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NEW YORK'S EXCITED UTTERANCE HEARSAY EXCEPTION: *AVE ATQUE* AND *VALE*?

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I. INTRODUCTION

New York's common law "excited utterance" exception to the rule against hearsay allows into evidence out-of-court statements "about a startling or exciting event . . . provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication."[1] Over the course of one hundred and forty years, the exception has evolved from the concept of *res gestae*, requiring the statement to accompany an act and tend to explain its character and quality,[2] to a statement made after an exciting event and within such time as precludes fabrication.[3] Despite the general prohibition on hearsay,

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[1] N.Y. STATE UNIFIED COURT SYS., GUIDE TO NEW YORK EVIDENCE 8.17 (2020) (hereinafter *Guide*), https://www.nycourts.gov/judges/evidence/8-HEARSAY/8.17_EXCITED%20UTTERANCE.rev.pdf [https://perma.cc/PL22-DFDR].

[2] 2 MCCORMICK ON EVIDENCE § 268 (Robert P. Mosteller ed., 8th ed. 2020) (noting courts in the 1800s used *res gestae* to refer to spontaneous statements that were accompanied by legally relevant acts). *See* People v. Davis, 56 N.Y. 95, 102 (1874) ("when the declarations offered are merely narratives of past occurrences, they are incompetent. That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office, and not any part of what was then done, and therefore no part of the *res gest[a]e*." (citations omitted)).

[3] *See* People v. Del Vermo, 85 N.E. 690, 695 (N.Y. 1908) (spontaneous exclamation exception to rule against hearsay "contemplates and permits proof of declarations by an injured person made after the event, so that it cannot fairly be said that the words spoken really constituted a part of the thing done"); JEROME PRINCE, RICHARDSON ON EVIDENCE § 281 (10th ed. 1973).

the courts, since as early as the 1800s, had begun their recognition that certain exceptions to the ban were warranted when the out-of-court statement contained "sufficient indicia of reliability to deem them worthy of admission into evidence,"[4] and one of these exceptions was the excited utterance exception. The theory was that a statement admitted under the exception was sufficiently reliable to be considered by a jury as the stress of excitement limits the ability of the declarant to utter a conscious and intentional fabrication.[5]

Since the recognition of the excited utterance exception in New York, there have been no widespread or organized claims that unreliable hearsay is being regularly admitted under the exception at trials, leading to wrongful convictions or flawed liability verdicts. Rather, commentators have addressed matters dealing with the judicial interpretation and application of the exception, and potential issues in its use in certain types of cases. As to the former, commentators have noted the exception has been too strictly applied, excluding evidence that by all accounts is reliable,[6] and too liberally applied, leading to likely unreliable evidence being admitted.[7] With respect to the latter, commentators have urged use of the exception, albeit cautiously, in domestic violence cases.[8]

However, in recent years the exception has come under attack by New York judges and commentators. Court of Appeals Associate Judge Jenny Rivera, in a concurring opinion, has argued that the conceptual underpinnings of the exception have been debunked by "[s]cience, fact, and common sense," which requires the exception to

The term "spontaneous exclamation" or spontaneous declaration was the nomenclature utilized by the Court of Appeals until it adopted the term "excited utterance" for the exception in 1979 following the lead of FED. R. EVID. 803(2). *See* People v. Edwards, 392 N.E.2d 1229, 1231 n.1 (N.Y. 1999).

[4] Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 720 (2015); *see* 5A ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 8:28, (2011); FED. R. EVID. 803 advisory committee's note.

[5] BARKER & ALEXANDER, *supra* note 4, § 8:31, at 167 ("The theory is that the stress of excitement caused by such an event will deprive the declarant of the reflective capacity for fabrication.").

[6] *See* Peter W. Thornton, Editorial Notes, *Spontaneous Declarations–New York Rules*, 10 BROOK. L. REV. 280, 287–90 (1940); William Roth, Note, *Evidence: Hearsay: Spontaneous Declarations*, 45 CORNELL L.Q. 810, 817 (1960) ("The spontaneous declaration exception . . . has not been warmly received by the New York courts.").

