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## Whose Phone Line Is It Anyway: A Prosecutor's Guide to Navigating the Evidentiary Gold Mine of Prison Phone Calls

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# Whose Phone Line Is It Anyway: A Prosecutor's Guide to Navigating the Evidentiary Gold Mine of Prison Phone Calls

## *Introduction*

Prison phone calls offer a treasure trove of prospective evidence to be used in a criminal trial. Often, a defendant will make an incriminating statement on a prison phone call even after being warned that the calls may be recorded.<sup>1</sup> Prosecutors can use the statements made in these phone calls in a wide variety of ways: to establish certain facts or events, to evaluate witness credibility, to impeach, to bolster their cases, or to corroborate additional evidence at trial. Individual party admissions may be easily admissible,<sup>2</sup> while other more complicated statements, such as coconspirator statements, require additional steps prior to admission.<sup>3</sup> This Comment provides prosecutors a comprehensive guide—paired with simple examples and solutions—to introduce prison phone calls into evidence and discusses the specific hurdles one must overcome to effectively filter through prison phone call statements. In addition, this Comment notes how courts may disagree on the interpretation of what it means for a statement to be “in furtherance of a conspiracy” once the coconspirator is incarcerated.<sup>4</sup>

To begin, Part I of this Comment shows how the prison phone call system operates in the federal system. Part II explains the process of introducing a statement, avoiding the rule against hearsay, and provides examples to show how the hearsay exceptions apply to prison phone calls. Part III provides analysis of a few exceptions, giving a framework for prosecutors to use and emphasizes the ease of introducing this information while noting potential objections defense counsel may raise. Part IV provides the conclusive, overall procedure to consider prior to submitting the phone calls into evidence.

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1. See generally Amy Pavuk, *Jail Phone Calls a Nightmare for Defense Attorneys*, ORLANDO SENTINEL (Apr. 26, 2014), [http://articles.orlandosentinel.com/2014-04-26/news/os-jail-phone-call-used-against-you-20140426\\_1\\_jail-phone-calls-jailhouse-phone-shellie-zimmerman](http://articles.orlandosentinel.com/2014-04-26/news/os-jail-phone-call-used-against-you-20140426_1_jail-phone-calls-jailhouse-phone-shellie-zimmerman).

2. See *infra* Section II.B.

3. See *infra* Section II.D.

4. See *infra* Section III.D.

### *I. How the Federal Phone System Operates*

The federal prison phone call system is heavily regulated.<sup>5</sup> The Code of Federal Regulations governs federal prisons,<sup>6</sup> but wardens maintain discretion in managing many aspects of the prisons, such as inmate contact with persons in the community through the use of telephones.<sup>7</sup> Phone regulations are extremely favorable to the warden, who is only required to allow an inmate to make one phone call per month.<sup>8</sup> The central purpose of phone privileges is to provide means for an inmate to maintain ties with family or community for personal development.<sup>9</sup>

Prisons commonly limit the individuals an inmate can call<sup>10</sup> and the prison must maintain a call list containing preapproved numbers.<sup>11</sup> The Federal Bureau of Prisons (“Bureau”) attempted to require inmate-phone-call recipients to provide personal information prior to the approval of the phone list, but the proposal was abandoned and amended to require that inmates concede “to the best of the inmate’s knowledge, the person or persons on the list are agreeable to receiving the inmate’s telephone call and that the proposed calls are to be made for a purpose allowable under Bureau policy or institution guidelines.”<sup>12</sup> This leaves some discretion to the inmates and allows them the opportunity to contact individuals who may not be on the approved list, as prisons often do not have the adequate workforce and time to constantly keep up with these lists.<sup>13</sup>

While a prison may ban the use of three-way calls for inmates, phone call recipients may utilize a three-way call, therefore sidestepping the

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5. *See generally* 28 C.F.R. §§ 540.100-105 (2015).

6. *See generally id.* § 0.95.

7. *Id.* § 540.100(a).

8. *Id.* § 540.100(b). A prison can restrict an inmate’s phone calls to an even greater extent if the inmate requires disciplinary sanctions. *Id.*; *see also* 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 14:18 (4th ed. 2011).

9. 28 C.F.R. § 540.100(a); *Stay in Touch*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/communications.jsp> (last visited Mar. 29, 2017) (“We extend telephone privileges to inmates to help them maintain ties with their families and other community contacts.”).

10. 28 C.F.R. § 540.100(a); MUSHLIN, *supra* note 8, § 14:19.

11. 28 C.F.R. § 540.101 (providing a general call list estimate); MUSHLIN, *supra* note 8, § 14:19.

12. *Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir. 1994) (quoting 28 C.F.R. § 540.101(a)(1)); MUSHLIN, *supra* note 8, § 14:19.

13. *See Valdez v. Rosenbaum*, 302 F.3d 1039, 1049 (9th Cir. 2002) (“[A]llowing Valdez telephone access would have required the defendants to allocate additional resources to monitor his telephone conversations to ensure that he did not try to tip off his cohorts.”).

benefits of requiring a phone call list.<sup>14</sup> Another situation arises where the phone call recipient can put another person on the line to speak to the inmate.<sup>15</sup> This action may be planned, as where a mother puts her son on the line to speak to his father,<sup>16</sup> or it can be unplanned, as where other people force their way onto the phone.<sup>17</sup> In either event, additional authentication may be required to introduce these statements made by third-party phone call recipients.<sup>18</sup>

Many prisons record these phone calls and give proper notice to inmates<sup>19</sup> so that calls might be monitored; and when an inmate uses the phone system, this establishes implied consent.<sup>20</sup> The primary purpose of recording these calls is to maintain security, uphold orderly management, and provide protection to the public.<sup>21</sup> Inmates may talk to a variety of individuals ranging from friends, family, coworkers, acquaintances, and significant others, thus presenting many opportunities for valuable evidence.

To obtain this valuable evidence, a prosecutor must first secure leave of court and issue a subpoena on the prison to obtain the phone call recordings.<sup>22</sup> Prison officials may view the subpoenas as “mere formalities” and will likely work hand in hand with the prosecution team.<sup>23</sup> To ensure

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14. See *Brutcher v. Cassady*, No. 4:11CV1613 ACL, 2014 WL 4823952, at \*11 (E.D. Mo. Sept. 26, 2014), for an example of a prison three-way call through a cell phone.

15. See, e.g., *Martinez v. Biter*, No. EDCV 14-1883 JGB (AS), 2015 WL 3407930, at \*1-2 (C.D. Cal. Apr. 6, 2015).

16. *Id.* at \*1.

17. *Id.* at \*1-2.

18. See FED. R. EVID. 901(a); *United States v. Gadson*, 763 F.3d 1189, 1203-05 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2350 (2015) (providing an example of a court’s analysis when authenticating prison phone call evidence).

19. See, e.g., *United States v. Chaiban*, No. 2:06-CR-00091-RLH-PAL, 2007 WL 437704, at \*8 (D. Nev. Feb. 2, 2007) (“The telephones play a ‘preamble’ which notifies the caller and the recipient that the call may be monitored and/or recorded. If the recipient wishes to accept the call, he or she presses the ‘0’ key on the phone.”); *Stay in Touch*, *supra* note 9 (“A notice is posted next to each telephone advising inmates that calls are monitored.”).

20. *Hill v. Donoghue*, 815 F. Supp. 2d 583, 588 (E.D.N.Y. 2011) (“Where a prison gives notice to inmates that their calls may be monitored, inmates’ use of the prison’s telephones constitutes implied consent for the purposes of Title III.” (citing *United States v. Willoughby*, 860 F.2d 15, 19-20 (2d Cir. 1988)), *aff’d*, 518 F. App’x 50 (2d Cir. 2013).

21. 28 C.F.R. § 540.102(a) (2015).

22. *United States v. Noriega*, 764 F. Supp. 1480, 1494 (S.D. Fla. 1991); see also *Chaiban*, 2007 WL 437704, at \*13 (“The public does not have access to inmate phone calls without a subpoena. Law enforcement does have access to the calls.”).

