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Inculpatory Declarations Against Penal Interest and the Coconspirator Rule Under the Federal Rules of Evidence

The Federal Rules of Evidence (FRE) includes both an exception to the hearsay rule for declarations against penal interest and a rule for the treatment of certain coconspirator statements as nonhearsay. Con-

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1 Fed. R. Evid. will be referred to as FRE throughout the text of this note.

2 Hearsay is conventionally defined as an out of court assertion that is offered to prove the truth of the matter asserted. Fed. R. Evid. 801(d)(c). McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 246 (2d ed. E. Cleary 1972); Garland & Snow, The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements, 63 J. Crim. L.C. & P.S. 1, 3 (1972); see 5 J. Wigmore, WIGMORE EVIDENCE § 1361 (rev. ed. J. Chadbourne 1974). The hearsay rule is difficult to define, even for those well versed in the exceptions to the rule. 4 J. Weinstein & M. Berger, EVIDENCE ¶ 800(01), at 800-8 to -9 (1979). A layman might define hearsay as "a statement by an individual which he or she heard someone say." Note, 28 Drake L. Rev. 189, 200 n.14 (1978). This definition must be qualified because a statement does not become hearsay unless it is also submitted for the truth of the matter asserted. Id.

In the development of Anglo-American law many reasons have been articulated for excluding hearsay. Note, 79 Dick. L. Rev. 189, 190 (1974). Hearsay statements are viewed as being unreliable because the out of court declarant making the assertions was not under oath, the demeanor of the declarant cannot be observed by the trier of fact and the declarant is not subjected to cross-examination. C. McCormick, supra, § 246; see Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 218 (1948). Of these factors, the lack of cross-examination is the biggest concern. According to Wigmore, cross-examination is the greatest legal engine for discovering truth. 5 J. Wigmore, supra, § 1367. But see 4 J. Weinstein & M. Berger, supra, ¶ 800(01), at 800-10. Chief Justice Marshall, in Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813), maintained that hearsay is a vehicle for fraud, intrinsically weak and incompetent to satisfy the mind that the fact exists, id. at 296, and Wigmore viewed hearsay as a source of untrustworthiness and error, 5 J. Wigmore, supra, § 1362.

In order to facilitate the proof of material facts at trial, however, many exceptions to the general rule of inadmissibility of hearsay have developed. 4 J. Weinstein & M. Berger, supra, ¶ 800(01), at 800-11. Wigmore rationalized the exceptions as an attempt to accommodate the reliability, § 1397, and necessity, id. § 1422, of particular evidence. In addition, Maguire presented a third interest—that of adversary practice. J. Maguire, EVIDENCE 140-44 (1947). A more cynical view is that the hearsay exceptions exist "to enhance social acceptance [of the judicial system] by shielding the system from possible embarrassment." Note, The Theoretical Foundation of the Hearsay Rules, 93 Harv. L. Rev. 1786, 1809 (1980).

3 Fed. R. Evid. 804(b)(3) makes admissible:

A statement which... at the time of its making... so far tended to subject [the declarant] to... criminal liability... that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

4 Fed. R. Evid. 801(d) provides: "(A) statement is not hearsay if... (B) the statement is offered against a party and is... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." This rule covers not only conspirators, but
gress did not anticipate the inherent conflict arising from their incorporation into the FRE. Indeed, at least one court has described the admission of inculpatory declarations under the declaration against penal interest exception as a mechanism to bypass the requirements of the coconspirator rule in those situations where the rules overlap. Suppose, for example, that A tells B, "C and I robbed the bank." C is on trial for the robbery. A refuses to testify because his testimony would be self-incriminating. The prosecution calls B as a witness to prove that C robbed the bank. Since A and C are coconspirators, A's statement should have to meet the pendency, furtherance and independent evidence requirements of the coconspirator rule. The statement does not meet these requirements, and, therefore, should not be admissible. Some courts have argued that the statement is admissible under the declarations against penal interest exception because B is testifying to a hearsay statement which tends to suggest
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the personal participation of the declarant (A) in the crime and, hence, subject him to criminal liability.\footnote{See United States v. Thomas, 571 F.2d 285, 289 (5th Cir. 1978) (citing United States v. Barrett, 539 F.2d 244 (1st Cir. 1976)).}

The Fifth Circuit Court of Appeals recognized the incongruity of admitting inculpatory declarations made by coconspirators under two different rules in United States v. Alvarez,\footnote{584 F.2d 694, 701 (5th Cir. 1978).} and held that the conflict would be eliminated if the admissibility of inculpatory declarations against penal interest were conditioned on establishing corroborating circumstances that indicate trustworthiness.\footnote{Id.} This note will demonstrate that requiring corroborating circumstances for the admission of inculpatory declarations against penal interest does not reconcile the two rules. Instead, the appropriate way to interpret the two rules is to recognize: First, as a factual matter, the portion of a coconspirator's declaration which implicates the accused is almost never against the declarant's interest, and, therefore, should not be admitted under the declaration against penal interest exception; and second, even in the few cases where the portion of the statement implicating the accused is against the declarant's interest, the statement still should not be admitted under the declaration against penal interest exception because Congress intended to limit the admission of statements made by coconspirators to only those which meet the pendency, furtherance and independent evidence requirements of the coconspirator rule.

THE DECLARATION AGAINST PENAL INTEREST EXCEPTION

The FRE includes declarations against penal interest as an exception to the hearsay rule.\footnote{FED. R. EVID. 804(b).} Rule 804(b)(3) permits the admission of hearsay if the declarant is unavailable,\footnote{Id. 804(b)(3).} his declaration was against interest when made\footnote{Id. 804(b)(3). For text of rule, see note 3 supra.} and his declaration so far tended to subject him to penal liability that a reasonable person would not have made the declaration unless it were true.\footnote{FED. R. EVID. 804(b)(3).} In addition, the rule requires a showing of corroborating circumstances that indicate the statement is trustworthy before an exculpatory declaration may be admitted.\footnote{Id. Exculpatory declarations against penal interest are declarations against the declarant's interest which exonerate the defendant.}

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\footnote{11 See United States v. Thomas, 571 F.2d 285, 289 (5th Cir. 1978) (citing United States v. Barrett, 539 F.2d 244 (1st Cir. 1976)).} \footnote{12 584 F.2d 694, 701 (5th Cir. 1978).} \footnote{13 Id.} \footnote{14 It is the modern trend to include declarations against penal interest as a hearsay exception. See note 120 infra.} \footnote{15 FED. R. EVID. 804(b). The declarant is considered unavailable when a privilege against testifying is asserted, for instance, the fifth amendment, as in the introductory example. Id. 804(a)(1).} \footnote{16 Id. 804(b)(3). For text of rule, see note 3 supra.} \footnote{17 Id. 804(b)(3).} \footnote{18 Id. Exculpatory declarations against penal interest are declarations against the declarant's interest which exonerate the defendant.}
This rule does not expressly refer to *inculpatory* declarations against penal interest, that is, declarations against the penal interest of the declarant which also implicate the accused. However, it appears that Congress intended that inculpatory declarations against penal interest be admissible in certain circumstances. Congress apparently left the

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19 Id.  
20 Comment, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 CALIF. L. REV. 1189, 1198 (1978).  