[7] *See* Steven Zeidman, *Who Needs an Evidence Code?: The New York Court of Appeals' Radical Evaluation of Hearsay*, 21 CARDOZO L. Rev. 211, 213–23 (1999).

[8] See Brooks Holland, Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?, 8 Cardozo Women's L.J. 171, 204–05 (2002) (discussing the pursuit of domestic violence cases without complainants by using excited utterances as a substitute for sworn pleadings in charging instruments and live testimony at trial).

be abolished.[9] This view has been shared by three New York trial judges.[10] In Judge Rivera's opinion, the exception has been used to put forth inherently unreliable evidence[11] leading to wrongful convictions. Notably, Judge Rivera and other judges point to no recent empirical research supporting their contention, much less claims to that effect. Their attack is derived from academic commentary that questions the soundness of the exception's underlying rationale.[12]

This article will address Judge Rivera's criticism and the soundness of the sources she relies upon, and assess the continued recognition of the excited utterance exception in New York. It will do so after a discussion of the emergence of the exception and its underlying rationale; the exception's foundation elements for admissibility and the determination thereof; the genesis of the present criticism; and the legitimacy of that criticism. The article will conclude by showing a case for the exception's abolition, or even modification, has not been made. The rule should remain as interpreted by the Court of Appeals.

II. EMERGENCE OF THE EXCITED UTTERANCE EXCEPTION IN NEW YORK

A. Origin of the Exception

The origin of the excited utterance exception can be traced to an old English rule which permitted a hearsay statement to be admitted into evidence for its truth only if the statement was strictly contemporaneous in time to an event that it explains or characterizes.[13] No inquiry was made as to whether the statement

[9] People v. Cummings, 99 N.E.3d 877, 886 (N.Y. 2018) (Rivera, J., concurring). *See also* People v. Almonte, 130 N.E.3d 873, 885 (N.Y. 2019) (Rivera, J., dissenting).

[10] *See* John J. Ark, Daniel J. Doyle, William K. Taylor and Richard A. Dollinger, *OMG: The Future of the Excited Utterance Doctrine in New York?*, N.Y.L.J. (Dec. 16, 2019).

[11] *Cummings*, 99 N.E.3d at 885–86 (Rivera, J. concurring).

[12] *Id.*; *Almonte*, 130 N.E.3d at 886 (Rivera, J., dissenting).

[13] *See* Thompson v. Trevanion, 90 Eng. Rep. 179 (K.B. 1694); Regina v. Bedingfield, 14 Crim. Cas. 341 (1879). *See also* Edith C. Fisch, NEW YORK EVIDENCE § 1000, at 578 (2d ed. 1977); Gabriel v. Mottla, NEW YORK EVIDENCE PROOF OF CASES § 248 (2d ed. 1966).

carried *indicia* of reliability.[14] This rule was often referred to as the *res gestae* rule.[15]

The early common law cases in New York consistently followed the English rule.[16] In 1884, the Court of Appeals decided *Wadele v. New York Cent. and Hudson Riv. R.R. Co.*[17] *Wadele* involved an action to recover damages for the alleged negligence of defendant railroad causing the death of plaintiff's intestate.[18] He had been found lying near a railroad track shortly after a freight train passed a street crossing on defendant's road, followed by an engine going backward.[19] No one saw the accident.[20] A witness for plaintiff was permitted to testify, over objection, to declarations made by plaintiff's intestate, a deaf-mute, by means of signs about thirty minutes after the accident to the effect that there was a long train, that he waited for it to go by, and was struck by an engine which followed.[21] The Court held that the declarations could not be treated as part of the *res gestae*, noting no authority in New York supported such a position as they "were not made at the same time, or so nearly contemporaneous with [the accident] as to characterize it, or throw any light upon [the accident]."[22] Having so concluded, the Court nonetheless noted criticism of the *res gestae* rule and as well the existence of a line of authority outside New York that admitted statements made shortly after an event, although clearly narrative, if the surrounding circumstances indicated some probability of truth.[23]

It is notable that in *Wadele* the Court discussed at length the decision of the Supreme Judicial Court of Massachusetts in

[14] MICHAEL M. MARTIN ET AL., NEW YORK EVIDENCE HANDBOOK at 729 (2d ed. 2003). *See* James B. Thayer, *Bedingfield's Case – Delcarations as a Part of the Res Gesta*, 15 AM. U.L. REV. 1, 10 (1881) (noting that the English rule was a product of the barbarous treatment of the accused; English judges used the rule to achieve fairness).