23. *Noriega*, 764 F. Supp. at 1493-94.

compliance with Rule 17 of the Federal Rules of Criminal Procedure, a prosecutor must be able to show she exerted a “genuine effort to obtain identifiable and relevant evidence.”<sup>24</sup> Therefore, she must show what is believed to be on the tape, avoiding a wide-ranging “fishing expedition” for evidence.<sup>25</sup>

The vast pool of evidence provided by prison phone call recordings includes acquired statements, which may be used to impeach a witness, bypass spousal immunity, establish individual party admissions, and bring in coconspirator statements. An individual party admission or impeachment evidence may be easily introduced,<sup>26</sup> while a coconspirator statement must clear additional hurdles.<sup>27</sup> These party admissions are nonhearsay under Federal Rule of Evidence 801(d) and are easily admissible when offered against the party.<sup>28</sup> Though also nonhearsay under 801(d), coconspirator statements have additional requirements—such as showing the statements were made by a party during and in furtherance of the conspiracy—that make using a prisoner’s statement against others more challenging.<sup>29</sup>

## *II. Admitting Prison Phone Calls into Evidence*

While Congress has the power to legislate all rules of civil, criminal, appellate, and bankruptcy procedure alike, the rules of evidence have always been given adequate attention. The importance of evidentiary questions is deeply rooted in the legal system:

[A]ll questions upon the rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules . . . and are now revered from their antiquity and the good sense in which they are founded.<sup>30</sup>

For that reason, evidentiary rules warrant significant attention from courts. Look no further than a criminal trial: evidentiary rules often determine a defendant’s fate.

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24. *Id.* (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220-21 (1951); *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980)).

25. *Id.* at 1492-93.

26. *See infra* Section II.B.

27. *See infra* Section II.D.

28. *See infra* Section II.B.

29. *See infra* Part III.

30. *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 295 (1813).

Prison phone calls offer massive pools of potential evidence for prosecutors to use in criminal trials, but the necessary requirements for admitting certain statements are dense, detailed, and problematic. Prosecutors may not have ample time to filter through prison phone calls, so the following sections provide key statements and procedures to efficiently navigate prison phone call recordings.

#### A. *Opposing Party Statements*

To begin, opposing party statements offer the best route for bringing in evidence from a prison phone call when used against the party/defendant. Specifically, party-opponent admissions are exempted from the rule against hearsay based “on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”<sup>31</sup> Two types of statements are likely to arise in a prison phone call: a statement “made by the party in an individual or representative capacity”<sup>32</sup> or a statement “made by the party’s coconspirator during and in furtherance of the conspiracy.”<sup>33</sup> A coconspirator statement must clear additional evidentiary obstacles before being admissible in court.<sup>34</sup>

#### B. *Individual Admissions*

An individual admission made by a party-opponent is simple. For example, Albert is incarcerated and calls his friend Brandon through a prison phone line. Albert tells Brandon that he hid the murder weapon at Brandon’s house, but Brandon did not participate in the murder. This statement is not hearsay and is admissible as an individual party admission under 801(d)(2)(A).<sup>35</sup>

Another easy way to utilize prison phone calls is to bypass the spousal communication privilege. Prison phone calls are monitored and spouses are made aware of the phone call recordings, therefore the privilege does not apply because it only protects statements made in confidence.<sup>36</sup> While these

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31. FED. R. EVID. 801(d)(2) advisory committee’s note to 1972 proposed rules.

32. *Id.* 801(d)(2)(A).

33. *Id.* 801(d)(2)(E).

34. *See infra* Part III.

35. “A party’s own statement is the classic example of an admission.” FED. R. EVID. 801(d)(2)(A) advisory committee’s note to 1972 proposed rules.

36. *See United States v. Madoch*, 149 F.3d 596, 602 (7th Cir. 1998) (“Janice admits she knew Larry was in jail while she was talking to him. Thus, because the marital communications privilege protects only communications made in confidence, under the unusual circumstances where the spouse seeking to invoke the communications privilege

present the easiest way to bring in prison phone calls, adding a conspiracy can change the requirements of introducing statements made from prison phone lines.

### C. Understanding Hearsay

Before jumping into coconspirator statements, a short background on hearsay is necessary to understand how and why coconspirator statements fall within a hearsay exception. Hearsay is defined as a statement<sup>37</sup> that “(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”<sup>38</sup> Reading this definition alone makes it seem likely that prison phone calls are hearsay because they contain statements that were not made while testifying at trial that will be offered for their truth.<sup>39</sup>

The Federal Rules of Evidence include a broad prohibition against using hearsay, save for exceptions, otherwise provided by statute, another rule of evidence, or any other rules set out by the Constitution and the Supreme Court.<sup>40</sup> The purpose of the hearsay rule lies in its design: it serves to prevent unreliable hearsay from being admitted, but also permits reliable hearsay through one of the many exceptions laid out in the rules.<sup>41</sup> The hearsay rule “is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact.”<sup>42</sup>

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knows that the other spouse is incarcerated, and bearing in mind the well-known need for correctional institutions to monitor inmate conversations, we agree with the district court that any privilege Janice and Larry might ordinarily have enjoyed did not apply.” (citations omitted)).

37. FED. R. EVID. 801(c). A statement can be an oral or written assertion, or any nonverbal conduct, “if the person intended it as an assertion.” *Id.* 801(a).

38. *Id.* 801(c).

39. *Cf. id.* 801(d)(2) advisory committee’s note to 1972 proposed rules (“Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”). Many inmates object to the admissibility of prison phone calls, claiming a violation of their Due Process and Fourth Amendment rights, but courts consistently decline these objections because the prisons provide proper notice and follow the procedure laid out by the Bureau. *See generally* United States v. Willoughby, 860 F.2d 15, 20-22 (2d Cir. 1988) (conducting a Fourth Amendment analysis); Kimberlin v. Quinlan, 774 F. Supp. 1, 8-9 (D.D.C. 1991) (conducting a Fifth Amendment due process analysis), *rev’d on other grounds*, 6 F.3d 789 (D.C. Cir. 1993), *vacated*, 515 U.S. 321 (1995).

40. FED. R. EVID. 802.

41. *Ferrier v. Duckworth*, 902 F.2d 545, 547 (7th Cir. 1990).

42. *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973).

Courts usually exclude these out-of-court statements “because they lack the conventional indicia of reliability.”<sup>43</sup>

The foundation of the conspiracy theory hearsay exception rests on agency theory where “each member of a conspiracy is the agent of each of the other conspirators whenever he is acting.”<sup>44</sup> The Court disfavors attempts “to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.”<sup>45</sup> These wide-sweeping nets can favor a prosecutor bringing in evidence of a conspiracy case because they may receive “some leeway to define the objectives of the conspiracy.”<sup>46</sup>

#### *D. Coconspirator Admissions*

For conspiracy cases, some statements taken from prison phone call recordings can become particularly tricky. These include party-opponent statements made “during and furtherance of the conspiracy.”<sup>47</sup> If a prosecutor wants to introduce evidence against a coconspirator not yet incarcerated and on the other end of the phone line, he must establish three additional things before the evidence can be admitted: (1) that a conspiracy existed “in which [both] the declarant and defendant participated,” (2) the statement to be admitted was “made during the conspiracy,” and (3) the statement was “made in furtherance of the conspiracy.”<sup>48</sup> For purposes of analyzing statements made over the phone, it is best to separate the first requirement into two preliminary foundational determinations, as they are discussed separately in Part III of this Comment.

### *III. Phone Call Statements Made During the Course of and in Furtherance of the Conspiracy*

In a conspiracy, specifically a large conspiracy, it is reasonable to believe that fellow coconspirators might phone a friend who has been incarcerated. A common hearsay exception used to introduce prison phone calls concerns

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43. *Id.*

44. *United States v. Perez*, 989 F.2d 1574, 1577 (10th Cir. 1993) (en banc) (quoting *United States v. Pallais*, 921 F.2d 684 (7th Cir. 1990)). *But see* PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 32.10 (3d ed. 2009) (noting that agency theory “is a fiction” and the federal drafters failed to justify admissibility under an alternative theory related to trustworthiness of evidence in itself).

45. *Dutton v. Evans*, 400 U.S. 74, 82 (1970) (quoting *Grunewald v. United States*, 353 U.S. 391, 404 (1957)) (emphasizing the impact of limited scope in conspiracy prosecutions).

46. GIANNELLI, *supra* note 44, § 32.10[B].

47. FED. R. EVID. 801(d)(2)(E).

48. GIANNELLI, *supra* note 44, § 32.10.



statements of an opposing party that “[were] made by the party’s coconspirator during and in furtherance of the conspiracy.”<sup>49</sup> Rule 801(d)(2)(E) allows “admission of statements by individuals acting in furtherance of a lawful joint enterprise.”<sup>50</sup> Effectively, the rule operates by “denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved.”<sup>51</sup> Prosecutors should give great attention to detail in conspiracy proceedings at the very beginning of the trial because the possibility of an appeal always lingers. Therefore, a prosecutor must have all her cards aligned. The standard of review plays an important role in how a prosecutor might be able to uphold her case on appeal, providing a great incentive to play all her cards at the trial level.