Earlier drafts of Fed. R. Evid. 804(b)(3) (at that time the rule was numbered 804(b)(4)) contained a provision excluding inculpatory statements from the coverage of the exception. Proposed Federal Rule of Evidence 804(b)(4) (1971 draft), 51 F.R.D. 315, 438-39 (1971); Proposed Federal Rule of Evidence 8-04(b)(4) (1969 draft), 46 F.R.D. 161, 378 (1969). This provision was absent from the official Advisory Committee draft. The Advisory Committee's note in the official draft explained:

Ordinarily the third-party confession is though [sic] of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. Douglas v. Alabama, 380 U.S. 415, . . . and Bruton v. United States, 399 U.S. 818, . . . both involved confessions by codefendants which implicated the accused . . . . Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed . . . . These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case.

Proposed Federal Rule of Evidence 804(b)(4), Advisory Committee Note (1972 draft), 56 F.R.D. 183, 327-28 (1972). It is clear from this note that the Advisory Committee intended some inculpatory declarations against interest to be admissible. However, the House inserted a sentence making an inculpatory statement or confession offered against the accused in a criminal case inadmissible. H.R. REP. No. 650, 93d Cong., 1st Sess. 16-17, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7090. The justification for this addition was set out in the Subcommittee Note: "The Subcommittee also determined to add to the Rule the final sentence from the 1971 draft, designed to codify the [confrontation clause] doctrine of Bruton v. United States . . . ." Proposed Rules of Evidence: Supplement to Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 176 (1973) (citation omitted). The House's version was sent to the Senate Judiciary Committee. This Committee decided to delete the House's provision on the inadmissibility of inculpatory statements offered against the accused for two reasons. First, "the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise." S. REP. No. 1277, 93d Cong., 2d Sess. 22, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7088. Second, "the House provision does not appear to recognize the exceptions to the Bruton rule . . . ." Id. The Conference Committee adopted the Senate version, writing: "[t]he Conference agrees to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." H.R. REP. No. 1597, 93d Cong., 2d Sess. 12, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7098, 7106. "Thus Rule 804(b)(3), as passed by Congress, leaves the admissibility of a declaration against interest which incriminates an accused subject to the Supreme Court's development of the meaning of the Confrontation Clause in this context." 11 J. MOORE, FEDERAL PRACTICE ¶ 804.083[2], at VIII—283-84. According to McCormick, the provision on inculpatory statements was removed from the draft submitted by the Advisory Committee to, and
determination of these circumstances to the courts.21

THE COCONSPIRATOR RULE

Conversely, Congress carved out specific requirements for the admissibility of coconspirators' statements.22 Traditionally, to be admissible, a coconspirator's statement must have been made during the course and in furtherance of the conspiracy, and there must have been independent evidence establishing the existence of the conspiracy.23 Congress adopted by, the Supreme Court, on the theory that, while third party statements implicating the accused made by a declarant in custody or to a person in authority might well be motivated by a desire to curry favor, the same was not necessarily so with regard to all third-party implicating statements, and hence that the matter could not appropriately be covered by general rule but must depend on circumstances.

C. Mccormick, supra note 2, § 276 n.1 (Supp. 1978).

Judge Weinstein takes the opposite view and explains that the final sentence excluding inculpatory statements was deleted because it was not needed, and therefore, that rule should be read to exclude inculpatory statements. 4 J. Weinstein & M. Berger, supra note 2, ¶ 804(b)(3)[03], at 804-110. However, the district court in United States v. Turner, 475 F. Supp. 194, 197 (E.D. Mich. 1978), pointed out: "It is unclear as to whether Weinstein's reading of the history of the Rule . . . has been adopted by any Court."

Regardless of legislative intent, the inculpatory version of rule 804(b)(3) is recognized by some federal courts. See, e.g., United States v. Garris, 616 F.2d 626 (2d Cir. 1980); United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978); United States v. McClendon, 454 F. Supp. 960 (W.D. Pa. 1978), cert. denied, 444 U.S. 952 (1979). Other states have decided that the House version is better and, therefore, do not admit statements implicating the declarant and the defendant as declarations against penal interest under their evidence codes. See, e.g., N.D. Cent. Code R. of Evid. § 804(b)(3) (Supp. 1979). This note suggests a resolution of the tension between the declaration against penal interest exception and the coconspirator rule for those jurisdictions which include inculpatory declarations in the declaration against interest exception.

21 See United States v. Alvarez, 584 F.2d 694, 700 (5th Cir. 1978); S. Rep. No. 1277, 93d Cong., 2d Sess. 21, 22, reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7068. It is not entirely clear that the legislature has the authority to delegate this power to the courts. See generally S. Barber, The Constitution and the Delegation of Congressional Power (1975). The FRE can be amended in only two ways. See Fed. R. Evid. 1102. First, the Supreme Court of the United States can prescribe amendments, which must then be reported to Congress and become law 180 days after they have been reported unless Congress disapproves them, 28 U.S.C. § 2076 (1976); and second, the rules can be amended by an act of Congress. Id. The delegation of power question is beyond the scope of this note. For a discussion of this issue, see W. Bondy, Separation of Governmental Powers in History and in the Constitutions (1967); L. Fisher, The Constitution Between Friends 22-23 (1978).

22 Fed. R. Evid. 801(d)(2)(E). For text of rule, see note 4 supra.

23 S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 461 (2d ed. 1977). Several theories have been offered in support of the coconspirator rule. Levie, Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule, 52 Mich. L. Rev. 1159, 1163 (1954). The most common theory is based on agency principles. Under this theory coconspirators are each other's agents, and hence are liable for each other's acts. Id. However, as prosecutors began to use this rule extensively, the rule became strained to such an extent that the agency rationale became totally out of line with the actual practice. Id. For discussions of the various rationales offered to explain the coconspirator rule, see M. Seidman, The Law of Evidence in Indiana 118 n.14 (1977) (the
enacted this traditional coconspirator rule to limit the types of admissible coconspirator statements.\textsuperscript{24} The pendency limitation, which requires that the statement be made during the course of the conspiracy, exists because a declaration made after the conspiracy ends is particularly untrustworthy.\textsuperscript{25} As one court noted, it is not unusual when thieves fall out for one to fasten guilt on the other while keeping his own skirts as clean as possible.\textsuperscript{26}

The furtherance requirement is a product of agency rationale.\textsuperscript{27} At one point, the retention of this limitation was doubtful.\textsuperscript{28} Although the Advisory Committee considering the rule recognized that the “agency theory of conspiracy is at best a fiction,”\textsuperscript{29} it saw the furtherance requirement as a useful way to protect defendants.\textsuperscript{30}

Although both the pendency and furtherance requirements are expressly listed under FRE 801(d)(2)(E), the rule does not expressly men-
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Section independent evidence as a requirement for the admission of coconspirator statements. Nevertheless, most courts interpret FRE 104 as furnishing the basis for an independent evidence requirement and read such a requirement into the rule. In retaining the pendency, furtherance and independent evidence requirements, Congress envisioned no further expansion of the traditional coconspirator rule. The United States Supreme Court and many commentators have expressed concern about the expansion of the coconspirator rule and have recommended that the rule be strictly contained to insure the protection of defendants' rights.

