits have not considered the *Dutton* factors to be a cohesive whole, however, and have considered satisfaction of less than all of the factors to be sufficient to meet the reliability requirement.<sup>162</sup> As dis-

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344 (1983); *United States v. Fleishman*, 684 F.2d 1329, 1340 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982); *United States v. Perez*, 658 F.2d 654, 661-62 (9th Cir. 1981); *cf.* *United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978) (pre-*Roberts* case in which court did not focus on availability of declarant), *cert. denied*, 440 U.S. 917 (1979); *United States v. Rogers*, 549 F.2d 490, 500-02 (8th Cir. 1976) (same), *cert. denied*, 431 U.S. 918 (1977).

The Third Circuit, however, has very recently begun to recognize the importance of the availability prong of *Roberts*. Recognizing that the prosecution has a duty to make a good faith effort to produce the declarant at trial, the court has reversed two conspiracy convictions when the only showing of unavailability was the prosecution's assertion that the declarants would presumably assert their fifth amendment privilege not to testify. See *United States v. Caputo*, No. 82-1791, slip op. at 17 (3d Cir. March 29, 1985) (prosecution's representations that declarant would have "taken the fifth . . . fall short of the Confrontation Clause's demands"); *United States v. Inadi*, 748 F.2d 812, 820 (3d Cir. 1984) (conviction reversed because of prosecution's failure to show that declarant was unavailable to testify; statements were therefore not admissible under Rule 801(d)(2)(E)). This new focus on the necessity for coconspirator hearsay under confrontation standards marks an important step in the preservation of the defendant's fundamental trial guarantees, and should be emulated by other circuits.

159. See *supra* note 36.

160. *United States v. Fielding*, 630 F.2d 1357, 1367 n.11 (9th Cir. 1980).

161. See, e.g., *United States v. Alfonso*, 738 F.2d 369, 372 (10th Cir. 1984); *United States v. Ordonez*, 737 F.2d 793, 802-03 (9th Cir. 1984); *United States v. Tille*, 729 F.2d 615, 621 (9th Cir.), *cert. denied*, 105 S. Ct. 156 (1984); *United States v. Layton*, 720 F.2d 548, 561 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); *United States v. Ammar*, 714 F.2d 238, 256-57 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Fleishman*, 684 F.2d 1329, 1339 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982); *United States v. Perez*, 658 F.2d 654, 661-62 (9th Cir. 1981).

162. See, e.g., *United States v. Tille*, 729 F.2d 615, 621 (9th Cir.) (applies all four factors to statement but reasons that less than all need be satisfied in every case), *cert. denied*, 105 S. Ct. 156 (1984); *United States v. Ammar*, 714 F.2d 238, 256-57 (3d Cir.) (reciting four *Dutton* factors, yet holding that declarant's possible lack of personal knowledge did not make the statement reversibly unreliable), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Foster*, 711 F.2d 871, 881 (9th Cir. 1983) (all elements need not be present where little risk that jury would give undue weight to the statement), *cert. denied*, 104 S. Ct. 1602 (1984); *United States v. Fleishman*, 684 F.2d 1329, 1339 (9th Cir.) (*Dutton* factors are not exhaustive considerations, nor need all be satisfied every time), *cert. denied*, 459 U.S. 1044 (1982); *United States v. Eaglin*, 571 F.2d 1069, 1081 (9th Cir. 1977) (finding statement reliable where three of four *Dutton* factors satisfied), *cert. denied*, 435 U.S. 906 (1978); *United States v. Snow*, 521 F.2d 730, 735 (9th Cir. 1975) (only two factors satisfied but statement deemed reliable), *cert. denied*, 423 U.S. 1090 (1976). *But cf.* *United States v. Ordonez*, 737 F.2d 792, 803-04 (9th Cir. 1984) (holding that although all *Dutton* factors need not be satisfied, failure to present evidence of any of the four, or of any other guarantee of trustworthiness, makes the statement inadmissible).

cussed, it is questionable whether the factors were ever meant to be used piecemeal rather than in the conjunctive.<sup>163</sup> Taken together, these requirements may indeed be a useful measure of reliability,<sup>164</sup> but when their application is diluted by reducing the number applied, they cannot ensure sufficient trustworthiness under the confrontation clause when the declarant is not produced.<sup>165</sup> Even pursuing the correct approach under *Roberts*, therefore, has led to unwarranted manipulation in the search for particularized guarantees, resulting in the admission of unreliable coconspirator statements.

### C. *Avoiding the Search for Reliability*

In some cases, both schools of thought have avoided the reliability search altogether. These courts have excused trial admission of coconspirator hearsay without having to reach the confrontation issue in either of two ways: by finding it to be harmless error or by finding that the defendant waived his confrontation right.

#### 1. The Harmless Error Excuse

When a coconspirator's statement should not have been admitted be-

163. See *supra* notes 70-74, 82 and accompanying text.

164. See *supra* notes 77-80 and accompanying text.

165. A requirement that statements satisfy all four factors is even more compelling in the case of coconspirator admissions because they enjoy no basis in trustworthiness, see *supra* note 36 and accompanying text, and must therefore overcome the testimonial infirmities of ambiguity, insincerity, faulty perception and erroneous memory, see *Tribe, supra* note 77, at 959.

In *United States v. Eaglin*, 571 F.2d 1069 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1977), the court acknowledged that the coconspirator hearsay did not even meet the admissibility criteria for the coconspirator exception, much less the confrontation clause. See 571 F.2d at 1078-79. The court found no confrontation problem, however, when three of the four factors were clearly met and there was little likelihood that the trier of fact would be misled. See *id.* at 1081. The factor dispensed with was the prohibition against express assertions about past fact—the memory factor. *Id.* The Federal Rules of Evidence specifically excluded statements of memory to prove the fact asserted in Rule 803(3), a necessary step to prevent the “virtual destruction of the hearsay rule.” Fed. R. Evid. 803(3) advisory committee note. This is thus the least desirable factor to abandon if one is seeking to overcome testimonial infirmities.

An even earlier Ninth Circuit opinion found coconspirator hearsay that satisfied only two of the *Dutton* factors to be sufficiently reliable to overcome a confrontation challenge. See *United States v. Snow*, 521 F.2d 730, 734-35 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976). Again the statement was an express assertion of past fact, *id.* at 735, —faulty memory potential—and the circumstances surrounding the making of the statement did not remove all reason to believe that the declarant had no motive to misrepresent the defendant's involvement, *id.*,—insincerity potential. Only the declarant's personal knowledge and the unlikelihood of faulty perception were present as factors to support admissibility. *Id.* at 735.