Trial courts can act as the be-all and end-all for criminal proceedings because they receive an extensive level of discretion when making evidentiary rulings.<sup>52</sup> If a case reaches review, the appellate courts examine the admission of evidence within the limited scope of the comprehensive record, determining whether the lower court abused its discretion.<sup>53</sup> Specifically, hearsay admissions by the trial courts are given a heightened level of deference while on review,<sup>54</sup> and because it must be determined by the trial court that a coconspirator statement does not fit into hearsay, appellate courts may be reluctant to find an abuse of discretion.<sup>55</sup>

Rule 801(d)(2)(E) contains “preliminary foundational determinations,” and those statements made in the course and in furtherance of a conspiracy are factual findings reviewed for clear error.<sup>56</sup> When applying the clear error standard, courts “will not reverse a lower court’s finding of fact simply because [it] ‘would have decided the case differently.’ Rather, a

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49. FED. R. EVID. 801(d)(2)(E).

50. *United States v. Brockenborough*, 575 F.3d 726, 735 (D.C. Cir. 2009) (citing *United States v. Gewin*, 471 F.3d 197, 201-02 (D.C. Cir. 2006); *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983)) (acknowledging that the use of the word “conspiracy” is not required and could be a joint enterprise based off of agency principles).

51. FED. R. EVID. 801(d)(2)(E) advisory committee’s note to 1972 proposed rules.

52. *See United States v. Jones*, 44 F.3d 860, 873 (10th Cir. 1995).

53. *Id.*

54. *Id.*

55. *See id.* Moreover, the Tenth Circuit

applies a harmless error standard when reviewing trial courts’ rulings on hearsay objections resting solely on the Federal Rules of Evidence. A harmless error is one that does not have a substantial influence on the outcome of the trial; nor does it leave one in grave doubt as to whether it had such effect.

*Id.* (citing *United States v. Jefferson*, 925 F.2d 1242, 1253-55 (10th Cir. 1991)).

56. *United States v. Morgan*, 748 F.3d 1024, 1036 (10th Cir.), *cert. denied sub nom. Ford v. United States*, 135 S. Ct. 298 (2014).

reviewing court must ask whether, ‘on the entire evidence,’ it is ‘left with the definite and firm conviction that a mistake has been committed.’”<sup>57</sup>

The standard for independent proof of a participation within a conspiracy is “lower than the standard of evidence sufficient to submit a charge of conspiracy to the jury,”<sup>58</sup> where “the trial court must view the evidence as a whole, rather than consider the individual pieces in isolation,”<sup>59</sup> and once the existence of the conspiracy has been proven, the evidence required to link other defendants “need not be overwhelming.”<sup>60</sup> This standard means that it is especially important for prosecutors to ensure they introduce all pertinent phone calls at trial because once they meet the initial hurdle of showing the preliminary foundational determinations for a conspiracy, the clear error standard will not likely overturn the conviction.<sup>61</sup>

Before addressing the preliminary questions, prosecutors should determine which individual statements will be brought into evidence. The prosecutor has the upper hand here by being able to prepare an argument ahead of time for each individual statement. But defense counsel has to play a “guessing game” and become familiar with the statements to object at the trial court level.<sup>62</sup> The opportunity for defense counsel to object at the trial level is crucial to their case because of the heightened level of discretion given to trial courts in admitting this evidence,<sup>63</sup> and the “clearly erroneous” standard on appeal is difficult to overcome.<sup>64</sup> Therefore, prosecutors should do all that they can to bring in whatever statements they may have.

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57. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (first quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); then twice quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

58. *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir. 1982) (quoting *United States v. Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir. 1981)).

59. *Id.* (citing *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977); *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969)).

60. *Id.* (quoting *United States v. Provenzano*, 615 F.2d 37, 47 (2d Cir. 1980)).

61. *See supra* text accompanying notes 56-57.

62. A defendant must make a request pursuant to Rule 16(a)(1)(B) of the Federal Rules of Criminal Procedure to obtain these phone calls. *See United States v. Sanchez-Garcia*, 685 F.3d 745, 755 (8th Cir. 2012), for an example of how the Eighth Circuit reviews the disclosure of jailhouse audio recordings obtained by the government.

63. *See supra* notes 54-55 and accompanying text.

64. *See supra* text accompanying note 56. A cautionary note for prosecutors: “[I]f the evidence is admitted over objection,” defense counsel will likely “try to convince the jury that the statement is untrustworthy and therefore should be accorded little weight.” James A. George, *Hearsay: Recognizing It and Handling the Objection*, 10 AM. J. TRIAL ADVOC. 489, 492 (1987).

If an opposing party objects to the statement's admission under Rule 801(d)(2)(E), a court must answer preliminary questions to ensure that the statement falls within the rule's definition.<sup>65</sup> Thus, the prosecutor must prepare an argument to support these statements prior to any objection. Defense counsel will likely make a hearsay objection, so courts will begin by evaluating whether the statement is hearsay, and if it is, courts will require prosecutors to show the statement meets four preliminary questions before admitting the statements under the coconspirator exception.<sup>66</sup> These questions can be viewed as separate elements that must be met by a preponderance of the evidence standard; therefore, the trial court must determine "(1) that a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy."<sup>67</sup> Each of these elements will be compared with specific examples of what is required to meet them, and will be paired with applications to the prison phone call system in the following sections.

*A. First Element: Establishing the Existence of a Conspiracy*

This first element to establish the existence of a conspiracy can be easily met. A conspiracy only requires "an agreement between two or more persons . . . with an intent to commit a crime."<sup>68</sup> At common law, the conspiracy required independent proof to establish its existence,<sup>69</sup> but in *Bourjaily v. United States*—a prominent case concerning admissible hearsay—the Court abolished this requirement.<sup>70</sup> This ruling was later codified into the rule itself: "The statement must be considered but does not

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65. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). When deciding preliminary questions, the court is not obliged to follow any evidence rules, except those on privilege. FED. R. EVID. 104(a).

66. *United States v. McGlory*, 968 F.2d 309, 333 (3d Cir. 1992).

67. *Id.*; see also *Bourjaily*, 483 U.S. at 175. Some courts combine the third and fourth elements as a statement "made during and in furtherance of the conspiracy." *United States v. Rodriguez*, 975 F.2d 404, 406 (7th Cir. 1992) (citing *United States v. Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1978)).

68. GIANNELLI, *supra* note 44, § 32.10[A].

69. *Id.* § 32.10[D] ("[T]he statement itself could not be used to determine whether a conspiracy existed.").

70. 483 U.S. at 181-82 (ruling that the trial court had correctly found an existing conspiracy and opining that "co-conspirator's statements [can] themselves be probative of the existence of . . . and participation . . . in the conspiracy"); GIANNELLI, *supra* note 44, § 32.10[D].

by itself establish . . . the existence of the conspiracy.”<sup>71</sup> After the amendment, it is generally accepted that the statement made by a coconspirator “could be used to establish the existence of a conspiracy,” but it is not sufficient.<sup>72</sup> Since *Bourjaily* and the 1997 amendment, courts may look toward independent corroborating evidence in affirming trial court decisions.<sup>73</sup>

If the court considers conspiracy statements themselves while making preliminary factual determinations, these “statements are presumptively unreliable and, for such statements to be admissible, there must be some independent corroborating evidence of the defendant’s participation in the conspiracy.”<sup>74</sup> *United States v. Abu-Jihaad* provides an example of how to avoid relying on the conspiracy statement itself as the court stated that the case exemplified “what the ‘during the course of’ and independent corroboration requirements are designed to catch,” because the sole evidence of the defendant’s conspiracy participation was the statement itself.<sup>75</sup> In *Abu-Jihaad*, pursuant to Rule 801(d)(2)(E), the government moved to admit certain statements made by a third party “five years after the events that form[ed] the basis of the charges against” the defendant.<sup>76</sup> The court considered the statements and additional evidence, but refused to find the defendant had entered into a conspiracy, because no additional corroborating evidence existed to establish the defendant’s participation in a conspiracy.<sup>77</sup> Thus, those statements were not made “during the course” of a conspiracy.<sup>78</sup>

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71. FED. R. EVID. 801(d)(2); *see also* GIANNELLI, *supra* note 44, § 32.10[D].