This concern with protecting defendants' rights conflicts with the desire to protect society. While the defendant needs protection against admission of unreliable statements, the admission of coconspirator statements helps combat the greater societal danger posed by group criminal activity compared to individual crime. Group participation increases the chance of success and the extent of harm, and lessens the likelihood of abandonment of criminal activity. Furthermore, conspiracy is difficult to prove, and the difficulty is increased because

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31 Fed. R. Evid. 104 provides:
(a) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.


35 See, e.g., Davenport, supra note 27, at 1384; Oakley, supra note 4, at 23; Comment, supra note 27, at 1119.

36 Oakley, supra note 23, at 1167.

37 See, e.g., Davenport, supra note 27, at 1384; Oakley, supra note 4, at 11; Comment, supra note 27, at 1108; Comment, supra note 23, at 533; Note, Connecting Defendants to Conspiracies: The Slight Evidence Rule and the Federal Courts, 64 Va. L. Rev. 881, 883 (1978).

38 Garland & Snow, supra note 2, at 2; Oakley, supra note 4, at 11; Comment, supra note 27, at 1108; Comment, supra note 23, at 533; Note, Connecting Defendants to Conspiracies: The Slight Evidence Rule and the Federal Courts, 64 Va. L. Rev. 881, 883 (1978).

39 Garland & Snow, supra note 2, at 2; Oakley, supra note 4, at 11; Comment, supra note 27, at 1108; Comment, supra note 23, at 533; Note, supra note 38, at 883.

40 Oakley, supra note 4, at 11; Comment, supra note 27, at 1108; Comment, supra note 23, at 533; Note, supra note 38, at 883.
members of the conspiracy can invoke their fifth amendment privilege to refuse to testify.\textsuperscript{41}

Protection of society thus necessitates some method for admitting coconspirator statements. Since coconspirator statements are not inherently reliable,\textsuperscript{42} requirements for their admission must protect defendants from the idle chatter of criminal partners and from misreported or fabricated evidence.\textsuperscript{43} The requirements of pendency, furtherance and independent evidence strike a proper balance between defendants' rights and societal protection.\textsuperscript{44} Protection of defendants' rights would be eroded if conspirators' statements which do not satisfy the stringent requirements of the coconspirator rule are admitted under the lesser standard of the declaration against penal interest exception.

**THE CONFLICT**

The conflict between the rules may be illustrated by the situation where \textit{A} tells \textit{B} that he and \textit{C} committed a crime.\textsuperscript{45} Admitting \textit{A}'s statement under the declaration against penal interest exception and not under the coconspirator rule initially appears to pose no major evidentiary problem. Many hearsay exceptions overlap,\textsuperscript{46} and a declaration falling within one exception is not inadmissible because it does not meet the requirements of another exception.\textsuperscript{47} If one adheres to the United States \textit{v. Alvarez}\textsuperscript{48} rationale, the coconspirator rule and the hearsay ex-

\textsuperscript{41} S. Saltzburg \& K. Redden, supra note 23, at 462 (quoting R. Lempert \& S. Saltzburg, A Modern Approach to Evidence 378 (1977)).

\textsuperscript{42} Comment, 44 U. Cin. L. Rev. 622, 623 (1975). Davenport suggests that the coconspirator rule be abolished and the declaration against interest exception be used in lieu of it. Davenport, supra note 27, at 1396. However, he still does not think inculpatory declarations against penal interest should be admitted because there is little assurance of reliability. Id.

\textsuperscript{43} S. Saltzburg \& K. Redden, supra note 23, at 462 (quoting 4 J. Weinstein \& M. Berger, supra note 2, ¶ 801(d)(2)(E)(01)).

\textsuperscript{44} See S. Saltzburg \& K. Redden, supra note 23, at 462.

\textsuperscript{45} See text accompanying note 7 supra.

\textsuperscript{46} Although the coconspirator rule is not a hearsay exception, Fed. R. Evid. 801(d)(2)(E), the analysis does not change. "The fact that the new Federal Rules choose the redefinition approach, rather than the approach of creating exceptions is of no great moment." S. Saltzburg \& K. Redden, supra note 23, at 460. "The distinction between a statement which is not hearsay and a statement which is an exception to the hearsay rule is semantic," United States \textit{v. Smith}, 578 F.2d 1227, 1231 n.6 (8th Cir. 1978), with the difference that there are no residual exceptions for admissions, but there are residual exceptions for hearsay. Fed. R. Evid. 803(24), 804(b)(5). These residual exceptions were included to permit some flexibility for the courts to develop new hearsay exceptions. S. Saltzburg \& K. Redden, supra note 23, at 538.

\textsuperscript{47} Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1, 65 (1944). For example, hearsay exceptions would overlap in the case of an authentic business record over 20 years old. The record could be admitted under the business record exception, Fed. R. Evid. 803(6), or the exception for ancient documents, id. 803(16).

\textsuperscript{48} 584 F.2d 694, 701 (5th Cir. 1978).
ception for inculpatory declarations against penal interest would almost completely overlap, and the coconspirator rule's requirements would rarely have to be met.49

Some recent decisions, including Alvarez, maintain that almost any statement a declarant coconspirator could make to incriminate the accused coconspirator would also tend to incriminate himself.50 These courts reason that the statement is against the declarant's interest because the statement tends to show the declarant had insider's knowledge and implies his personal participation in the crime.51 In addition, the declarant coconspirator is not only liable for the crime of conspiracy, but is also vicariously liable for the specified offenses committed in furtherance of the conspiracy even if he did not directly participate in the commission of the offenses.52 Hence, the declarant coconspirator's statement incriminating the accused coconspirator would be against the declarant's penal interest.53 If this reasoning is followed and coconspirator statements are admitted under the inculpatory declarations against penal interest exception, the limitations of the coconspirator rule are negated without alternative safeguards being imposed.54 There is great

49 Id.; United States v. Smith, 578 F.2d 1227, 1231 n.5 (8th Cir. 1978) (purpose of Fed. R. Evid. 801(d)(2)(E) would be negated if coconspirators' statements are admissible under id. 804(b)(3)). The Model Code of Evidence recognizes the possible conflict between the coconspirator rule and the inculpatory declaration against penal interest exception and allows this type of statement to be admitted under either rule. MODEL CODE OF EVIDENCE rule 509, Comment b.

50 584 F.2d at 701; United States v. Barrett, 539 F.2d 244, 251 (1st Cir. 1976). "All confessions (and usually all declarations of co-conspirators) are against the declarant's interest." Commonwealth v. Antonini, 165 Pa. Super. Ct. 501, 504, 69 A.2d 436, 438 (1949); see United States v. Lang, 589 F.2d 92, 97, 99-100 (2d Cir. 1978) (statement would have been admissible as against penal interest if the declarant had had personal knowledge, but not admissible under the coconspirator rule).