What remains is prejudicial hearsay with little assurance of accurate perception and clarity, and no assurance of sincerity or accurate memory. To make matters worse, the court found nothing crucial to the prosecution or devastating to the defense in the statement, even though it constituted a “significant portion of the testimony at trial.” *Id.* at 735.

cause of its questionable reliability, appellate courts sometimes excuse the violation of the defendant's confrontation rights if the weight of the other evidence against him indicates that the admission of the coconspirator's statement was "harmless."<sup>166</sup> If an error is of constitutional proportion, the prosecution on appeal must prove beyond a reasonable doubt<sup>167</sup> that the error did not affect the defendant's substantial rights,<sup>168</sup> injure the defendant's case in any way, or otherwise contribute to the verdict.<sup>169</sup> If the prosecution fails to satisfy this burden, it must suffer reversal.<sup>170</sup>

"[S]ome constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error."<sup>171</sup> Although the confrontation right has not yet been included in these fundamental rights, it should be recognized as among them. The automatic reversal penalty is designed to discourage prosecutors from indulging in blatant violations of a defendant's constitutional rights,<sup>172</sup> and this deterrence policy was

166. See *United States v. Massa*, 740 F.2d 629, 640 (8th Cir. 1984) (despite clear unreliability and no showing of unavailability, court holds admission to be harmless beyond a reasonable doubt); *United States v. O'Connor*, 737 F.2d 814, 820-21 (9th Cir. 1984) (acknowledging that statement did not qualify for admission under Rule 801(d)(2)(E) because it was not in furtherance of the conspiracy, but finding error harmless beyond a reasonable doubt in light of other evidence), *cert. denied*, 105 S. Ct. 1198 (1985); *United States v. Traylor*, 656 F.2d 1326, 1332-33 (9th Cir. 1981) (same); *United States v. Castillo*, 615 F.2d 878, 883-84 (9th Cir. 1980) (statement not in furtherance of conspiracy should not have been admitted under Rule 801(d)(2)(E); nevertheless, if statement is reliable under the *Dutton* factors, it is not an error of constitutional proportions and need only be shown that it more probably than not was harmless).

167. *Chapman v. California*, 386 U.S. 18, 24 (1967).

168. See *id.* at 23; see also *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) (error affecting the substantial rights of a party cannot be harmless).

169. See *Chapman v. California*, 386 U.S. 18, 23-24 (1967); see also *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) (error in admitting relevant evidence that contributes to the conviction cannot be harmless). In *Chapman*, the prosecutor impermissibly commented on the defendant's refusal to testify, a right guaranteed to the defendant by the fifth amendment privilege against self-incrimination. *Id.* at 25-26. This prosecutorial tactic was prohibited by an earlier Court decision, *Griffin v. California*, 380 U.S. 609 (1965), which held invalid state constitutional provisions permitting adverse inferences to be drawn from a defendant's failure to testify. See *id.* at 615.

170. See *Chapman v. California*, 386 U.S. 18, 24 (1967) ("the burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment").

171. *Id.* at 23 & n.8 (citing as examples, a defendant's rights to be free from coerced confessions, *Payne v. Arkansas*, 356 U.S. 560, 568 (1958); to have the assistance of counsel, *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); and to be tried by an impartial judge, *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)).

172. Justice Stewart advocated a rule of automatic reversal to discourage prosecutors from "indulging in clear violations of *Griffin*," see *supra* note 169, in the future. See *Chapman v. California*, 386 U.S. 18, 45 (1967) (Stewart, J., concurring). If the prosecution chose to ignore such clear Court proscriptions, Justice Stewart saw "no reason why the sanction of reversal should not be the result." *Id.*

Justice Harlan stated that limitations on harmless error rules stem from two types of error that cannot be permitted in a fair trial. The first are those that have a devastating effect on the defendant, such as the admission of coerced confessions or the denial of the right to counsel, which can never be harmless because of their unfair impact on the ac-

also the original thrust of the Supreme Court's use of the confrontation clause.<sup>173</sup> If such violations of a defendant's confrontation rights carried the automatic reversal penalty, prosecutors would be less likely to try to bolster their cases with unnecessary and prejudicial coconspirator hearsay evidence.<sup>174</sup>

Harmless error is often really not "harmless" when viewed in terms of an overall fair trial. "[H]armless error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one."<sup>175</sup> This kind of subversive prejudice to the defendant, which coconspirator statements are particularly likely to evoke,<sup>176</sup> should not be permitted when the evi-

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cused. *Id.* at 51-52 & n.7 (Harlan, J., dissenting). Automatic reversal can also serve to discourage a second type of error—prosecutorial or official misconduct; such a sanction for "official misbehavior [is necessary] because society cannot tolerate giving final effect to a judgment tainted with . . . intentional misconduct." *Id.* at 52 n.7.

173. Fed. R. Evid. art. VIII advisory committee note. The advisory committee draws this conclusion from an examination of *Pointer v. Texas*, 380 U.S. 400 (1965), which might as easily have been decided "under [the] conventional hearsay doctrine read in the light of a constitutional right to counsel," Fed. R. Evid. art. VIII advisory committee note, and *Douglas v. Alabama*, 380 U.S. 415 (1965), in which exclusion of the codefendant's confession on hearsay grounds was possible but would not have accomplished the opinion's "real thrust . . . in the direction of curbing undesirable prosecutorial behavior, rather than merely applying rules of exclusion . . . [T]he confrontation clause was the means selected to achieve this end." Fed. R. Evid. art. VIII advisory committee note. *Dutton v. Evans*, 400 U.S. 74 (1970), also pointed to the use of the confrontation clause to prevent misuse of confessions or prosecutorial misconduct or negligence. *See id.* at 87; *see also Confrontation, supra* note 4, at 1439 (confrontation clause should be read as a "canon of prosecutorial behavior," requiring the prosecution to produce available declarants and refrain from the temptation "to use hearsay instead of live witnesses whose demeanor is unimpressive").

174. The adoption of an automatic reversal penalty, at least for the misuse of coconspirator admissions that violate a defendant's confrontation rights, can be justified on both a general and a specific level. First, a general sanction against the intentional violations of a defendant's constitutional rights should be available in any case involving prosecutorial misconduct, regardless of its impact on the outcome. This rationale is nothing more than the fair trial guarantee supported by deterrent measures to protect defendants from overzealous prosecutors. It attaches equally to all constitutional protections.