72. *United States v. Gambino*, 926 F.2d 1355, 1361 (3d Cir. 1991).

73. *See, e.g.*, *United States v. Zambrana*, 841 F.2d 1320, 1346 (7th Cir. 1988).

74. *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996) (citations omitted) (citing *Bourjaily*, 483 U.S. at 179); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir. 1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir. 1988); *United States v. Bentvena*, 319 F.2d 916, 948-49 (2d Cir. 1963)). “‘Some’ independent evidence is not merely a scintilla, but rather enough to rebut the presumed unreliability of hearsay. Admissibility of the hearsay, therefore, hinges on whether some sufficiently corroborating evidence exists which overcomes the suspected unreliability of out-of-court statements.” *Clark*, 18 F.3d at 1342 (citing *United States v. Silverman*, 861 F.2d 571, 579 (9th Cir. 1988)).

75. 531 F. Supp. 2d 289, 298 (D. Conn. 2008) (noting the similarity of the case to *Tellier* and thus reaching the same conclusion).

76. *Id.* at 295 (emphasizing those statements as being only one example of many).

77. *Id.* at 298.

There simply is no independent evidence that corroborates Mr. Abu-jihaad’s participation in a conspiracy with Mr. Shareef in early October 2006. That is made plain from the fact that the Government’s opening brief relied solely upon Mr. Shareef’s own statements to prove the existence of the conspiracy in

*B. Second Element: Establishing Membership of the Conspiracy Between the Declarant and the Party Against Whom the Statement Is Offered*

Prosecutors must be able to show that “both the declarant and the defendant were members of the conspiracy”<sup>79</sup> at the time the statement was made. When determining this, the analysis is similar to that used to establish the existence of a conspiracy.<sup>80</sup> It is generally thought that once the declarant has been arrested, his participation in the conspiracy has terminated, therefore rendering his post-arrest statement inadmissible against a defendant.<sup>81</sup> This becomes particularly relevant when trying to establish the third element—a statement being made during the course of the conspiracy—which is discussed in detail in the following section. It is entirely possible, however, for a conspiracy to continue while incarcerated.<sup>82</sup> Thus, prosecutors focus first on the declarant as being a member of the conspiracy.

The declarant has many opportunities to join or withdraw from the conspiracy during the defendant’s incarceration, and the defendant need not know of the declarant’s status during a phone call.<sup>83</sup> Courts seem to put the most emphasis on illustrating *separate* arguments for both the declarant *and* the defendant, showing they were members of an ongoing conspiracy while the statement was made.<sup>84</sup> In addition, “[T]he court[s] can look at the substance of the challenged co-conspirator testimony, as well as independent evidence, to determine whether or not [the party] was a participant in the conspiracy.”<sup>85</sup> This broad, sweeping language demonstrates how far courts will go to find supporting evidence and seems to favor prosecutors. The language also supports and provides another example of why prosecutors should always exploit their ability to corroborate evidence: it will more likely help than hurt them on review.

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early October 2006.

*Id.* at 296.

78. *Id.* at 298.

79. GIANNELLI, *supra* note 44, § 32.10[A].

80. *See generally* Bourjaily v. United States, 483 U.S. 171, 175 (1987).

81. GIANNELLI, *supra* note 44, § 32.10[A].

82. *Id.* § 32.10[A] n.104.

83. *See* United States v. Lampley, 68 F.3d 1296, 1301 (11th Cir. 1995) (acknowledging that declarations of a coconspirator are “admissible against members of the conspiracy who joined after the statement was made.” (quoting United States v. Tombrello, 666 F.2d 485, 491 (11th Cir. 1982))).

84. *See, e.g.,* Lutwak v. United States, 344 U.S. 604, 618 (1953); United States v. Cruz, 797 F.2d 90, 98 (2d Cir. 1986); *see also* GIANNELLI, *supra* note 44, § 32.10[A].

85. United States v. Allison, 908 F.2d 1531, 1534 (11th Cir. 1990).

To determine whether the declarant or defendant was a member of the conspiracy, prosecutors and courts can look to several areas. To show membership in a conspiracy, “each coconspirator need not know of or have contact with all other members, nor must they know all of the details of the conspiracy or participate in every act in furtherance of it.”<sup>86</sup> In fact, evidence of another separate conspiracy can help provide a basis for admitting a coconspirator statement.<sup>87</sup> Additionally, “[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose or agreement to accomplish an unlawful objective may be inferred from a ‘development and a collocation of circumstances.’”<sup>88</sup> A “single overt act by the defendant” may also be sufficient.<sup>89</sup> The identification of the declarant is not required and “[s]ometimes evidence, usually circumstantial in nature, will convince the trial judge that it is more likely than not that an unidentified declarant was a participant in a conspiracy together with the party against whom the declarant’s assertion has been offered.”<sup>90</sup> While identification is not required for the declarant, it is in the prosecutor’s best interest to try and authenticate the declarant’s identity.<sup>91</sup>

Some prosecutors may face large conspiracy cases, and these may be analyzed differently in determining if the declarant and defendant were members of the conspiracy. These large and complex conspiracy cases can make it “inconvenient or impossible for the Government to prove the existence of the conspiracy and/or the participation therein of each of the alleged co-conspirators, prior to seeking admission of a co-conspirator’s statement.”<sup>92</sup> To remedy this, the government has an obligation prior to the close of the case to prove the existence of the conspiracy for each individual coconspirator.<sup>93</sup> This also favors prosecutors, as they may gain additional evidence throughout the trial concerning the identification of those coconspirators on the phone. The next two elements concern the strategic and fundamental elements when answering the preliminary questions to admit coconspirator statements. These are key because the

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86. *United States v. Martínez-Medina*, 279 F.3d 105, 113 (1st Cir. 2002).

87. *United States v. Marino*, 277 F.3d 11, 25-26 (1st Cir. 2002) (adding that the separate conspiracy can be larger than the conspiracy charged).

88. *United States v. Pack*, 773 F.2d 261, 265-66 (10th Cir. 1985) (quoting *Glassner v. United States*, 315 U.S. 60, 80 (1942)).

89. *United States v. Morehead*, 959 F.2d 1489, 1500 (10th Cir. 1992) (quoting *Pack*, 773 F.2d at 266).

90. DAVID F. BINDER, *HEARSAY HANDBOOK* § 35:12 (4th ed. 2011).

91. *See supra* text accompanying note 18.

92. *United States v. Giampa*, 904 F. Supp. 235, 286 (D.N.J. 1995).

93. *Id.*; *see also, e.g.*, *United States v. Gambino*, 926 F.2d 1355, 1360-61 (3d Cir. 1991).

defense will most likely challenge these statements and it may be difficult in some situations to show an ongoing conspiracy while a defendant remains incarcerated.

*C. Third Element: Establishing a Statement Made During the Course of the Conspiracy*

When examining whether a statement was made during the course of the conspiracy, the prosecutor must consider the agreement of the conspiracy and the objective of the conspiracy.<sup>94</sup> In turn, the court will “carefully ascertain the nature and extent of a conspiracy in determining whether acts or statements can properly be viewed as made during its existence.”<sup>95</sup> This requirement illustrates why the drafters of the federal rules decided to base Rule 801(d)(2)(E) on agency theory, stating their intent as being “consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved.”<sup>96</sup> This shows that the object of the conspiracy is crucial to determine whether an act was made during the course of the conspiracy. Luckily, prosecutors may have some flexibility in defining the main objective of the conspiracy.<sup>97</sup>

Generally, the conspiracy ends upon completion or failure to complete the main or central conspiratorial objectives.<sup>98</sup> The Supreme Court has repeatedly rejected the argument that an “implicit subsidiary phase” automatically begins after completion with the sole objective of concealing the conspiracy.<sup>99</sup> An early example of the Court’s rejection of this argument began with *Krulewitch v. United States*,<sup>100</sup> where “the Court rejected the government’s argument that statements made after the main objective of the conspiracy had been achieved were nonetheless admissible if made to conceal the crime.”<sup>101</sup> *Krulewitch* pointed out that if the Court adopted the government’s argument, it could cause “far-reaching results” and risk an unnecessary expansion of the rule against hearsay, leading to most, if not all, statements potentially being construed as a statement made to prevent

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94. GIANNELLI, *supra* note 44, § 32.10[B].

95. *United States v. Perez*, 989 F.2d 1574, 1579 (10th Cir. 1993) (keeping in mind the limited scope set by the Court for hearsay exceptions).