53 United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978).

54 Some may argue that Fed. R. Evid. 804(b)(3) imposes additional safeguards. Nonetheless, this argument does not withstand close scrutiny. First, there is no requirement of the accused's complicity in the conspiracy. United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978). Second, it is open to question whether the unavailability requirement adds to the probability of reliability, see 4 J. WEINSTEIN & M. BERGER, supra note 2, ¶ 804(b)(3)(02), at 804-95; Note, Declarations Against Interest: A Critical Review of the Unavailability Requirement, 52 CORNELL L.Q. 301, 308 (1967); Comment, Evidence: The Unavailability Requirement of Declaration Against Interest Hearsay, 55 IOWA L. REV. 477 (1969), and thereby protects the accused. Certainly, it does not afford much additional protection where the declarant coconspirator will nearly always use his fifth amendment privilege against self-incrimination and, therefore, be unavailable under either the coconspirator rule or the declaration against penal interest exception.
danger that the reduced threshold for admitting declarations against interest will be used to evaluate statements that would traditionally be evaluated under the coconspirator rule.\textsuperscript{5} Thus, by admitting coconspirator statements under the inculpatory declarations against penal interest exception, the coconspirator rule is emasculated.\textsuperscript{5}\textsuperscript{6}

The general rule of statutory construction requires that each provision in a statute be considered in the context of all its other provisions,\textsuperscript{67} and, if possible, that each provision be construed so that every provision has significance.\textsuperscript{68} The coconspirator rule and the declaration against

Third, the personal knowledge requirement under the declaration against penal interest exception, see FED. R. EVID. 602, is somewhat like the independent evidence requirement under the coconspirator rule in that both are there to show the connection between the declarant and the defendant, and to make it more probable that the defendant will be able to expose inaccuracies. Oakley, supra note 4, at 49. The personal knowledge requirement would not be more protective than that for independent evidence.

Fourth, the basic rationale for the against interest requirement is that an individual is not likely to make a statement adverse to his criminal interest unless it is true. Morgan, Declarations Against Interest, 5 VAND. L. REV. 451, 456-57 (1952). While this notion has some common sense appeal, no empirical studies have so demonstrated. Comment, supra note 20, at 1217. Furthermore, there are many instances where individuals have confessed to crimes they did not commit, id. at 1209; see R. Lempert & S. Saltzburg, A Modern Approach to Evidence 467 (1977), thus subjecting themselves to penal liability by making a false statement. Until this common sense assumption is tested, the validity of the assumption will remain arguable. Even assuming that this rationale is sound, the against interest requirement is not as restrictive as the furtherance and pendency requirements which tie the statement down to a particular time and purpose. For example, a statement which was against interest but was made after the conspiracy terminated would not be admissible under the coconspirator rule; rather, it would be admissible under FED. R. EVID. 804(b)(3). The furtherance requirement exists in order to prevent the mere inculpation of fellow coconspirators. See R. Lempert & S. Saltzburg, supra, at 379. If inculpatory coconspirator statements are admitted under the declaration against penal interest exception, there would be a great danger that this would occur. Congress rejected the adoption of a trustworthiness guarantee to replace the use of the furtherance requirement, see note 28 supra, suggesting that the furtherance requirement should be strictly construed.

Fifth, in the situation where the defendant inculpates the accused, the protection gained from requiring that the statement be against interest is absent. See notes 117-26 & accompanying text infra. FED. R. EVID. 804(b)(3) adds a requirement of corroboration for exculpatory declarations against penal interest. Nevertheless, it does not require corroboration for inculpatory declarations. Therefore, the safeguards offered by FED. R. EVID. 804(b)(3) are not really safeguards at all.

\textsuperscript{5} United States v. Smith, 578 F.2d 1227, 1231 n.5 (8th Cir. 1978). To illustrate: suppose O makes a statement to a third person the day after a mail fraud caper was completed. In the statement O admits participating in this venture and also implicates P. This statement would traditionally be evaluated under a coconspirator rule, and would probably be inadmissible since the conspiracy was over. Now, as long as O asserted his fifth amendment privilege against self-incrimination, some courts would allow the admission of this statement as a declaration against penal interest.

\textsuperscript{6} "[T]here is a serious danger that the declaration against interest exception will swallow the coconspirator's exception with its attendant Glasser safeguard." United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978).

\textsuperscript{67} Marine Carriers Corp. v. Fowler, 429 F.2d 702, 706-07 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971).

\textsuperscript{68} Markham v. Cabell, 326 U.S. 404, 409 (1945); see Liggett Co. v. Baldridge, 278 U.S. 105, 112-13 (1928).
penal interest exception were expressed in a single enactment. Therefore, unless Congress meant the two rules to be interchangeable, each should have a separate and distinct purpose.

The Fifth Circuit Court of Appeals was the first court to attempt to reconcile the conflict between these rules. In United States v. Alvarez, the government proposed two theories for the admissibility of a deceased coconspirator's extrajudicial statement which inculpated the defendant. The government contended that the statement was admissible either under the coconspirator rule or under the declaration against penal interest exception. The court ruled that the independent evidence requirement of the coconspirator rule had not been met, and, consequently, the deceased declarant's statement was inadmissible under that rule. Furthermore, the court held that the declaration against penal interest exception requires corroborating circumstances for admissibility, and, because that requirement had not been met, the deceased declarant's statement was likewise inadmissible under that exception.

Although rule 804(b)(3) does not specifically refer to inculpatory declarations against penal interest, the Alvarez court applied the rule's express language governing requirements for the admissibility of exculpatory declarations to inculpatory declarations against penal interest as well. According to the court, this reformulation requiring corroborating circumstances would avoid constitutional difficulties with the confrontation clause, provide a workable unitary standard, and solve the incongruity between the coconspirator rule and the declara-

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584 F.2d 694, 701 (5th Cir. 1978).
59 In Alvarez, one alleged coconspirator told another that the defendant was his heroin supplier. The declarant coconspirator died before the defendant went to trial. The deceased declarant's out of court statement was the critical evidence connecting the defendant to the conspiracy. Id. at 694-96.
60 Id. at 696.
61 Id. at 699.
62 Id.
63 Id. at 701.
64 Id. at 702. It was stated in Smith v. United States, 348 U.S. 147 (1954), that "corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed." Id. at 156 (emphasis added). This suggests that corroboration may be similar to independent evidence, which may explain why the Alvarez court thought that corroboration solved the declaration against penal interest problem.
65 FED. R. EVID. 804(b)(3). For text of rule, see note 3 supra. For a discussion of the legislative history and development of the inference that Congress intended for inculpatory declarations against interest to be admissible, see note 20 supra.
66 584 F.2d at 701.
67 Id. "The Court held that the confrontation clause . . . requires corroborating circumstances that clearly indicate the trustworthiness of the statements." S. SALTZBURG & K. REDDEN, supra note 20, at 294 (Supp. 1980). The necessity of the court's constitutional con-
tion against penal interest exception as applied to inculpatory state-
ments. However, the court in Alvarez did not adequately resolve the
conflict since it failed to recognize the inherent differences between ex-
culpatory and inculpatory declarations against penal interest.
Although the Alvarez solution of a uniform standard for both in-
culpatory and exculpatory declarations against penal interest might
seem desirable to facilitate the application of the standard, several con-
siderations prevent applying a uniform rule requiring corroborating cir-
cumstances to both types of declarations. First, exculpatory declara-
tions against penal interest must be admitted under the compulsory pro-
cess clause of the sixth amendment and the due process clause of the
fourteenth amendment. On the other hand, the admission of in-
culpatory declarations against penal interest is not required, and may
even be precluded by the confrontation clause of the sixth amendment.