On a specific level, however, violation of a defendant's confrontation guarantee with coconspirator admissions may support an automatic reversal penalty regardless of any flagrant prosecutorial misconduct. Coconspirator admissions can be conceived of as a species of involuntary confession when the declarant is identified with the defendant for purposes of admitting the statement. Like involuntary confessions, which are extremely prejudicial, *Payne v. Arkansas*, 356 U.S. 560, 568 (1958), coconspirator statements have a "profound impact on the jury," *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting) (case involving codefendants), at least when the declarant is unavailable and the defendant is unable to expose the defects in the admission. An automatic reversal sanction, like that for involuntary confessions, *see Payne*, 356 U.S. at 568, would prevent the continued use of inherently unreliable coconspirator admissions attributed to the defendant, thereby preserving the defendant's confrontation and due process guarantees.

175. *Chapman v. California*, 386 U.S. 18, 22 (1967).

176. In *Bruton v. United States*, 391 U.S. 123 (1968), the Court commented on "the powerfully incriminating [effect of] extrajudicial statements of a codefendant who stands

dence is unreliable and conceivably unnecessary to a conviction.<sup>177</sup> If trial courts do not begin to exclude questionable hearsay on their own, appellate courts must send the message that such exclusion is required. This message will not be communicated if the higher courts continue to excuse admission of coconspirator hearsay as harmless.

## 2. The Waiver Excuse

Courts have sometimes excused the violation of a defendant's right of

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accused side-by-side with the defendant," *id.* at 135-36, finding these incriminations "devastating to the defendant" and their credibility "inevitably suspect." *Id.* at 136. Justice Stewart later inverted this warning when writing for the plurality of the Court in *Dutton*, holding that statements that are neither "crucial" nor "devastating" may be admitted without violating a defendant's confrontation rights. See *Dutton v. Evans*, 400 U.S. 74, 87 (1970).

In his dissent in *Dutton*, Justice Marshall also found that an "incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule." *Dutton*, 400 U.S. at 110-11 (Marshall, J., dissenting). Coconspirators, even if unindicted, cast a similar pall of prejudicial suspicion upon the defendant with their statements, if not because of the actual content of the statement, then because of the derivative prejudice which always accompanies a charge of conspiracy.

The Supreme Court has held that evidence of any uncharged crime is inherently prejudicial. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). Thus, in cases in which no conspiracy is charged, there can be no doubt of the inherent prejudice. Even if a conspiracy is charged, however, coconspirator admissions are often prejudicial. See *United States v. Cambindo Valencia*, 609 F.2d 603, 635 n.25 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Layton*, 549 F. Supp. 903, 917 (N.D. Cal. 1982), *aff'd in part and rev'd in part on other grounds*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); see also *United States v. Ordonez*, 737 F.2d 793, 796 (9th Cir. 1984) (the court "reverse[d] the conspiracy charge because of the prejudicial impact of the inadmissible ledger entries [admitted under Rule 801(d)(2)(E)] on the jury's fact finding function"); *United States v. Ammar*, 714 F.2d 238, 257 (3d Cir.) ("admission of coconspirator statements in a complex conspiracy trial with multiple defendants must be carefully monitored . . . to avoid undue prejudice to the defendants"), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Petersen*, 611 F.2d 1313, 1331 (10th Cir. 1979) (there is a need to prevent the "inherent danger of prejudice to a defendant which would result should a jury consider hearsay statements that lack adequate guarantees of trustworthiness"—as coconspirator statements usually do), *cert. denied*, 447 U.S. 905 (1980); *Uncharged Conspiracies*, *supra* note 36, at 949 (coconspirator statements are inherently prejudicial).

On a common sense level, coconspirator statements are inherently prejudicial because they evoke guilt by association. In this regard, the criminal agency theory is more fact than fiction.

177. Even if the evidence does not affect the substantial rights of the defendant in some cases, it is at the very least constitutionally inelegant to allow the admission of evidence that will often later meet the harmless-beyond-a-reasonable-doubt standard. Defendants "are entitled to a trial free from the pressure of unconstitutional inferences." *Chapman v. California*, 386 U.S. 18, 26 (1967). "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). While this argument may be based more on aesthetics than on substantial rights, there is something slightly profane about invading a constitutional right and then finding the error harmless. Although procedural rules are expedient and necessary, it seems unfortunate that they ever need to be used as a means of skirting fundamental guarantees.

confrontation by finding that the defendant has impliedly or expressly waived that right.<sup>178</sup> A waiver of a constitutional right is "an intentional relinquishment . . . of a known right or privilege."<sup>179</sup> Whether a waiver is made with adequate intent depends on the facts of each case and the accused's knowledge of his act's consequences.<sup>180</sup>

A waiver of the confrontation right has been implied in a variety of ways, so long as the record contained evidence that the conduct or action resulting in a waiver was undertaken with knowledge of its potential effects.<sup>181</sup> Misconduct during the trial may constitute a waiver of the confrontation right,<sup>182</sup> although the right can be reclaimed when the defendant agrees to act properly.<sup>183</sup>

Confrontation rights have been waived more directly by a guilty plea, when the record indicates that the plea was entered voluntarily and with knowledge of its consequences.<sup>184</sup> A silent record will not support an implied waiver.<sup>185</sup> The confrontation right has also been waived when the defendant voluntarily was absent from his trial,<sup>186</sup> when he stipulated to evidence offered by the prosecution,<sup>187</sup> and when the unavailability of the witnesses has been caused by the unlawful interference of the defendant or his agents.<sup>188</sup> Finally, one circuit avoided the confrontation issue,

178. See *infra* notes 181-89 and accompanying text.

179. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

180. *Id.*

181. If a defendant contests the validity of an allegedly competent and intelligent waiver, he must prove his claim by a preponderance of the evidence. *Id.* at 468-69. Once it is established that the right had not been waived, it then becomes the duty of the reviewing court to grant a defendant's habeas corpus petition to annul the proceeding. *See id.*

182. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

183. *Id.* Even in the absence of the defendant, however, counsel may be permitted to continue to represent and protect his interests. *See id.* at 351 (recommending that after a contumacious defendant is removed from the proceeding, the court should use reasonable efforts to allow the defendant to communicate with his attorney and keep abreast of the proceeding) (Brennan, J., concurring). *But cf.* *United States v. Carlson*, 547 F.2d 1346, 1358 n.11 (8th Cir. 1976) (counsel may continue to represent a defendant's interest when the defendant is voluntarily absent from trial or removed due to misconduct, but not when the waiver occurred through the defendant causing the witness unavailability through intimidation or misconduct), *cert. denied*, 431 U.S. 914 (1977).

184. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

185. *Id.* at 242-43 & n.5 (record must contain an affirmative showing that the waiver was voluntary and intelligent: "[p]resuming waiver from a silent record is impermissible").

186. *See Taylor v. United States*, 414 U.S. 17, 19-20 (1973).

187. *See United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974). *But cf.* *Phillips v. Neil*, 452 F.2d 337, 345 (6th Cir. 1971) (adequate waiver of a hearsay objection does not constitute a valid waiver of a defendant's confrontation right), *cert. denied*, 409 U.S. 884 (1972).

188. *See United States v. Carlson*, 547 F.2d 1346, 1358-60 (8th Cir. 1976) (defendant's intimidation of a witness to prevent his testifying is a waiver of the confrontation right: "[t]he Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery"), *cert. denied*, 431 U.S. 914 (1977); *Graham, supra* note 2, at 139 (a defendant cannot prevent the use of a witness' hearsay testimony on confrontation grounds if the defendant has murdered the witness).

and therefore the reliability inquiry, by finding that the defendant waived his confrontation right by failing to make a timely objection to the introduction of the evidence.<sup>189</sup> Although preservation of constitutional rights often takes a back seat to a state's interest in finality,<sup>190</sup> this interest and other forms of administrative inconvenience should not outweigh a defendant's confrontation guarantee. Appellate courts should therefore review claimed abridgements of confrontation rights under the plain error doctrine, regardless of whether the issue was raised at trial.<sup>191</sup>

In any trial where the defendant has waived his constitutional right,

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189. See *United States v. Gibbs*, 739 F.2d 838, 840 (3d Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 779 (1985). In *Gibbs*, the defendant objected to the introduction of coconspirator double hearsay at the close of the prosecution's evidence, *id.* at 848, but only in general terms of a "clear Sixth Amendment problem," *id.*, and not on the specific ground that the prosecution had failed to carry its burden of showing the declarant to be unavailable. The court viewed this nonspecific objection as having the effect of depriving the prosecution of the opportunity to produce the declarant or to demonstrate his unavailability. See *id.* at 849. Construing the *Roberts* burden of demonstrating the unavailability of the declarant, see 448 U.S. at 65, in this way imposes a burden on the defendant to lodge a timely and specific confrontation objection before the prosecution's duty to produce the declarant or demonstrate his unavailability arises. *Gibbs*, 739 F.2d at 849. The prosecution's duty to produce the declarant or demonstrate unavailability, however, was not so conditionally imposed in *Roberts*. See 448 U.S. at 65. On the basis of this finding of untimely objection, see *Gibbs*, 739 F.2d at 849, and no plain error, see *id.* at 850 & n.25, the court declined to review *Gibbs*' sixth amendment objection, see *id.* at 850.

The dissent exposed the problems caused by avoiding the confrontation issue in this case. First, the "crux of the Government's case depend[ed] upon the out-of-court statements," *id.* at 851 (Rosenn, J., dissenting), which sounds very much like the sort of "crucial" evidence that *Dutton* arguably would require to be cross-examined to assure the defendant's confrontation right was respected, see *infra* note 210. Also, the testimony was more than merely crucial, more than "the core of the Government's case." *Gibbs*, 739 F.2d at 854. The dissent classifies the case against *Gibbs* as resting "largely on untested, devastating hearsay." *Id.* at 857 (Rosenn, J., dissenting). In *Gibbs*, there is more than the *Dutton* threat of crucial or devastating hearsay—there is both. The need and permissibility for review becomes clear in such cases of plain error, regardless of the timeliness, or even the complete absence, of appropriate objection.

190. For example, if the defendant has gone through the entire appellate process on direct review and petitioned the federal court for a writ of habeas corpus, great deference should be given to the state procedural rules barring the adjudication of any issues not raised at trial, because collateral attacks on convictions undermine the finality of the judgment. See *United States v. Frady*, 456 U.S. 152, 164-66 (1982) (Court imposing stricter prejudice requirements for adjudicating procedurally defaulted constitutional claims on habeas review than are imposed on direct appeal); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 444-53 (1963) (noting the great finality interest in convictions once the appellate process or direct review is completed); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-51 (1970) (same).

191. Both the Federal Rules of Criminal Procedure and the Federal Rules of Evidence provide for sua sponte review of plain errors affecting a defendant's substantial rights. See Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Fed. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."); see also *United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("[E]specially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no excep-

objections should nevertheless be permitted against the admission of coconspirator hearsay when it is clearly unreliable. The waiver of any or all of the criminal defendant's protections, in any form short of a guilty plea waiving the right to trial altogether, should not waive the defendant's due process right to a fair trial. A waiver may mean that no rights of the accused are being infringed, but it cannot answer the need to supply the trier of fact with reliable evidence.<sup>192</sup> Accordingly, although a defendant's confrontation rights would not be at issue after the waiver—especially in cases in which the defendant's own misconduct has caused the absence of the declarant<sup>193</sup>—this excuse should not be used as a

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tion has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.”).

Because the Supreme Court has determined that unavailability and reliability must be demonstrated in order to satisfy confrontation principles before introduction of hearsay evidence, *see* *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), a silent record on the issues of availability and reliability must raise a presumption of error; the burden of addressing these issues is on the party seeking to admit the hearsay, *see id.* at 65, and should not be satisfied by defendant's failure to make a timely objection to the invasion of his substantial rights, *see United States v. Gibbs*, 739 F.2d 838, 857 (3d Cir. 1984) (Rosenn, J., dissenting), *cert. denied*, 105 S. Ct. 779 (1985).

*Roberts* does not condone silent records on the subject of admissibility of hearsay. To satisfy the *Roberts* requirement, an offer of hearsay must be accompanied by one or more of the following: 1) the testifying declarant, in which case confrontation requires nothing further; 2) a showing of the prosecution's good faith efforts to produce the declarant, *see supra* note 89 and accompanying text; 3) if no efforts could produce the declarant, a convincing statement of the reason why production is impossible, *see supra* note 92 and accompanying text, or would be of remote utility to the defendant, *see supra* note 94 and accompanying text; 4) a showing of the circumstantial guarantees of trustworthiness of the proffered hearsay, *see supra* note 110 and accompanying text. If a trial record does not contain this information, and the hearsay is not harmless beyond a reasonable doubt, the protections of *Roberts* have not been satisfied, and remand should ensue. *United States v. Fielding*, 630 F.2d 1357, 1367 (9th Cir. 1980).