96. *Id.* (quoting FED. R. EVID. 801(d)(2)(E) advisory committee’s note to 1972 proposed rules).

97. GIANNELLI, *supra* note 44, § 32.10[B].

98. *See Grunewald v. United States*, 353 U.S. 391, 400 (1957).

99. *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949).

100. *Id.* at 442-43.

101. *Perez*, 989 F.2d at 1579.

detection, punishment, or made to shield fellow coconspirators.<sup>102</sup> While this may be an unfavorable ruling for prosecutors, it does not impede their ability to prove such a statement in a prison phone call setting thanks to the Court's subsequent decision in *Lutwak v. United States*.<sup>103</sup>

In applying the teaching of *Krulewitch*, the *Lutwak* Court further enumerated the limits of admitting coconspirator declarations.<sup>104</sup> This distinction is essential:

Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the *declarant's* participation therein. The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch*. Such declaration is inadmissible as to all but the declarant.<sup>105</sup>

This situation will only apply to prosecutors when the coconspirator arrest ends the conspiracy for the incarcerated. For example, Albert and Brandon were members of a conspiracy to kill Charlie. Albert is incarcerated for shoplifting and makes a phone call to Brandon. Assume incarceration has ended Albert's participation in achieving the conspiracy's objective to kill Charlie because he can no longer participate in the conspiracy. Brandon tells Albert that the plan to kill Charlie is still ongoing and further discloses details of the conspiracy's plan to commit this crime all while Albert simply acknowledges these statements. *Krulewitch* only allows Brandon's statements to be used to show *his* participation in the conspiracy—not Albert's participation. When this occurs, the usefulness of the statement is necessarily marginalized.

*Krulewitch* still applies today, though many courts have clarified certain characteristics regarding the concealment phase of the conspiracy.<sup>106</sup> Shortly after the decision in *Krulewitch*, the Supreme Court addressed yet

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102. *Krulewitch*, 336 U.S. at 444-45.

103. 344 U.S. 604 (1953).

104. *Lutwak*, 344 U.S. at 618.

105. *Id.* at 615.

106. GIANNELLI, *supra* note 44, § 32.10[B].



another case concerning the admission of conspirator statements.<sup>107</sup> The Court in *Grunewald v. United States* reaffirmed the *Krulewitch* standard in a short opinion.<sup>108</sup> Justice Jackson thereafter clarified the Court's expectations in his concurring opinion.<sup>109</sup> Jackson boiled down the government's argument as follows: "a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment."<sup>110</sup> He then dismissed this argument again because it attempted to broaden the narrow rule.<sup>111</sup> But he did not rule out the possibility that acts of concealing a conspiracy could carry weight in the furtherance requirement.<sup>112</sup> And courts have given this weight;<sup>113</sup> therefore prosecutors should assert that concealment of a conspiracy plays a meaningful role in satisfying the "in furtherance" requirement.

Switching back to the main object of a conspiracy, it is presumed that the conspiracy continues until completion of the main objective<sup>114</sup> or an affirmative showing of termination or withdrawal from the conspiracy.<sup>115</sup> "[W]here a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn."<sup>116</sup> Postponing the main objective of the conspiracy or slowing down the process does not explicitly show termination of the conspiracy.<sup>117</sup>

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

108. *Id.* at 399.

109. *See id.* at 400-24 (Jackson, J., concurring).

110. *Id.* at 404.

111. *Id.*

112. *Id.* at 405 ("By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.").

113. *See, e.g.*, *United States v. Hong Vo*, 978 F. Supp. 2d 49, 55-57 (D.D.C. 2013); *United States v. Alberico*, 559 F.3d 24, 28-29 (1st Cir. 2009); *United States v. Justus*, 162 F.3d 1157 (4th Cir. 1998), 1998 WL 546095 at \*6.

114. *United States v. Ammar*, 714 F.2d 238, 253 (3d Cir. 1983).

115. *United States v. Maloney*, 71 F.3d 645, 660 (7th Cir. 1995).

116. *United States v. Hamilton*, 689 F.2d 1262, 1268 (6th Cir. 1982) (alteration in original) (quoting *United States v. Mayes*, 512 F.2d 637, 642-43 (6th Cir. 1975)).

117. *Ammar*, 714 F.2d at 253.

In addition, the arrest of one of the conspirators or the principal member does not automatically terminate participation in the conspiracy.<sup>118</sup>

The defendant bears the burden of showing withdrawal from a conspiracy by proving an “attempt to undo the wrong that has been done in one of two ways”: (1) “giv[ing] authorities information with sufficient particularity to enable the authorities to take some action to end the conspiracy”; or (2) “communicat[ing] his withdrawal directly to his coconspirators in a manner that reasonably and effectively notifies the conspirators that he will no longer be included in the conspiracy.”<sup>119</sup> “The second method ‘requires more than implied dissociation. It must be sufficiently clear and delivered to those with authority in the conspiracy such that a jury could conclude that it was reasonably calculated to make the dissociation known to the organization.’”<sup>120</sup> Overall, the burden is high on the defendant to prove withdrawal from the conspiracy. If the defendant is incarcerated, however, the prosecutor is likely to bear the burden of proving the defendant was not terminated from the conspiracy and did not withdraw from the conspiracy merely by being incarcerated.

The main objective of a conspiracy informs how far a conspiracy may continue.<sup>121</sup> Stemming from the Court’s reluctance in *Krulewitch* and *Grunewald* to broadly admit implicit subsidiary agreements to conceal a conspiracy (paired with the presumption of continuation), lower courts may carefully reason through each statement with a critical eye to ensure the party has met its high burden.<sup>122</sup> Courts determine the duration of a conspiracy on a case-by-case basis,<sup>123</sup> and the “nature of the crime” is relevant.<sup>124</sup> For example, in a conspiracy to kidnap, the conspirators had a central purpose to kidnap, obtain money, and then divide the proceeds amongst the coconspirators.<sup>125</sup> The admitted phone call contained statements discussing concerns over the proceeds, furthering the central

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118. *Id.*

119. *United States v. Randall*, 661 F.3d 1291, 1294-95 (10th Cir. 2011).

120. *United States v. Morgan*, 748 F.3d 1024, 1037 (10th Cir.) (quoting *Randall*, 661 F.3d at 1295), *cert. denied sub nom. Ford v. United States*, 135 S. Ct. 298 (2014).

121. *See* Mark Lippman, *Defending Against the Co-Conspirator Hearsay Exception*, CHAMPION, Aug. 1997, at 16, 18.

122. *See id.* at 17-18 (“The timing of the subsidiary agreement is crucial, and the government bears the burden of proving it was formed during the principal conspiracy.”).

123. *United States v. Varella*, 692 F.2d 1352, 1362 (11th Cir. 1982); *see also* Lippman, *supra* note 121, at 18.

124. Lippman, *supra* note 121, at 18.

125. *Morgan*, 748 F.3d at 1036.

purpose for kidnapping for money.<sup>126</sup> The court stated that “[i]t is well settled that the distribution of the proceeds of a conspiracy is an act occurring during the pendency of the conspiracy.”<sup>127</sup> When the “general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants.”<sup>128</sup> This type of call can apply to a prison phone call as well. Taking the kidnapping example from above and applying it to Albert and Brandon again, Albert may need money to support his incarceration and therefore calls Brandon to discuss distributions of the proceeds from their kidnapping escapade. These statements occur during the concealment phase of the conspiracy, but are admissible under the exception because Albert and Brandon are pursuing the main objective of conspiracy—to obtain money—even while Albert is incarcerated.

The most important concern a prosecutor may face is to show the court that incarceration or arrest of one or more coconspirators, the principal member, or even all but one member of the conspiracy does not necessarily cause the conspiracy to end.<sup>129</sup> In some cases, “[i]f the conspiracy is ongoing, assertions made by the remaining conspirators may be introduced against the one arrested, though made after the arrest.”<sup>130</sup> For example, in *United States v. Marques*, Marques was arrested and convicted for a conspiracy to manufacture methamphetamine.<sup>131</sup> Upon review, Marques challenged evidence admitted “after he allegedly dropped out of the conspiracy,”<sup>132</sup> contending that “when he abandoned the venture, was arrested and cooperated with the authorities, the conspiracy ended as to him, and all acts and declarations by other conspirators thereafter should not have been considered in assessing his guilt.”<sup>133</sup> But the court rejected his argument, stating that “[t]he acts and declarations of coconspirators, done or made in furtherance of the conspiracy, are admissible against a conspirator whose participation has terminated because of arrest.”<sup>134</sup> Therefore, while Marques stated that he had abandoned the venture, his acts

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126. *Id.*

127. *Id.* (quoting *United States v. Davis*, 766 F.2d 1452, 1458 (10th Cir. 1985)).