[15] *See* William Payson Richardson, THE LAW OF EVIDENCE § 330 (4th ed. 1931) ("The *res gestae* is the transaction or the thing done. Declarations or statements which accompany an act and which tend to elucidate and explain the character and quality of the act are admitted in evidence as part of the *res gestae*.").

[16] *See* Moore v. Meacham, 10 N.Y 207, 210 (1851); Luby v. Hudson River R.R. Co., 17 N.Y. 131, 133 (1858); Hamilton v. New York Cent. R.R. Co., 51 N.Y. 100, 107 (1872); Whitaker v. Eighth Ave. R.R. Co., 51 N.Y. 295, 299–300 (1873).

[17] Wadele v. New York Cent. and Hudson Riv. R.R. Co., 95 N.Y. 274 (1884).

[18] *Id*. at 276–77.

[19] *Id*. at 276.

[20] *Id*.

[21] *Id*. at 277.

[22] *Id*. at 278.

[23] *See Id*. at 278–80 (citing. Rockwell v. Taylor, 41 Conn. 55 (1874); Hanover R. Co. v. Coyle, 55 Pa. 396 (1867); Commonwealth v. Hackett, 84 Mass. 136 (1861).

Commonwealth v. Hackett,[24] and did so favorably.[25] In *Hackett*, the prosecution offered evidence that Hackett stabbed the victim and then immediately ran away.[26] A witness for the prosecution testified that he heard the victim scream "I'm stabbed"[27] and when the witness approached the victim, the victim twenty seconds later said, "I'm stabbed–I'm gone–Dan Hackett has stabbed me."[28] Hackett argued that the statements were "mere narration of a past event," and thus fell outside the *res gestae* rule.[29] In rejecting the argument and holding the testimony was admissible, the Court held:

> If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted. It was not therefore an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement, contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestae*. The true test of the competency of the evidence is not, as was urged by the counsel for the defendant, that it was made after the act was done, and in the absence of the defendant. These are important circumstances, entitled to great weight, and, if they stood alone, quite decisive. But they are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive

[24] Commonwealth v. Hackett, 84 Mass. 136 (1861).
[25] *See Waldele*, 95 N.Y. at 280 (citing *Hackett*, 84 Mass. at 140).
[26] *See Hackett*, 84 Mass. at 136.
[27] *Id.* at 136.
[28] *Id.* at 136–37.
[29] *Id.* at 138–39.

> credit and support as one of the circumstances which accompanied and illustrated the main fact, which was the subject of inquiry before the jury.[30]

Excitement, however, was not mentioned as a factor in determining admissibility.

In *People v. Del Vermo*, the Court of Appeals abandoned its adherence to the res gestae rule, and recognized a separate hearsay exception for "spontaneous exclamations" or declarations, terminology which has given way to "excited utterance."[31] In *Del Vermo*, the defendant was charged with murder in the first degree, committed by stabbing the victim with a knife.[32] A witness testified that he was walking with the defendant and the victim when the defendant started to run.[33] The victim then took four or five steps and fell to the ground.[34] The witness asked him, "What is the matter?" and he answered, "Del Vermo stabbed me with a knife."[35] The Court held the testimony was properly received under the exception to the general rule excluding hearsay evidence, which is treated by Professor Wigmore under the convenient term of "spontaneous exclamation."[36] The Court stated the exception as follows:

> Evidence is admissible of exclamatory statements declaratory of the circumstances of an injury, when uttered by the injured person immediately after the injury, provided that such exclamations be spontaneously expressive of the injured person's observation of the effects of a startling occurrence, and the utterance is made within such limit of time as presumably to preclude fabrication. It will be observed that this exception contemplates and permits proof of declarations by an injured person made after the event, so that it cannot fairly be said that the words spoken really constituted a part of the thing done.[37]