Some courts have recognized the fair trial requirement. *See, e.g., United States v. Ordonez*, 737 F.2d 793, 799 (9th Cir. 1984) (although no confrontation objection was raised at trial, court reviewed the confrontation issue because it “involve[d] substantial rights which must be reviewed even in the absence of a timely objection”); *United States v. Foster*, 711 F.2d 871, 880-81 (9th Cir. 1983) (court reviewed, under the plain error doctrine, the unpreserved issue whether admission of coconspirator hearsay was crucial or devastating), *cert. denied*, 104 S. Ct. 1602 (1984); *United States v. Traylor*, 656 F.2d 1326, 1333 (9th Cir. 1981) (unpreserved confrontation issue reviewed under the plain error doctrine); *United States v. Fielding*, 630 F.2d 1357, 1367 (9th Cir. 1980) (court finding that confrontation clause is violated when record is silent regarding availability and reliability); *cf. United States v. Roberts*, 583 F.2d 1173, 1175 (10th Cir. 1978) (court will review unpreserved confrontation issue when the prosecution fails to challenge a defendant's right to raise the issue), *cert. denied*, 439 U.S. 1080 (1979); *Phillips v. Neil*, 452 F.2d 337, 345 (6th Cir. 1971) (proper admission of hearsay under evidentiary rules does not relieve a federal court from reviewing all facts relating to governing constitutional principles), *cert. denied*, 409 U.S. 884 (1972).

192. Because of the requirement that convictions be based only on reliable evidence, *see Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968), it is doubtful whether due process rights to reliable evidence can ever be waived. Thus, a defendant should be able to object to unreliable coconspirator admissions on due process grounds even after a waiver of his confrontation right. *See supra* note 113.

193. *See supra* note 188 and accompanying text.

means to permit wholly unreliable coconspirator hearsay to be considered as evidence against the accused.

### III. CLOSING THE WIDE-FLUNG WINDOW OF ADMISSIBILITY FOR COCONSPIRATOR ADMISSIONS

Despite the Supreme Court's narrow rulings on when admission of hearsay will not abridge the defendant's right of confrontation,<sup>194</sup> courts have consistently admitted coconspirator hearsay under Rule 801(d)(2)(E).<sup>195</sup> Most of the courts have not paid sufficient attention to the *Roberts* requirement that the declarant be unavailable before the statement is admitted,<sup>196</sup> often failing even to address the issue of the declarant's availability.<sup>197</sup> Furthermore, although courts that look for particularized guarantees of reliability<sup>198</sup> are taking the better approach, their basic error with regard to coconspirator admissions is their unwavering success in finding that the *Roberts* criteria are satisfied.<sup>199</sup> *Roberts* provides useful and reasonable guidance for the admission of hearsay when the declarant is not produced at trial, but that guidance is premised on a search for reliability,<sup>200</sup> and, try as they may, courts are not convincing in their attempts to infuse reliability into admissions of unproduced coconspirators.<sup>201</sup>

Ironically, these courts, in recognition of how unreliable coconspirator statements can be, are adding a requirement not contained in Rule 801(d)(2)(E): They require that the prosecution show some independent evidence of the conspiracy before the coconspirator hearsay can be presented to the trier of fact.<sup>202</sup> Although such independent evidence may be useful in determining whether a conspiracy exists, it does little to

194. See *supra* notes 18, 55, 111-12 and accompanying text.

195. See *supra* notes 122-23, 154, 166, 181-90 and accompanying text.

196. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

197. See *supra* notes 123, 158 and accompanying text.

198. See *supra* Pt. II.

199. See *supra* notes 154-62 and accompanying text.

200. See *supra* notes 18, 55, 95, 111-12 and accompanying text.

201. See *supra* notes 154-62 and accompanying text.

202. Independent evidence of the declarant's and defendant's participation in the conspiracy will usually be required before the coconspirator hearsay is admitted. See *Glasser v. United States*, 315 U.S. 60, 74 (1942). Five circuits require the independent evidence to reach a clear or fair preponderance level—a "more probable than not" standard—before the hearsay is admitted. See, e.g., *United States v. Ammar*, 714 F.2d 238, 246 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Andrews*, 585 F.2d 961, 965 (10th Cir. 1978); *United States v. Ziegler*, 583 F.2d 77, 81 n.6 (2d Cir. 1978); *United States v. Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1978); *United States v. Enright*, 579 F.2d 980, 986 (6th Cir. 1978); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States v. Jones*, 542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).

Four circuits have recently adopted a higher standard of proof, however, requiring "substantial independent evidence" before admitting the coconspirator admission. See, e.g., *United States v. Bulman*, 667 F.2d 1374, 1377-78 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982); *United States v. Zemek*, 634 F.2d 1159, 1170 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *United States v. Slade*, 627 F.2d 293, 307 (D.C. Cir.), *cert. denied*,

ensure the reliability of the coconspirator's statement implicating the defendant in the conspiracy.<sup>203</sup>

The proper analysis for determining the admissibility of coconspirator hearsay should vary, depending on whether the declarant is truly unavailable or whether he is available but not produced. When the declarant is available but not produced, the coconspirator hearsay should be excluded because the necessity of admitting the hearsay will almost never outweigh the statement's unreliability. This is apparent because coconspirator hearsay is neither firmly rooted in the reliability sense of that term,<sup>204</sup> nor can it, in the vast majority of cases, contain the kinds of trustworthiness guarantees envisioned by the *Roberts* Court in its alternative to firmly rooted exceptions.<sup>205</sup>

A bright line rule requiring the declarant's production is needed to curb prosecutors' demonstrated weakness for introducing coconspirator hearsay,<sup>206</sup> even though there may be a few cases in which coconspirator statements are reliable enough to be admitted under the confrontation clause if an available witness is not produced. Rule 801(d)(2)(E) provides sufficient protection when the coconspirator declarant is available and produced for cross-examination at trial, but without this guarantee of trustworthiness, no policy or rationale underlying the exception is a

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449 U.S. 1034 (1980); *United States v. James*, 590 F.2d 575, 581 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

Bootstrapping the evidence into competency occurs when the trial judge permits the evidence to be admitted contingent upon the subsequent satisfaction of the independent evidence requirement. See Davenport, *supra* note 8, at 1388-89. If the prosecution fails to meet this burden, the judge must either instruct the jury to disregard the admission, *id.*, or declare a mistrial, Martin, *Two Proposed Rules of Evidence Discussed*, 188 N.Y.L.J. 70, Oct. 8, 1982, at 2, col. 5. One court has even held that the judge may consider the hearsay statement itself in determining the preliminary question of admissibility. See *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). The better practice, however, is when courts delay the admission of hearsay until after the independent proof burden has been satisfied. See, e.g., *United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *James*, 590 F.2d at 581-82.