128. *United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir. 1978) (citing *United States v. Floyd*, 555 F.2d 45, 48 n.10 (2d Cir. 1977); *United States v. Manarite*, 448 F.2d 583, 591 (2d Cir. 1971)).

129. *See supra* text accompanying notes 79-82.

130. BINDER, *supra* note 90, § 35:11.

131. 600 F.2d 742, 743 (9th Cir. 1979).

132. *Id.* at 745.

133. *Id.* at 750.

134. *Id.* (citing *United States v. Wentz*, 456 F.2d 634 (9th Cir. 1972)).

reflected a different conclusion and he failed to convince the court as to any reasons to be treated differently.<sup>135</sup> Unfortunately, the court did not delve into what acts Marques committed that warranted their conclusion in spite of his statements of abandoning the conspiracy. The court seemed reluctant to adopt Marques's argument, as it would limit the coconspirator participation in the conspiracy after arrest, as discussed in the following paragraph.

Marques relied on the decision in *Sandez v. United States*, where the court believed that "the moment of any conspirator's arrest is decisive as to him, even if it should be maintained that the arrest of the first conspirator is not conclusive as to all."<sup>136</sup> In addition, the arrested conspirator may believe that "the conspiracy has been thwarted, and presumably no other overt act contributing to the conspiracy can possibly take place at least so far as the arrested conspirator is concerned."<sup>137</sup> The *Sandez* court looked to an older Supreme Court case, *Fiswick v. United States*,<sup>138</sup> where the Court "laid down the rule that although the result of the conspiracy may be a continuing one, the conspiracy itself does not become a continuing one."<sup>139</sup> Therefore a "[c]onfession or admission by one coconspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise."<sup>140</sup> This can be interpreted as an example of courts trying to preclude the use of statements made after a coconspirator has been arrested.

These cases can be compared with the outcome in *United States v. Grubb*.<sup>141</sup> There, the court noted "ample evidence for the district court to find that the conspiracy had continued after the . . . arrests."<sup>142</sup> "In the absence of definite proof, [a] withdrawal from the conspiracy, or [an] abandonment of it, will not be presumed."<sup>143</sup> The "[a]rrest of some co-conspirators does not, as a matter of law, terminate a conspiracy."<sup>144</sup> The arrests in *Grubb* did not end the conspiracy but merely made the participants more cautious.<sup>145</sup>

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135. *Id.*

136. *Id.* at 750 n.4 (quoting *Sandez v. United States*, 239 F.2d 239, 243 (9th Cir. 1956)).

137. *Sandez*, 239 F.2d at 243.

138. 329 U.S. 211 (1946).

139. *Sandez*, 239 F.2d at 243 (discussing *Fiswick*).

140. *Id.* at 244 (quoting *Fiswick*, 329 U.S. at 217).

141. 527 F.2d 1107 (4th Cir. 1975).

142. *Id.* at 1109.

143. *Id.*

144. *Id.*

145. *Id.*

In another case using arrests to determine the continuation of a conspiracy, the court concluded that “[t]he fact that Urrego and one of his co-conspirators were arrested did not necessarily mean that the conspiracy was terminated.”<sup>146</sup> Urrego argued “that since he and Restrepo already had been apprehended and the cocaine seized, the statements made by Rivera during the monitored telephone conversations were outside of the course of the conspiracy.”<sup>147</sup> Yet the court concluded “[t]here was ample evidence for the district court to conclude that Rivera’s statements were made in the course of and in furtherance of the conspiracy.”<sup>148</sup> The defendants made similar arguments to those in *Marques*.<sup>149</sup> Nonetheless, courts remain unsympathetic, especially to those continuing to oversee the conspiracy while incarcerated.<sup>150</sup> In short, a prosecutor will want to gain a feel for her circuit’s stance on whether an arrest ends the conspiracy or whether it can continue under certain circumstances. Even if the court seems reluctant to reject the argument, the prosecutor should push the issue anyway.

*D. Fourth Element: Establishing a Statement Made in Furtherance of the Conspiracy*

The requirements that a statement must be made during the course of the conspiracy and in furtherance of the conspiracy are closely linked<sup>151</sup> such that a prosecutor will often find himself aggregating the evidence. Unfortunately, “[n]o talismanic formula exists for ascertaining whether a particular statement was intended by the declarant to further the conspiracy.”<sup>152</sup> Rather, “this determination must be made by examining the context in which the challenged statement was made.”<sup>153</sup> Courts split on the application of this element,<sup>154</sup> but on review, the standard of construction

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146. *United States v. Urrego-Linares*, 879 F.2d 1234, 1240 (4th Cir. 1989) (citing *Grubb*, 527 F.2d at 1109).

147. *Id.*

148. *Id.*

149. *See United States v. Marques*, 600 F.2d 742, 743-50 (9th Cir. 1979).

150. *See United States v. Babb*, 369 F. App’x 503, 510 (4th Cir. 2010).

151. *United States v. Ammar*, 714 F.2d 238, 253 (3d Cir. 1983).

152. *United States v. Heidarpour*, No. CR-11-109-M, 2012 WL 2825810, at \*1 (W.D. Okla. July 10, 2012) (quoting *United States v. Perez*, 989 F.2d 1574, 1578 (10th Cir. 1993)).

153. *Id.* (quoting *Perez*, 989 F.2d at 1579).

154. *See Perez*, 989 F.2d at 1578. *Compare United States v. Ciresi*, 697 F.3d 19, 28-30 (1st Cir. 2012) (applying a broad construction of the “in furtherance” requirement), *and United States v. Kocher*, 948 F.2d 483, 485 (8th Cir. 1991) (maintaining that the “in furtherance” requirement be construed broadly), *with United States v. Rutland*, 705 F.3d 1238, 1252 (10th Cir. 2013) (highlighting the four kinds of statements the Tenth Circuit finds to satisfy the “in furtherance” requirement), *and United States v. Johnson*, 927 F.2d

should minimally affect evidentiary rulings due to the high level of discretion given to trial courts.<sup>155</sup>

Courts tend not to apply the “in furtherance” requirement strictly because it would defeat the purpose of the hearsay exception.<sup>156</sup> For example, in one conspiracy charge for possession with intent to distribute, the Fifth Circuit considered statements made from one conspirator to another coconspirator identifying another fellow coconspirator as the purchaser of marijuana to be statements made in furtherance of the conspiracy.<sup>157</sup> As the Fifth Circuit reasoned, “It has been held that a statement by a person acting as a connection informing the ultimate purchaser of the identity of the source is a statement in furtherance of the conspiracy.”<sup>158</sup> The burden is not high to meet here and often, if all the other elements are met, courts might be willing to stretch their views to meet this last requirement. Thus, these decisions tend to favor the prosecution.

A statement furthers a conspiracy if it promotes the conspiracy’s main objectives or furthers the conspiracy’s goals in some way.<sup>159</sup> Generally, narratives or narrative declarations of past events between coconspirators are not considered to be in furtherance of the conspiracy, but statements that reflect future intent to “set transactions integral to the conspiracy in motion and maintain the information flow among coconspirators” do meet the requirement.<sup>160</sup> Return to the example with Albert and Brandon: Albert is incarcerated for possession with the intent to distribute cocaine. Albert and Brandon are both members of a large drug-trafficking conspiracy run by a prominent drug lord that the federal government is trying to take down. Albert calls Brandon to tell him that he made arrangements with other inmates to distribute cocaine after he is released on bail. This statement can be considered to be “in furtherance of the conspiracy” because Albert arranged to further distribute cocaine in connection with the large drug-

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999, 1001-02 (7th Cir. 1991) (emphasizing the limitations on admitting co-conspirator statements and adhering to a narrow construction of the “in furtherance” requirement). *But see* United States v. Cornett, 195 F.3d 776, 782-85 (5th Cir. 1999) (applying a mixed level of construction using strict and broad language).

155. *See supra* notes 52-61 and accompanying text.

156. United States v. Patton, 594 F.2d 444, 447 (5th Cir. 1979); *see also* United States v. McMurray, 34 F.3d 1405, 1412 (8th Cir. 1994) (favoring admissibility); United States v. Gibbs, 739 F.2d 838, 845 (3d Cir. 1984) (using a broad interpretation).