frontation holding has been questioned. Id. First, the statement was probably not against
interest since it was made to someone involved in the criminal activity. Second, the court
could have deleted the reference to third parties. Id. Therefore, the court did not have to
reach the constitutional issue. For a further discussion of the confrontation clause prob-
lems, see notes 96-114 & accompanying text infra.
67 584 F.2d at 701.
70 Id.
71 See Washington v. Texas, 388 U.S. 14 (1967). The defendant has a fundamental right
to present witnesses in his own defense. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); 4
J. WEINSTEIN & M. BERGER, supra note 2, ¶ 804(b)(3)[03], at 804-107. U.S. Const. amend. VI
provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have com-
pulsory process for obtaining witnesses in his favor."
72 Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973). Professor Westen argues that the
compulsory process clause and the confrontation clause are both designed for witness pro-
duction, and the defendant’s interest can only be compromised when there is an urgent
need for secrecy. Westen, Confrontation and Compulsory Process: A Unified Theory of
73 United States v. White, 553 F.2d 310 (2d Cir.), cert. denied, 431 U.S. 972 (1977). This, of
course, depends on the circumstances of the case. For example, many circuit courts hold
that the sixth amendment problems raised by inculpatory statements by a coconspirator
are overcome if there are interlocking confessions by defendants. See, e.g., United States v.
Walton, 538 F.2d 1348 (8th Cir. 1976); Mack v. Maggio, 538 F.2d 1129 (5th Cir. 1976); United
States v. Spinks, 470 F.2d 64 (7th Cir. 1972); Metropolis v. Turner, 437 F.2d 207 (10th Cir.
1971); United States ex rel. Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968). In Parker v.
Randolph, 445 U.S. 62 (1979), the Court reasoned that once a defendant’s confession stands
unchallenged before the jury, the right to cross-examine or impeach his confessing codefen-
dant would be of little value to the complaining defendant. Id. at 73. Moreover, denial of
confrontation does not require automatic reversal. Frazier v. Cupp, 394 U.S. 731, 734-36
An example of a case where the defendant’s sixth amendment right of confrontation had
been violated is Douglas v. Alabama, 380 U.S. 415 (1965). An accomplice who had been
found guilty in a separate trial was called as a witness in Douglas’ trial. The accomplice’s
extrajudicial confession implicated Douglas. However, Douglas’ accomplice refused to
testify since his own conviction was being appealed, and the prosecutor then read the ac-
complice’s confession to the jury. The Supreme Court found that Douglas’ inability to cross-
examine his accomplice was a violation of the confrontation clause. This clause states that
"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with
Another complication is that the standard of corroboration required for admission of exculpatory declarations against penal interest has not been uniformly decided. Some courts have interpreted the corroboration requirement so stringently that almost no exculpatory declarations against penal interest are admitted and the rule thereby loses its utility. Other courts have evaluated the credibility of the witness instead of the corroborating circumstances. One court has employed a more liberal standard allowing admission once a threshold of corroboration is met.

Considering the wide range of standards applied to corroborating evidence for exculpatory statements, it is unclear which standard of corroboration would be applied to inculpatory declarations against penal interest. The few courts that have considered the admissibility of inculpatory declarations against penal interest have not announced any guidelines.

Even if the same degree of corroboration is required for both inculpatory and exculpatory declarations against penal interest, the resulting protection afforded a defendant would not be the same. If a high standard of corroboration is required for exculpatory declarations, they will be difficult to admit, and the defendant's protection against an unfair conviction is reduced. If a defendant cannot have a third party's confession admitted, the defendant may be convicted even though he did not commit the crime. On the other hand, if a high standard of corroboration is applied to admit inculpatory declarations against penal interest, the defendant's protection is increased, because there is less chance that the defendant will be convicted on the basis of untrustworthy evidence. The converse is also true. If the standard of corroboration is relaxed for exculpatory declarations against penal interest, the witnesses against him.
defendant's protection against unfair conviction is increased; at the same time, if a less stringent corroboration standard is applied to inculpatory declarations against penal interest, an innocent defendant could be convicted on the basis of an inherently untrustworthy statement. Because of this risk of convicting innocent persons, it would seem better to require different standards for exculpatory and inculpatory declarations against penal interest, thereby erring in the defendant's favor with each. Since the two types of evidence should not be held to the same standard, the Alvarez court should have focused less attention on a unitary standard in attempting to reconcile the rules.

In attempting to reconcile the incongruity between the coconspirator rule and the inculpatory declaration against penal interest exception, the Alvarez court did focus on the problem of the inherent unreliability of inculpatory declarations against penal interest. The Alvarez court thought the incongruity would disappear if the reliability question was addressed by making FRE 804(b)(3) available only where circumstances of trustworthiness were established.

In the committee hearings on the rule, it was originally suggested that the coconspirator rule's requirement of furtherance be abolished and replaced with a guarantee of trustworthiness. Although Congress chose not to adopt this suggestion, the Alvarez court appears to have adopted the approach as a solution to the problem.

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62 Chambers v. Mississippi, 410 U.S. 284 (1973), suggests that the standard of corroboration should not be too high. See also 11 J. Moore, supra note 20, ¶ 804.06(3)(2), at VIII-283; 4 J. Weinstein & M. Berger, supra note 2, ¶ 804(b)(3)(3), at 804-106.

In Chambers, a witness had admitted committing the crime for which the defendant was being tried. He had given a statement admitting guilt to defense counsel, but later repudiated the statement and claimed he had an alibi. Although the defendant showed the alibi was false, the defendant was not allowed to cross-examine the witness because of the voucher rule, and could not call anyone who had heard this witness' admission because this would be hearsay.

In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice. . . . [W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

410 U.S. at 300-03.

63 4 J. Weinstein & M. Berger, supra note 2, ¶ 804(b)(3)(3), at 804-111.

W. LaFave & A. Scott, supra note 52, at 15.

64 584 F.2d at 701. Accomplices are notorious for their lack of veracity, Cool v. United States, 409 U.S. 100, 103 (1972); see Levie, supra note 23, at 1166, and their credibility is inevitably suspect, Bruton v. United States, 391 U.S. 123, 136 (1968); 4 J. Weinstein & M. Berger, supra note 2, ¶ 801(d)(2)(E)(1), at 801-171; Note, supra note 38, at 890.

65 584 F.2d at 701.


Furthermore, the Alvarez approach allows coconspirators' statements to be admitted under a new exception, and thereby expands the type of admissible statements. Instead of adhering to the traditional coconspirator requirements which Congress intended to preserve, such requirements are put aside and a new avenue for the admission of these types of statements is created.