203. *United States v. Fielding*, 630 F.2d 1357, 1369 (9th Cir. 1980).

204. See *supra* Pt. I.B.2.a.

205. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). See *supra* notes 113, 125-29 and accompanying text.

206. Bright line rules are often justified as a means of providing clear guidance and predictable results in areas in which alternative results are so rarely appropriate that it is preferable to have one rule for all situations than to leave the field open to potential abuse. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (although there may be isolated instances when horizontal price-fixing in restraint of trade may not be unreasonable and thus in violation of the Sherman Act, a per se rule of illegality is needed to assure predictability, act as a deterrent to price-fixing and save judicial costs).

Coconspirator admissions pose a similar need for such guidance. Coconspirator statements will be sufficiently reliable in so few cases that justice would be better served by excluding those few statements when the declarant is available but unproduced, rather than by allowing courts to continue to admit unreliable hearsay that infringes upon the defendant's confrontation guarantee.

sufficient guarantee of the reliability of the evidence.<sup>207</sup> This clear rule of exclusion would also provide the prosecution with a predictable basis for determining what evidence can be offered against a defendant.<sup>208</sup>

In cases in which the declarant is truly unavailable, such as when he is deceased,<sup>209</sup> the necessity of admitting the declarant's statement into evidence becomes a more important factor in determining whether or not to admit the out-of-court statement. Accordingly, with sufficient independent evidence of a conspiracy, those rare coconspirator statements that are reliable should be admitted if the declarant is unavailable. Even in the unusual case of a deceased declarant and a somewhat reliable coconspirator statement, however, the evidence should not be admitted if it is crucial to the prosecutor's case or devastatingly prejudicial to the defendant. Convictions based predominantly on hearsay testimony should be eschewed because, at the very least, the confrontation clause ensures that a defendant's conviction will not be wholly based on evidence that has not been confronted. *Dutton's* crucial or devastating inquiry should therefore represent an outer boundary, barring the prosecutor from using statements of unavailable declarants that are crucial to its case or that have a devastatingly prejudicial effect on the defendant.<sup>210</sup>

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207. See *supra* notes 36, 44, 126-29 and accompanying text. Of course, if the statement does meet the requirements of another hearsay exception, such as the former testimony or business records exception, it has satisfied the confrontation reliability requirement apart from its status as a coconspirator admission and can be admitted if the declarant is sufficiently unavailable. Such admission is proper because the requirements for admission under such exceptions, unlike the requirements for admission under Rule 801(d)(2)(E), guarantee reliability. See *supra* notes 14, 24-26 and accompanying text.

208. The rule of exclusion would also contribute to the state's interest in finality of its convictions, see *supra* note 190 and accompanying text, by curtailing the need for prolonged appeals, at least on the confrontation ground. Such finality is also in the defendant's interest because his sixth amendment guarantee to a speedy trial must include a reasonably speedy conclusion to the proceedings and should not be frustrated by the need to appeal convictions based on questionable evidence.

209. Because of the potential for abuse in other forms of unavailability, the prosecution should only be excused from its duty to produce coconspirator declarants when they are deceased, verifiably incompetent or impossible to locate. Unavailability due to declaration of a privilege, refusal to testify, claimed loss of memory or absence from the jurisdiction should not suffice to excuse the prosecutor from producing the declarant. All of these forms of unavailability can be cured in some manner or other. Because of the special need for the tests of cross-examination when offering coconspirator admissions, the prosecution's need to introduce the evidence should be limited to occasions when necessity cannot be questioned and the form of the declarant's unavailability does not tend to influence the weight the jury gives to the out-of-court statement, see *supra* note 90. Even in cases in which unavailability is unquestionable, however, the statements cannot be admitted when they are crucial or devastating.

210. By permitting the introduction of coconspirator hearsay because it was neither "crucial" nor "devastating," *Dutton v. Evans*, 400 U.S. 74, 87 (1970), *Dutton* arguably establishes a bar to hearsay evidence that is crucial to the prosecution's case or devastating to the defendant. See *United States v. Fielding*, 630 F.2d 1357, 1368 n.12 (9th Cir. 1980) ("*Dutton* may require exclusion of 'devastating' or 'crucial' evidence even if indicia of reliability are present.").

The "crucial" or "devastating" inquiry derives from a number of earlier Supreme Court cases finding that the prosecution cannot use crucial or devastating testimony

against the defendant when the declarant is not produced. *Dutton v. Evans*, 400 U.S. at 87 (citing *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965); *Pointer v. Texas*, 380 U.S. 400, 403-08 (1965)); see *Barber v. Page*, 390 U.S. 719, 720, 725-26 (1968) (introduction of "principal evidence" against the accused in the form of a preliminary hearing transcript violates the defendant's right of confrontation); *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965) (admission of a declarant's alleged statement without cross-examination violated defendant's confrontation right as it was a "crucial" link to the proof of defendant's crime); *id.* at 420 (prohibiting the use of hearsay that adds "'critical weight to the prosecution's case in a form not subject to cross-examination'" because it "'unfairly prejudice[s] the defendant'") (quoting *Namet v. United States*, 373 U.S. 179, 187 (1963)); *Pointer v. Texas*, 380 U.S. 400, 401, 408 (1965) (prohibiting the "principal evidence" against the accused to be in the form of a preliminary hearing transcript when the defendant was unable adequately to confront the witness due to his lack of counsel); see also *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974) (post-*Dutton* case holding that a defendant's confrontation right is denied when impeachment of a "crucial" witness' testimony is curtailed); *California v. Green*, 399 U.S. 149, 157 & n.10 (1970) (referring to the Raleigh trial, see *supra* note 2, and the "crucial" evidence presented in the form of hearsay, in a context implying the constitutional inadequacy of evidence that has not been cross-examined); *id.* at 162 (noting that the Court in *Pointer v. Texas*, 380 U.S. 400, 403 (1965), found a confrontation violation in the admission of an unfronted "crucial" witness' testimony); *Green*, 399 U.S. at 186 n.20 (Harlan, J., concurring) (noting that convictions should be reversed whenever "the critical issues" were only supported by *ex parte* testimony not found reliable by the trier of fact and not cross-examined); *Bruton v. United States*, 391 U.S. 123, 127-28 (1968) (holding that a hearsay confession violates confrontation rights when it adds "critical weight" to the prosecution's case); *id.* at 136 (codefendant's confession was "devastating" to the defendant and therefore must be cross-examined); *id.* at 137-38 (Stewart, J., concurring) (confrontation clause precludes the use of "highly damaging" extra-judicial statements by codefendants that have not been cross-examined). When mentioning that the statement was neither "crucial" nor "devastating" to the defendant in *Dutton*, 400 U.S. at 87, the plurality contrasted the facts of the case with several of the above cases and found the statement in *Dutton* fully distinguishable, see *id.*