157. *Patton*, 594 F.2d at 447 (noting that statements unnecessary to the conspiracy can be held to further the conspiracy).

158. *Id.*

159. *Perez*, 989 F.2d at 1578.

160. United States v. Roberts, 14 F.3d 502, 514-15 (10th Cir. 1993).

trafficking conspiracy case, and therefore the statement is admissible. Other examples showing statements to be in furtherance of the conspiracy include statements that identify other conspiracy members, describe roles within the conspiracy, induce conspiracy enlistment, further participation in group activities, reassure the existence of a conspiracy, dispel fears or suspicions, and keep members up-to-date on conspiracy activities.<sup>161</sup>

Casual conversations made between coconspirators without the intent to encourage continued involvement or actions not advancing the conspiracy do not meet the “in furtherance” requirement.<sup>162</sup> Therefore, Albert and Brandon chatting about how Charlie, another fellow coconspirator, “made a huge drop the other day” cannot meet the “in furtherance” requirement because Albert and Brandon are only speaking about past events.

Again, to utilize the coconspirator exception, a conspiracy charge is not needed.<sup>163</sup> “Subject to relevancy and similar considerations, out-of-court statements of a declarant coconspirator, if made during and in furtherance of a conspiracy, are admissible for the truth of the matter asserted, regardless of whether the conspiracy furthered is charged or uncharged. . . .”<sup>164</sup> The statement is also admissible “regardless of whether it is identical to or different from the crime that the statements are offered to prove.”<sup>165</sup> In general,

[a]s long as it is shown that a party, having joined a conspiracy, is aware of the conspiracy’s features and general aims, statements pertaining to the details of plans to further the conspiracy can be admitted against the party even if the party does not have specific knowledge of the acts spoken of.<sup>166</sup>

The acquittal of an alleged coconspirator does not preclude the trial judge from finding participation in a conspiracy.<sup>167</sup> Thus, if those assertions are offered against a fellow coconspirator, the statements made may be allowed through a hearsay exception.<sup>168</sup>

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161. *Id.* at 515; *United States v. Heidarpour*, No. CR-11-109-M, 2012 WL 2825810, at \*1 (W.D. Okla. July 10, 2012).

162. *United States v. Gibbs*, 739 F.2d 838, 845 (3d Cir. 1984).

163. *United States v. Lewis*, 759 F.2d 1316, 1339 (8th Cir. 1985).

164. *United States v. Lara*, 181 F.3d 183, 196 (1st Cir. 1999).

165. *Id.*

166. *United States v. Marino*, 277 F.3d 11, 25 (1st Cir. 2002) (alteration in original) (quoting *United States v. Angiulo*, 847 F.2d 956, 969 (1st Cir. 1988), *abrogated on other grounds* by *Powers v. Ohio*, 499 U.S. 400, 415 (1991)).

167. *Id.* at 18.

168. BINDER, *supra* note 90, § 35:12.

Overall, when admitting statements through the coconspirator exception, courts can have different understandings and applications of Rule 801(d)(2)(E). For example, consider the Eighth Circuit's decision in *United States v. Smith*.<sup>169</sup> In *Smith*, four coconspirators (Leonard Smith, Myron Jackson, Russell Spearman, and Faustino Selvera) were involved in a large conspiracy to distribute heroin.<sup>170</sup> Ike Conway was also involved in the conspiracy, but Conway worked as an informant for the government and was the primary witness at trial.<sup>171</sup> In this case, Conway wore a body transmitter to record conversations between alleged conspiracy members, and a wiretap was also installed on Selvera's phone.<sup>172</sup> *Smith* concerned a conspiracy to distribute heroin where the appellants had challenged statements relating to the conspiracy and admitted into evidence via tape recordings.<sup>173</sup>

The trial court admitted many of these tapes, including conversations between Conway and Jackson (referencing prior heroin deals), Conway and Selvera (referencing payments received from Smith), Conway and Smith (where Conway made attempts to set up meetings), Selvera and Smith (after Selvera had been warned by the Drug Enforcement Administration that he was going to be placed under surveillance), and a call from Smith to Selvera (explaining that Smith should not continue business there because he was under surveillance).<sup>174</sup> The Eighth Circuit held that these statements were improperly admitted and those inadmissible statements were tested as to whether their admission reasonably contributed to the conviction.<sup>175</sup>

The Eighth Circuit held that the recorded statements between Conway and Jackson were inadmissible because neither were still members of the conspiracy when the statements were made.<sup>176</sup> This tape only concerned past dealings with Jackson and the remainder of Conway's statements were "largely cumulative" as to the evidence used against them.<sup>177</sup> The court, however, did find reversible error in the statements made between Conway and Smith because those improperly admitted statements could have reasonably contributed to his conviction.<sup>178</sup> Two judges disagreed on how

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169. 578 F.2d 1227 (8th Cir. 1978).

170. *Id.* at 1228.

171. *Id.*

172. *Id.* at 1230.

173. *Id.* at 1228.

174. *Id.* at 1230.

175. *Id.* at 1233.

176. *Id.*

177. *Id.* at 1234.

178. *Id.* at 1234-35.



to apply both 801(d)(2)(E) and the reversible error standard on appeal. Judge Heaney wrote the opinion, and Judge Lay concurred in the judgment but viewed the application in another light.<sup>179</sup> Judge Ross, on the other hand, provided yet another analysis, dissenting in the decision to grant a new trial to one of the defendants.<sup>180</sup>

Like Judge Heaney, Judge Lay agreed that the tapes between Jackson and Conway were inadmissible since they were not members of the conspiracy at the time the statements were made.<sup>181</sup> But Judge Lay agreed with the government “that the Selvera-Conway, Smith-Conway and Smith-Selvera tapes were made during the course of the conspiracy and in furtherance of it.”<sup>182</sup> He remarked on the necessary proof of the continued conspiracy between Selvera and Smith even after Conway’s arrest: “Selvera’s conversations with Smith create a permissible inference that the conspiracy between the two of them remained alive and that further drug distribution would take place when the opportunity presented itself.”<sup>183</sup> Judge Lay went even further in his analysis, stating that “even assuming the conspiracy had terminated, Smith’s statements would still be admissible against him as admissions against his interest. A conspirator’s statement made after a conspiracy has always been held admissible against the declarant as an admission against interest.”<sup>184</sup> Overall, he concluded that even if those taped conversations were admissible, they constituted harmless error as to Smith.<sup>185</sup> Yet another judge, Judge Ross, viewed this differently.

Judge Ross agreed with Judge Lay that a conspiracy existed and continued between Selvera and Smith even after the departure of Spearman and Jackson and after Conway’s arrest.<sup>186</sup> But Judge Ross believed that “the statements made by either Selvera or Smith in the furtherance of the conspiracy were admissible under Rule 801(d)(2)(E) of the Federal Rules of

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179. *Id.* at 1236 (Lay, J., concurring); *see also id.* at 1239 (Ross, J., concurring and dissenting in part) (“I agree with Judge Lay that the conspiracy, at least as between Smith and Selvera, continued after Spearman and Jackson left it and after Conway’s arrest. Therefore, the statements made by either Selvera or Smith in the furtherance of the conspiracy were admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence.”).

180. *Id.* at 1239 (Ross, J., concurring in part and dissenting in part).

181. *Id.* at 1236-37 (Lay, J., concurring).

182. *Id.* at 1237.

183. *Id.*

184. *Id.* at 1238.

185. *Id.*

186. *Id.* at 1239 (Ross, J., concurring in part and dissenting in part).

Evidence.”<sup>187</sup> Judge Ross distinguished the statements, determining the relevancy as to whom each statement was made because “[e]ven though Conway’s tape recorded statements to Smith and Selvera, after the conspiracy terminated as to Conway, were inadmissible, tape recorded statements *by either Smith or Selvera*, to each other or to Conway, were admissible. Both defendants made statements incriminating Smith.”<sup>188</sup>

Although the taped recordings in *Smith* did not involve a tape-recorded prison phone call, the analysis used is similar to what can be used in admitting statements taken from a prison phone call. Judges look at each aspect and can come to different conclusions as illustrated by *Smith*. As Judge Lay mentioned, the concept of the 801(d)(2)(A) party-opponent admission can kick in if the statements are found not to be “in furtherance” of the conspiracy.<sup>189</sup> Therefore, the inmate must be aware of Rule 801(d)(2)(A), because a singular statement or admission of the inmate can be introduced if the statement “was made by the party in an individual or representative capacity.”<sup>190</sup> As noted in Part II, the individual party-opponent admission provides an easier way to admit statements and should thus be ruled out before jumping to coconspirator statements, *unless* the prosecutor is attempting to perform an evidentiary catchall, penalizing both the declarant and the defendant alike for their statements made on the phone call.