There is a societal need to admit coconspirator statements. However, the need is not so great as to require two avenues for their admission. Since coconspirator statements are already admissible under rule 801(d)(2)(E), there is no reason to add new requirements to the declaration against penal interest exception in order to admit inculpatory coconspirator statements. Congress neither intended nor envisioned any further expansion of the coconspirator rule. To admit statements made by coconspirators under a new and different rule would, therefore, be contrary to the legislative intent.

The coconspirator rule is not perfect. However, allowing another avenue for the admission of inculpatory coconspirator statements would merely add more confusion. Because all kinds of circumstances could be considered for corroboration under the declaration against penal interest exception, the admission of coconspirator statements would become much less predictable. This would effectively be treating hearsay individually. Individual analysis involves more judicial discretion and would facilitate the development of numerous definitions of what is reliable.

The court in United States v. Alvarez was concerned with the reliability of inculpatory declarations against penal interest because the

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10 See notes 38-41 & accompanying text supra.
11 Garland & Snow, supra note 2, at 5; Oakley, supra note 4, at 45; Comment, supra note 23, at 539; Comment, supra note 42, at 623; Note, supra note 38, at 890.
12 See notes 22-34 & accompanying text supra.
13 Garland & Snow, supra note 2, at 5; Oakley, supra note 4, at 45; Comment, supra note 23, at 539; Comment, supra note 42, at 623; Note, supra note 38, at 890.
14 See United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978) (some factors to consider include: veracity of in court witness, reliability of out of court declarant, motive to misrepresent, general character of speaker, whether others heard statement, timing of declaration and relationship between speaker and witness); United States v. Guilette, 547 F.2d 743 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1978) (four general, though not exhaustive, considerations are: time of declaration and to whom it was made, existence of corroborating evidence, extent to which statement is truly against interest and availability of declarant).
17 584 F.2d 694, 700-01 (5th Cir. 1978).
confrontation clause of the sixth amendment forbids the introduction of unreliable evidence in certain circumstances. The Advisory Committee grappled with the problem of inculpatory declarations against penal interest and the confrontation clause because of its concern that the Supreme Court's ruling in *Bruton v. United States* might require the exclusion of all inculpatory declarations against penal interest. In *Bruton*, the Court held that a confession by the codefendant's accomplice which inculpated the defendant was inadmissible in a joint trial when the accomplice refused to testify on fifth amendment grounds. According to the Court, the admission of the confession violated the confrontation clause of the sixth amendment because the defendant was not given the opportunity to cross-examine the witness against him.

While Congress was considering the implications of *Bruton*, it ignored *Dutton v. Evans*, where the Supreme Court examined the relationship between a coconspirator rule and the confrontation clause. *Dutton* held that when a coconspirator's statement is admitted pursuant to a coconspirator rule, the confrontation clause is not violated if there are sufficient “indicia of reliability” warranting the statement's admission.

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8 Id. "[T]he central feature of Confrontation Clause analysis became the 'practical concern' for the reliability of inculpatory hearsay." *Id.* at 701. One commentator believes that a literal reading of the confrontation clause would require the state to present all the evidence against the accused in direct testimony form. Griswold, *The Due Process Revolution and Confrontation*, 119 U. Pa. L. Rev. 711, 713-14, 717-18, 728 (1971).


11 391 U.S. at 123; *see United States v. Bailey, 581 F.2d 341, 346 n.6 (3d Cir. 1978).*

12 391 U.S. at 126.

We emphasize that the hearsay statement inculpating petitioner was clearly not admissible against him under traditional rules of evidence . . . , the problem arising only because the statement was . . . admissible against the declarant Evans. . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause. *Id.* at 128 n.3 (emphasis added). This point was also made in *Dutton v. Evans*, 400 U.S. 74, 86 (1970).


14 *Id.* at 87-89. It has been suggested that the “indicia of reliability” test is derived from the due process clause—not the confrontation clause. *See id.* at 96-97 (Harlan, J., concurring in the result). Trial by affidavit is the evil at which the confrontation clause is aimed, and it only applies to criminal prosecutions. *See id.* at 94-95 (Harlan, J., concurring in the result). Therefore, the confrontation clause is not intended as a standard for testing evidence. *See id.* at 96 (Harlan, J., concurring in the result). Evidence should be tested under the fifth and fourteenth amendment due process clauses. *See id.* at 96-97 (Harlan, J., concurring in the result); Westen, supra note 72, at 601.

The courts of appeals are split on whether the coconspirator rule satisfies the reliability
COCONSPIRATOR STATEMENTS

The standards for what constitute "indicia of reliability" were not clearly set out in Dutton.106 Some courts focus only on the aspect of Dutton which requires that the statement be admitted pursuant to a hearsay exception, and conclude that whenever this occurs there is no confrontation problem.108 These courts either do not concern themselves with reliability,107 or hold that the statement is per se reliable if it meets an exception to the hearsay rule.109 Other courts of appeals read Dutton as requiring a case-by-case determination to see if the statement is reliable after the requirements of the coconspirator rule are met.110 The Supreme Court, however, recently stated: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Therefore, if Dutton is read in conjunction with this recent case, the better interpretation is that the statements are reliable if the coconspirator rule requirements are met.

Although the coconspirator rule has Supreme Court confrontation requirements of Dutton v. Evans, 400 U.S. 74 (1970). In Dutton, the statement was both spontaneous and against the declarant's penal interest. Id. at 89. The Court's analysis of the reliability criterion in Dutton is unconvincing, and the fact that a portion of the statement was against penal interest does not establish trustworthiness. 4 J. WEINSTEIN & BERGER, supra note 2, ¶ 804(b)(3)[03], at 804-111.

106 See R. LEMPERT & S. SALTZBURG, supra note 54, at 546. In Mancusi v. Stubbs, 408 U.S. 204 (1972), the Court reiterated the Dutton language: "The focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,'" id. at 213 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)), "and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,'" 40B U.S. at 213 (quoting California v. Green, 399 U.S. 149, 161 (1970)).

107 See, e.g., United States v. Johnson, 575 F.2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979); United States v. Papia, 560 F.2d 827 (7th Cir. 1977); Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Some writers have interpreted the case in a similar manner. See Note, 28 DRAKE L. REV. 198, 198 (1978); Comment, supra note 42, at 628.


109 United States v. Papia, 560 F.2d 827, 836 n.3 (7th Cir. 1977).

110 See, e.g., United States v. Wright, 588 F.2d 81 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); United States v. Davis, 571 F.2d 277 (10th Cir. 1978); United States v. Kelley, 526 F.2d 615 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); United States v. Snow, 521 F.2d 730 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). Under the existing procedure in some federal courts, a coconspirator statement is admitted and the jury is instructed to ignore the statement unless the prosecutor establishes the preliminary facts by independent evidence. Note, Co-Conspirator Declarations: Constitutional Defects in the Admissions Procedure, 9 U. CAL. D. L. REV. 63, 86 (1976). It has been suggested that the judge's preliminary determination should ensure the reliability of coconspirator statements. Id. at 85.