Two circuit courts have stated that hearsay testimony should be excluded if it is crucial and the defendant has not been able adequately to cross-examine the declarant. See *Stevens v. Bordenkircher*, 746 F.2d 342, 347 (6th Cir. 1984) (conviction reversed due to improper curtailment of defendant's cross-examination of a "crucial" prosecution witness); *United States v. Williams*, 668 F.2d 1064, 1070 (9th Cir. 1982) (conviction reversed due to curtailment of cross-examination of a "crucial" witness for the prosecution). Other courts have implied that they might have excluded the testimony if it had been crucial or devastating. See, e.g., *United States v. Alfonso*, 738 F.2d 369, 372 (10th Cir. 1984) (per curiam) (coconspirator statements not "crucial" to the prosecution's case, so held to be admissible); *United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978) (indicia of reliability may permit the introduction of hearsay that the defendant cannot cross-examine when the statement is neither "crucial" nor "devastating"), *cert. denied*, 440 U.S. 917 (1979); *United States v. Kelley*, 526 F.2d 615, 621 (8th Cir. 1975) (statement, "although damaging, was not crucial or devastating," so held to be admissible), *cert. denied*, 424 U.S. 971 (1976); see also *Davenport*, *supra* note 8, at 1380 & n.11 ("[W]herever such ["crucial" or "devastating"] evidence is involved, a reliability analysis will be deemed an inadequate substitute for cross-examination.") (citing *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 196-98 (1971)); *Davenport*, *supra* note 8, at 1400 ("[A]t least one absolute proposition seems clear: a declaration should be excluded whenever its sincerity is not assured and its hearsay impact is likely to be 'crucial' or 'devastating'").

At least one commentator reads the *In re Winship*, 397 U.S. 358 (1970), requirement that evidence support every element of a conviction "beyond a reasonable doubt," *id.* at 361, as a prohibition of convictions based solely on uncross-examined hearsay testimony. See *Westen*, *supra* note 68, at 1194 & n.40. This analysis is consistent with the "crucial"

Rule 403 of the Federal Rules of Evidence,<sup>211</sup> considered with this proposed upper limit, should exclude coconspirator statements in many situations. Coconspirator hearsay is often prejudicial to the defendant, if for no other reason than the moral theory that coconspirators, because of the concert of action element, are somehow more culpable than other criminal defendants.<sup>212</sup> As argued, coconspirator hearsay at least should be necessary enough to the prosecution's case to preclude it from being found harmless on appeal.<sup>213</sup> If not, its probative value will sometimes be substantially outweighed by the danger of unfair prejudice to the defendant, thereby requiring exclusion of the evidence under Rule 403 when the declarant is unavailable.<sup>214</sup> At the other extreme, evidence with a high probative value will often be excluded by application of the proposed prohibition against crucial or devastating hearsay when the declarant is unavailable.<sup>215</sup> Other forms of hearsay might have a considera-

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limitation on coconspirator hearsay when the declarant is unavailable: For hearsay that adds critical weight to the prosecution's case, the declarant must be cross-examined to satisfy all reasonable doubts and the confrontation guarantee. Only when hearsay is not "crucial" or "devastating" may full confrontation be excused without violating a defendant's constitutional guarantees.

211. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This balancing of probative value and prejudice has been referred to as "the cornerstone" of the Federal Rules of Evidence, see 22 C. Wright and K. Graham, *Federal Practice and Procedure* § 5212, at 250 n.1, and the rule is applicable to all "situations for which no specific rules have been formulated," Fed. R. Evid. 403 advisory committee note. For examples of rules to which Rule 403 would not apply, see Fed. R. Evid. 609(a)(1) (specific balancing prescribed for admission of felony convictions as impeachment evidence; probative value need merely outweigh prejudicial effect); Fed. R. Evid. 609(b) (specific balancing prescribed for admission of old convictions as impeachment evidence; probative value must substantially outweigh prejudicial effect).

212. See *supra* note 176 and accompanying text.

213. See *supra* note 175-77 and accompanying text.

214. Prosecutors who find evidence that is probative but has little value because of the availability of other evidence should not be permitted to use such evidence unless a witness is available.

For the purpose of this analysis, it may be helpful to assess coconspirator statement factors on a numerical scale. Probative value will be the variable, ranging from 0 to 70 for harmless error (presuming the better standard of substantial independent evidence of the conspiracy, see *supra* note 202), 71 to 80 for reliable evidence that is neither harmless, crucial nor devastating, and 81 to 100 for inadmissible crucial evidence. The danger of unfair prejudice is set at a constant of 90—with a recognition that although some small variations are possible, prejudice generally will remain high. See *supra* note 176.

In this hypothetical, because a coconspirator's hearsay is not necessary enough to preclude it from being found harmless on appeal, its probative value is 70 or less and prejudice is 90; exclusion under Rule 403 therefore should result because prejudice substantially outweighs probative value.

215. Although Rule 403 might permit the introduction of evidence with a probative value rating over 80 and a prejudice rating of 90 on the numerical scale, see *supra* note 214—prejudice not substantially outweighing probative value—the proposed upper boundary would not permit admission if the crucial or devastating language in *Dutton* is read as the upper limit on admissibility.

ble range of admissibility between the lower threshold of limited probative value and the upper threshold of probative but devastating hearsay.<sup>216</sup> Because of the high level of prejudice that coconspirator hearsay often elicits,<sup>217</sup> however, whether through the content of the statement or derivatively from the nature of the charge, and because of the low level of reliability inherent in the nature of the statements, coconspirator hearsay by unavailable declarants does not share with other hearsay evidence this support for admissibility. Coconspirator hearsay by unavailable declarants would be admissible only in the few situations in which there is sufficient independent evidence of the conspiracy, coupled with probative and reliable evidence that is not crucial to the prosecution's case or devastatingly prejudicial to the defendant.<sup>218</sup>