#### *IV. Comprehensive Overview for Admitting Prison Phone Calls Through the Coconspirator Hearsay Exception*

To admit prison phone calls under the coconspirator hearsay exception, the preliminary foundational determinations must be established by a preponderance of the evidence at the trial court level.<sup>191</sup> To review, those preliminary questions are (1) that a conspiracy existed, (2) the declarant and the party against whom the statement is offered were members of the conspiracy, (3) the statement was made in the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy.<sup>192</sup> Each of these elements must be introduced prior to admission for each individual statement.<sup>193</sup> The phone call cannot be introduced as a whole.<sup>194</sup>

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187. *Id.*

188. *Id.* at 1240 (emphasis added).

189. *See supra* text accompanying note 184.

190. FED. R. EVID. 801(d)(2)(A).

191. *See supra* text accompanying note 67.

192. *See id.*

193. *See* FED. R. EVID. 801(a) (defining statement in its singular form).

Often the facts introduced to establish each statement can overlap with each of the foundational determinations. The first preliminary question establishes the existence of a conspiracy. For an inmate, the existence of a conspiracy can be challenging to establish because it is often thought that the individual's actions and participation with the conspiracy end once apprehended. As Part III explained, some courts split on this approach. But a simple framework exists that prosecutors should follow to determine the existence of a conspiracy, which can easily be met.

To establish the existence of a conspiracy, the first question is: How large of a conspiracy is alleged?<sup>195</sup> This is an easy place to begin because prosecutors should be able to approximate the size of the conspiracy before trial.<sup>196</sup> If the conspiracy is large, officers or detectives may be working alongside the prosecution team and can provide general estimates of the size of the conspiracy.<sup>197</sup> This can help prosecutors immensely, as they are only required to establish the existence and members of the conspiracy prior to the close of the trial, not at the beginning.<sup>198</sup> Therefore, prosecutors may be able to establish each individual's participation as the evidence comes into play and not worry about this burden up front.<sup>199</sup>

Another important inquiry for prosecutors to consider is: To whom is the statement being offered against? This question is imperative because it requires separate concerns for a statement brought against an incarcerated prisoner as compared to a declarant on the other end of the phone line. As seen in the above examples, if incarcerated Albert calls Brandon, a fellow coconspirator, and tells him he sold drugs to Charlie, the prosecutor would not have to establish the statement as a coconspirator admission and could bring this statement in as an individual party-opponent admission under 801(d)(2)(A).<sup>200</sup> But if the prosecutor determines she wants to use statements made by the declarant on the phone line, she must utilize the

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194. *See id.* In theory, the entire phone call may be introduced if *each* statement meets the necessary requirements, but this is unlikely to be the case.

195. Ideally, prosecutors can anticipate the size of the conspiracy before bringing the suit.

196. Coconspirators should have a rough estimate on the general size of the conspiracy if they are being held accountable for all actions of other coconspirators.

197. *See supra* text accompanying note 23.

198. *See supra* text accompanying note 93.

199. "However, if the evidence is not introduced by the end of the prosecution's case, a mistrial may be required." GIANNELLI, *supra* note 44, § 32.10[D].

200. *See supra* Section II.B.

hearsay exception regarding coconspirator admissions under 801(d)(2)(E).<sup>201</sup>

The next preliminary determination is to establish that the declarant and defendant were members of the conspiracy. This element is similar to establishing the existence of a conspiracy, but the timing of the conspiracy itself carries more importance at this level. The main question to consider in this section is: Did the conspiracy end for the incarcerated defendant? Here, timing is important based on the underlying conspiracy charge.<sup>202</sup> For example, in a conspiracy to commit a murder, the conspiracy likely ended for the incarcerated inmate once apprehended because the inmate will not be able to further the conspiracy while in prison, as concealing the murder will not constitute the main objective of the conspiracy. But compared with a drug conspiracy case, an incarcerated inmate remains able to continue the main objective. In prison, one could socialize with other prisoners and negotiate drug deals with those who may be getting out of jail soon. After making these negotiations, the prisoner could call a coconspirator and inform them to prepare for these new deals. Therefore, the prosecutor should look to the underlying conspiracy charge to assist her determination of whether the declarant and the defendant were members of the conspiracy after the defendant's incarceration.

Prosecutors must be aware that inmates want to establish themselves as outside of the conspiracy once incarcerated. If the prisoner withholds contact from coconspirators who are not incarcerated or if the prisoner was incarcerated on other grounds outside of the conspiracy, he may be able to convince courts that his participation has ended, and the prosecution bears the burden of showing that his acts prove otherwise. Keep in mind that this does not necessarily free the inmate from all liability, as the court retains discretion.<sup>203</sup>

Whether a coconspirator statement is admissible does not turn on whether the statement was made between coconspirators.<sup>204</sup> This situation likely only arises in few circumstances. An example of this would be a prisoner who passes along a statement to his unknowing family member who is not involved in the conspiracy and that family member later

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201. There may be a limited situation where the prosecutor can gain access to the calls for the purpose of catching the declarant on the hook for a party admission, but it has many opportunities to fail because the defendants may challenge the purpose for obtaining the prison records. *See supra* text accompanying notes 22-25.

202. *See supra* text accompanying notes 121, 123-25.

203. *See supra* text accompanying note 52.

204. *See supra* text accompanying note 86.

communicates that statement to someone involved in the conspiracy who recognizes what it means through code or slang. This situation makes it difficult to establish the statement because the prosecutor would need familiarity with all facts of the case, the other members involved in the conspiracy, and typical slang or code words used. Stated another way, Albert tells his mother, Bernice, to speak with Charlie and tell him, “Danny started *drinking milk*<sup>205</sup> again, and I think Charlie and I should too.” This statement could be construed as a coconspirator statement made during and in furtherance of the conspiracy, but if Bernice were to testify regarding this statement at trial, then it would be inadmissible hearsay unless the prosecutor could show that the statement was either an individual party admission and provide additional corroborating evidence to support the significance of the statement, or as a coconspirator admission made by Albert himself.

Another preliminary determination the prosecutor must consider is whether the statement was made during the course of the conspiracy.<sup>206</sup> This determination hinges on the existence of a conspiracy that both the declarant and the defendant were a part of at the time the statement was made.<sup>207</sup> Therefore, this question will only be raised if (1) there was a conspiracy capable of continuing and (2) the conspiracy continued after incarceration. Part III provided examples based on the main objective of the conspiracy. To recap, if the main objective has been completed, the conspiracy cannot continue in prison.<sup>208</sup> Consider another example of this: Albert and Brandon engage in a conspiracy to commit fraudulent stock transfers. Albert was arrested because he violated the Securities Exchange Act through his workplace and called Brandon from the prison to discuss business. During the call, Albert told Brandon to commit a few more fraudulent stock transfers, falling within the scope of during the course of the conspiracy. This example could also be used to satisfy the “in furtherance” requirement of a conspiracy<sup>209</sup> because it involves a statement made to induce further action on the part of the conspirators,<sup>210</sup> thus

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205. Brad Hamilton, *A to Z: Deadly Slang by Gangs of New York*, N.Y. POST (Oct. 28, 2012, 4:00 AM), <http://nypost.com/2012/10/28/a-to-z-deadly-slang-by-gangs-of-new-york/> (defining “drinking milk” as a gang term “for targeting or killing a rival”).

206. *See supra* Section III.C.

207. *See supra* text accompanying note 79.

208. *See supra* text accompanying note 114.

209. *See supra* Section III.D.

210. *See supra* text accompanying notes 159, 161.

illustrating how the same statement might be used to establish different preliminary determinations.

*V. Conclusion*

Prison phone calls offer prosecutors a potential evidentiary cash cow in a criminal trial. If a prosecutor wonders what a defendant may be discussing via prison phone calls, she must subpoena the prison and outline reasonable expectations of what she may find to satisfy the court. She may be able to introduce statements made by an individual party-opponent or she may be able to introduce the statements through the coconspirator admission, so long as she can satisfy the preliminary determinations despite likely objections from defense counsel. Laying out these requirements allows prosecutors to determine precisely how they may benefit from filtering through these valuable calls. More likely than not, prosecutors can use this evidence to strengthen their cases and win big.

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