111 Ohio v. Roberts, 48 U.S.L.W. 4874, 4877 (June 25, 1980). The Court did not cite prior decisions for this exact statement, and there is a conflict between this statement and the statement in California v. Green, 399 U.S. 149, 155-56 (1970): "[W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception."
clause approval, the same cannot be said for the declaration against penal interest exception. The declaration against penal interest exception is not "a firmly rooted" hearsay exception,11 and reliability cannot therefore be inferred on this basis. Furthermore, a coconspirator's statements that inculpate a fellow coconspirator are rarely against interest112 and reliability cannot be established on the basis of the against interest rationale. Consequently, admitting a coconspirator's inculpatory declaration against penal interest could be a violation of the confrontation clause. This possible violation of the confrontation clause together with Congress' decision to require pendency, furtherance and independent evidence for the admission of coconspirator statements113 suggests that inculpatory coconspirator statements should not be admitted under the declaration against penal interest exception.

COLLATERAL STATEMENTS — A RESOLUTION

The apparent overlap which some courts have perceived between FRE 801(d)(2)(E) and FRE 804(b)(3) can be avoided if it is recognized that the portions of a statement which implicate another are almost never against the declarant's interest,114 and if only those declarations or portions thereof that are truly against the declarant's interest are admitted. Some courts have incorrectly maintained that almost any statement a declarant coconspirator could make to incriminate the accused would tend to implicate the declarant himself because it tends to show he had insider's knowledge115 and implies his personal participation in criminal activity.116 The implication of personal participation, however, does not make the naming of the other party a statement against the declarant's interest.117 Invoking another's name might be gratuitous, or said in the interest of avoiding responsibility and shifting the blame, or exaggerating to impress a listener.118 It will almost never be against the declarant's own interest to name another as a compatriot.119 The rationale of the declaration against penal interest exception is that an individual is unlikely to make a statement adverse to his criminal interest

111 See note 120 infra.
112 See notes 117-25 & accompanying text infra.
113 See note 33 supra.
114 Davenport, supra note 27, at 1396.
115 United States v. Barrett, 539 F.2d 244, 252 (1st Cir. 1976).
116 United States v. Thomas, 571 F.2d 285, 289 (5th Cir. 1978) (quoting United States v. Barrett, 539 F.2d 244, 251 (1st Cir. 1976)). Furthermore, since coconspirators are liable for the crimes of fellow coconspirators, W. LAFAVE & A. SCOTT, supra note 52, § 65, at 515 (1972); see United States v. Testa, 548 F.2d 847 (9th Cir. 1977), statements inculpating a fellow coconspirator in a crime would implicate the declarant in the crime.
117 Davenport, supra note 27, at 1396.
118 Jefferson, supra note 47, at 62.
119 Id. at 59; see State v. Darby, 123 Ariz. 368, 371, 599 P.2d 821, 824 (Ct. App. 1979).
unless it is true.\textsuperscript{120} This rationale is not applicable to the portion of the statement that inculpates the accused\textsuperscript{121} because it is not truly against the declarant's interest. If \textit{X} tells his acquaintance, \textit{Y}, that \textit{Z} offered \textit{X} $2000 to burn down a hotel, and that \textit{X} agreed and did burn down the hotel, it is against \textit{X}'s penal interest to admit to burning down the hotel, but it is not against his interest to say that someone else was involved. The portion inculpating \textit{Z} is merely collateral to the "against interest" portion of the statement, unless \textit{X} knows his inculpating \textit{Z} could subject him to penal liability for conspiracy,\textsuperscript{122} or that he is liable for the acts of fellow coconspirators.\textsuperscript{123} If, when making the statement, \textit{X} did realize that he was implicating himself not only in the crime of arson but also in the separate crime of conspiracy, it would still not be against his interest to admit that the other party was \textit{Z}, as opposed to \textit{A} or \textit{B}. The problem becomes more severe when one recognizes that the declarant does not have to directly implicate himself,\textsuperscript{2} he merely has to make a statement that tends to implicate himself. Without \textit{X}'s knowledge that his statement was against his interest there is no safeguard that the statement is reliable.\textsuperscript{125}

\textsuperscript{120} 4 J. WEINSTEIN \& M. BERGER, supra note 2, ¶ 804(b)(3)[01], at 804-80; Morgan, supra note 54, at 456-57. This reasoning was rejected by the English courts in the famous Sussex Peerage Case, 11 Cl. \& Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844). The Sussex Peerage Case first announced what became the traditional view on the admissibility of declarations against penal interest. C. MCCORMICK, supra note 2, § 278; Note, Declarations Against Penal Interest: What Must Be Corroborated Under the Newly Enacted Federal Rule of Evidence, Rule 804(b)(3), 9 VAL. U. L. REV. 421, 423 (1975). Ignoring the prior precedent of Clymer v. Littler, 97 Eng. Rep. 812 (K.B. 1761), the court in Sussex Peerage decided that a statement against the declarant's penal interest was not admissible as an exception to the hearsay rule. Jefferson, supra note 47, at 40; Morgan, supra note 54, at 463; see C. MCCORMICK, supra note 2, § 278; 5 J. WIGMORE, supra note 2, § 1476. The Sussex Peerage Case was followed without question in the United States. Fine, supra note 102, at 1097; Jefferson, supra note 47, at 40; Note, 79 Dick. L. Rev. 189, 192 (1974). Both state, see, e.g., Halvorsen v. Moon 7 Kerr Lumber Co., 87 Minn. 18, 91 N.W. 28 (1902); In re Wininegar, 337 F.2d 445 (Okla. Crim. 1963); Breeden v. Independent Fire Ins. Co., 530 S.W.2d 769 (Tenn. 1975), and federal courts, see, e.g., Donnelly v. United States, 228 U.S. 243 (1913); United States v. Harris, 391 F.2d 1 (5th Cir. 1968), followed the Sussex Peerage Case, especially in criminal cases. See Jefferson, supra note 47, at 40. The first famous challenge to this doctrine was Mr. Justice Holmes' dissenting opinion in Donnelly v. United States, 228 U.S. 243, 277 (1913). The modern trend is to follow Holmes' dissent and include statements against penal interest as an exception to the hearsay rule. Chambers v. Mississippi, 410 U.S. 284, 298-302 (1973); see Note, Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 B.U. L. REV. 148, 179 (1976); Note, 43 Tenn. L. Rev. 374, 376 (1976). The Federal Rules of Evidence follow the modern trend. See Fed. R. Evid. 804(b)(3).

\textsuperscript{121} 4 J. WEINSTEIN \& M. BERGER, supra note 2, ¶ 804(b)(3)[03], at 804-111; Comment, supra note 23, at 546; Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. P.A. L. REV. 741 (1965).

\textsuperscript{122} 4 J. WEINSTEIN \& M. BERGER, supra note 2, ¶ 804(b)(3)[03], at 804-111; Comment, supra note 23, at 546; Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. P.A. L. REV. 741 (1965).

\textsuperscript{123} 4 J. WEINSTEIN \& M. BERGER, supra note 2, ¶ 804(b)(3)[03], at 804-111; Comment, supra note 23, at 546; Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. P.A. L. REV. 741 (1965).