Prior to the enactment of the Federal Rules of Evidence, the advisory committee considered the possibility of abolishing the rule against hearsay evidence, but abandoned the notion because of the continuing need for reliability, for which the exceptions to the hearsay rule provide.<sup>219</sup> In its commentary, the committee noted that adopting such a position would require that the confrontation clause enter into an area presently monitored in criminal cases by the rule against hearsay<sup>220</sup> to prevent admission of unreliable evidence against criminal defendants. By removing the coconspirator exception from its common law status as a hearsay exception and placing it among the nonhearsay admissions in Rule 801(d)(2), the Federal Rules arguably accomplished a partial abolition of the rule against hearsay in this narrow area. Because coconspirator statements are the only form of "not hearsay" that creates tension with the confrontation clause,<sup>221</sup> and because Rule 801(d)(2)(E), unlike the "hearsay exceptions," does not use reliability as its basis of admissibility,<sup>222</sup> this Rule is in the greatest need of the injection of the confronta-

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216. For example, the numerical scale, see *supra* note 214, for business records would be very different than for coconspirator statements. Because the exception is trustworthy, minimal probative value might be 50 or lower. Moreover, prejudice might not appear on the scale at all in many instances, because business records are not inherently prejudicial. Even leaving the crucial boundary at 80, more business record hearsay than coconspirator admissions would be admissible under Rule 403 and *Dutton*. The key differences are the hearsay's reliability and potential for prejudice.

217. See *supra* note 171 and accompanying text.

218. On the numerical scale, see *supra* note 214, this would be the evidence remaining in the 71-80 probative value range. A 90 prejudice factor would still substantially outweigh most, if not all, of the probative value of coconspirator admissions. Nevertheless, as the probative value approaches the crucial border, a Rule 403 weighing may permit its admission. It would arguably have to be knocking at the "crucial" door, however, before its probative value is sufficient.

219. See Fed. R. Evid. art. VIII advisory committee note.

220. See *id.*

221. See *supra* notes 24-46 and accompanying text. Other forms of "not hearsay," such as prior inconsistent statements, Fed. R. Evid. 801(d)(1)(A), or prior identifications, Fed. R. Evid. 801(d)(1)(C), already have an availability requirement built in, and therefore create no tension with the confrontation clause.

222. See *supra* notes 14, 23-43 and accompanying text.

tion clause to provide guarantees of reliability. Excluding all coconspirator hearsay when the available coconspirator is unproduced, and prohibiting the introduction of crucial or devastating evidence even when the declarant is truly unavailable,<sup>223</sup> would admirably serve that purpose, consistent with the need for the protection of confrontation clause guarantees in the absence of procedural rules based on trustworthiness.

Rule 801(d)(2)(E) would then be simple to apply. Prosecutors could still introduce hearsay evidence against alleged coconspirators when the declarant is available for cross-examination at trial, or when the declarant is unavailable and the hearsay, supported by adequate independent assurances of reliability, is not crucial or devastating. If the declarant is available but refuses to testify due to a declaration of privilege, a prosecutor could weigh the need for the coconspirator's evidence against the cost of some form of immunity.<sup>224</sup> In cases in which the proposed, stringent rules would bar admissibility of the hearsay altogether, the prosecution could still use the coconspirator's statements as the basis for a search for reliable independent evidence against the accused. The loss to conspiracy prosecutions would therefore not be overwhelming.<sup>225</sup>

The gain to the defendant and the integrity of the criminal justice system, however, would be immense. A fundamental guarantee of life and liberty would be preserved and simultaneously the factfinder's search for truth would be aided by admission of reliable evidence.<sup>226</sup> At least in an area in which the rule against hearsay has forsaken the field, the confrontation clause can assume a predictable and efficient role in furthering the

223. Fed. R. Evid. 801(d)(1) permits the admission of statements by witnesses about the declarant's prior inconsistent, consistent, or identification statement when the declarant is available for cross-examination.

224. The decision to confer immunity is usually within the complete discretion of the prosecutor, who would be in the best position to determine whether the declarant's evidence was important enough to pay that price. In *United States v. Wright*, 588 F.2d 31 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979), the defendant claimed that the prosecution's refusal to grant immunity to the "most critical witness" against him, *see id.* at 35, violated his compulsory process right, *id.* at 37, and implied an additional confrontation problem, *id.* Unfortunately, this interesting question was not resolved because the court did not consider the witness to be crucial, *id.* at 35, and the defendant failed to exercise his compulsory process rights to subpoena the witness anyway, *id.* at 37.

225. If the coconspirator statement were really that reliable, as shown by independent guarantees of trustworthiness, *see supra* note 202, the prosecution could offer it under the residual hearsay exceptions, Rules 803(24) or 804(b)(5), when the declarant is shown to be unavailable. This rule offers a clear standard to assure trustworthiness of statements made by unavailable declarants and would probably entail a more careful review of availability and reliability than is the current practice in admitting coconspirator statements under Rule 801(d)(2)(E). One circuit has indicated that Rule 803(24) may provide the reliability standard for coconspirator admissions. *See United States v. Fielding*, 630 F.2d 1357, 1369 n.13 (9th Cir. 1980); *United States v. Nick*, 604 F.2d 1199, 1203 (9th Cir. 1979).

226. Exclusion of coconspirator admissions would also encourage the gathering of reliable evidence on which to base conspiracy convictions, thereby responding to the judicial system's concern that only trustworthy evidence come before the trier of fact.

ideal of swift<sup>227</sup> and certain justice.

#### CONCLUSION

In the small corner of the hearsay world dealing with coconspirator statements, the confrontation clause has a special vitality that cannot be disregarded. Some minimum level of reliability must exist before coconspirator statements should be permitted to come before a jury. Every defendant—including an alleged coconspirator—is entitled to a verdict based on reliable evidence, and if the evidence cannot be reliable when the declarant is not produced, the defendant must receive the protection through the guarantees of the confrontation clause.

In order to comport with the confrontation clause, Rule 801(d)(2)(E) should be applied in a more limited context, with a requirement for actual confrontation with the declarant, with minor exceptions, so that the defendant can be protected from the dangers of unreliable coconspirator hearsay. The confrontation clause does not require such literal confrontation for the admission of every species of hearsay because many other forms of hearsay are sufficiently reliable despite the unavailability of the declarant. Coconspirator statements, however, almost never provide sufficient guarantees of trustworthiness apart from producing the declarant and testing the veracity of his statement. Accordingly, a rule of exclusion when the declarant is available but unproduced, with a limited exception when the declarant is unavailable and the evidence is not crucial to the prosecution's case or devastatingly prejudicial to the defendant, is necessary to prevent the courts from continuing to find illusory indicia of reliability in the statements. The confrontation clause was designed to protect a criminal defendant from just this kind of hearsay, and, because of the absence of any fair substitute for reliability, its requirements must be met in most cases by producing the coconspirator declarant.

*Georgia J. Hinde*

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227. See *supra* note 208.