\textsuperscript{124} See United States v. Thomas, 371 F.2d 265, 269 (6th Cir. 1978).

\textsuperscript{125} 4 J. WEINSTEIN \& M. BERGER, supra note 2, ¶ 804(b)(3)[03], at 804-111; Comment, supra note 23, at 546; Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. P.A. L. REV. 741 (1965).

Even in those very rare cases where invoking the name of the accused is truly against
Since the portion of the statement which inculpates a fellow coconspirator is, at best, collateral to the portion of the declaration that is truly against interest, the collateral statement should not be admissible. The text of FRE 804(b)(3) does not discuss whether collateral statements are admissible, and commentators and courts disagree about their admissibility. Both Wigmore and Morgan maintain that hearsay declarations incriminating defendants as well as declarants should be admissible. They reason that the declaration against interest shows the declarant's trustworthy state of mind, and, therefore, the entire statement should be admissible. This theory presumes that a trustworthy state of mind carries over to statements that are not against interest. However, the basis of the declaration against penal interest exception is not that the declarant is in a trustworthy state of mind, but that an individual is unlikely to make a statement adverse to his penal interest unless it is true. Therefore, once the declarant has begun the collateral portion of the statement, the probability of trustworthiness becomes highly speculative. The collateral portion of the statement would seem to be equally unreliable whether or not accompanied by a declaration against interest. Consequently, only those declarations or portions of declarations that are truly against interest should be admitted.

The coconspirator declarant's interest, the declaration against penal interest exception should not be applied. These statements still should be required to meet the foundation of the coconspirator rule.

Congress enacted a strict rule for coconspirator statements. See note 33 & accompanying text supra. Although the Advisory Committee seemingly allowed the courts to legislate by providing that the courts could determine the circumstances under which inculpatory declarations against penal interest were admissible, see note 20 supra, the courts should not be allowed to supersede congressional intent concerning the coconspirator rule in applying the new declaration against penal interest exception. This congressional intent, when considered together with the confusion that would result from having two rules, see notes 91-93 & accompanying text supra, the necessity of giving every provision of a legislative enactment significance, see notes 56-57 & accompanying text supra, and the undesirability of applying the same corroboration standard for inculpatory and exculpatory declarations against penal interest, suggests that the higher burden imposed by Congress under the coconspirator rule must be met even by those inculpatory coconspirator statements that arguably do fall under both rules.

See FED. R. EVID. 804(b)(3); see Comment, supra note 74, at 1201. See notes 130-46 & accompanying text infra. "Under the common law exception for declarations against interest, the treatment to be given portions of a declaration collateral to the declarant's interest has been the subject of much debate." United States v. Barrett, 539 F.2d 244, 252 (1st Cir. 1976).

5 J. WIGMORE, supra note 2, § 1465 ("[T]he statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the statement."). Jefferson, supra note 47, at 62.

Id. at 60; see State v. Darby, 123 Ariz. 366, 371, 599 P.2d 821, 824 (Ct. App. 1979).

Jefferson, supra note 47, at 60; see notes 121-22 & accompanying text supra.

Jefferson, supra note 47, at 60.

Id. at 62.
A second method for dealing with the admissibility of collateral statements is to admit the entire declaration if the "against interest" element predominates over the collateral part. This position is taken by many courts if there is a single inseparable statement that is both self-serving, or neutral, and against interest. If the against interest portion is equalized by the self-serving or neutral component, the statement is excluded. However, this can be faulted on the same basis as Wigmore's approach. Since the reliability theory for the declaration against penal interest exception is not based on any sustained frame of mind, it is no more probable that the collateral portion, which is either self-serving or neutral, is reliable when accompanied by an "against interest" portion, than when the "against interest" portion is not present. This approach allows remarks that are not against interest to be admitted under the declaration against penal interest exception, and it does not guarantee that only reliable statements will be admitted. This is especially harmful when the portion that is not against interest inculpates the accused. Therefore, the conclusion, again, is that only the truly against interest statements should be admitted.

CONCLUSION

Ideally, all unreliable statements should be withheld from the trier of fact, especially when those unreliable statements are offered against an accused. The tolerable margin for error in presenting unreliable statements is even smaller when a coconspirator's declaration is used against an accused than when it is used in his favor. Consequently, while it may be acceptable to admit a coconspirator's exculpatory declaration even though the portion referring to the accused is not truly against the declarant's penal interest, only the portion of a coconspirator's statement which is truly against the declarant's interest should be admitted where the statement inculpates the defendant. This is neces-
sary in order to avoid dilution of the coconspirator rule requirements through the use of the declaration against penal interest exception, and to avoid the confrontation clause problems presented by a coconspirator's incriminatory declarations.

Since the portion of the statement implicating the accused will only be admitted under the coconspirator rule, there is no confrontation clause problem. The overlap between the coconspirator rule and the declaration against penal interest exception for incriminatory statements would be avoided because only the truly "against interest" portion of the declarant coconspirator's statement which would not implicate the accused could be admitted as a declaration against penal interest. If the jury could reasonably infer the deleted portion, even the "against interest" portion would not be admissible. The entire statement could be admitted only if the additional requirements of the coconspirator rule are met.

The higher standard imposed by Congress for coconspirator statements under the coconspirator rule should be met even in those very rare situations when inculpating a fellow coconspirator is against the declarant coconspirator's interest. This avoids the confusion that would result from having two rules, gives every provision of a legislative enactment significance and follows congressional intent.

Although one court has held that the rules can be reconciled by requiring corroborating circumstances for inculpatory declarations against penal interest, just as are required for exculpatory declarations, this is unacceptable. Not only are different constitutional considerations applicable to inculpatory and exculpatory statements, but also, the level of protection afforded a defendant varies when the same standard is applied to both. Furthermore, admitting coconspirators' incriminatory declarations against interest under the declaration against penal interest exception wherever corroborating circumstances are present contravenes the congressional intent to limit the admission of coconspirators' statements. These problems are alleviated if incriminatory cocon-

Rules of Evidence (1972 draft), 56 F.R.D. 183, 328 (1972). The California Supreme Court did not directly deal with the conflict between the coconspirator rule and the declaration against penal interest exception since they found the evidence in question was inadmissible under either rule.

14 The Supreme Court has upheld a coconspirator rule against confrontation clause challenges. See Dutton v. Evans, 400 U.S. 74 (1970); text accompanying notes 104-10 supra.

14 See People v. Leach, 15 Cal. 3d 419, 541 P.2d 296, 124 Cal. Rptr. 752 (1975). It might seem that the defendant would try to introduce that portion of his coconspirator's statement that says that the declarant robbed the bank, thereby implying that the defendant was not involved. However, this could be treated as an adoptive admission, see FED. R. EVID. 801(d)(2)(B), or as an exculpatory declaration, and by offering the declarant coconspirator's statement into evidence the defendant may waive his objection to the total statement.

14 United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978).
Coconspirator statements are inadmissible under the declaration against penal interest exception. If a prosecutor wants an inculpatory coconspirator's statement admitted, the statement should have to meet the requirements of the coconspirator rule.

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