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[30] *Id.* at 139–40.
[31] People v. Del Vermo, 85 N.E. 690, 695 (N.Y. 1908).
[32] *See id.* at 691.
[33] *Id.* at 692.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 695 (citing 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1745 (1904)).
[37] *Id.*

Professor Wigmore was the first to categorize spontaneous declarations as an exception to the hearsay rule independent of the *res gestae* rule.[38] The key to this exception in his view was that "[t]here must be some shock, startling enough to produce [the] nervous excitement and render the utterance spontaneous and unreflecting."[39] The exception, he said, was

> based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him.[40]

It must be noted that this articulated rationale was not supported by any psychological studies. This was apparently of no concern to Wigmore, as he was convinced that his rationale was so compelling and powerful that "it satisfied the two basic criteria he set out for an exception to the hearsay rule: trustworthiness and necessity."[41] In this regard, as the declaration was likely to be "the unreflecting and sincere expression of [the declarant's] actual impressions and belief[s]," it had sufficient trustworthiness to except "it from the ordinary test of cross-examination on the stand"[42] and "[t]he extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it."[43]

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[38] *See* 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1745, 1746 (1904).
[39] *Id*. § 1750(a).
[40] *Id*. § 1747.
[41] Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1218 (2002).
[42] WIGMORE, *supra* note 38, § 1749.
[43] *Id*. § 1748. *See* Freidman & McCormack, *supra* note 41, at 1218.

The Court of Appeals in *Del Vermo* cited with approval Professor Wigmore's recognition of the exception and underlying rationale, observing that while an excited utterance is "pure hearsay," it is admissible "only upon the great improbability that the spontaneous utterance of the instant should be false."[44] The Court took comfort in the fact that courts in other states had recognized this exception.[45] In this connection, Wigmore's analysis had a major influence on American courts in the twentieth century recognizing this exception.[46] Indeed, through the early 1900s, as observed by a commentator, there were numerous cases admitting hearsay based on their spontaneity after an exciting event with commentary "laud[ing] the quality and reliability of such statements."[47]

In short, the Court of Appeals recognized the excited utterance exception based on the belief that an excited utterance hearsay statements are more likely to be truthful and not false because they were made under circumstances that make lying difficult. Nothing in *Del Vermo* states or even suggests that such a statement is admissible because it is inherently reliable.

*B. Development and Application of the Exception Post-*Del Vermo

The excited utterance exception is now well established in New York law, and considered to be "[o]ne of the better-known exceptions to the injunction against the reception of hearsay testimony . . . ."[48] Post-*Del Vermo* decisions of the Court of Appeals have continued the exception substantively unchanged to present day.[49] As currently defined by the Court, "[s]tatements within this exception are generally made contemporaneously or immediately after a startling event which affected or was observed by the declarant, and relate to

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[44] *See* People v. Del Vermo, 85 N.E. 690, 696 (N.Y. 1908).

[45] *See id*. at 695-696 (first citing Waldele v. N.Y. Cent. & Hudson River R.R. Co., 95 N.Y. 274, 279–80 (1884); and then citing State v. Morrison, 58 P. 48, 51 (Kan. 1902); and then citing Commonwealth v. Werntz, 29 A. 272, 273 (Pa. 1894); and then citing Travelers' Ins. Co. v. Sheppard, 12 S.E. 18, 26 (Ga. 1890)). The Court even stated that it had endorsed the exception in *Waldele*. *Id*. at 695.

[46] Friedman & McCormack, *supra* note 41, at 1220; *see* Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 238 (1922).

[47] Williams, *supra* note 4, at 727.

[48] People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979).

[49] *See Guide to New York Evidence: Article 8: Hearsay*, NY CTS., https://www.nycourts.gov/judges/evidence/8-HEARSAY/ARTICLE-8-RULES.pdf [https://perma.cc/9SF7-6DYY].

the event."[50] The Court has also continued to assert Wigmore's trustworthiness rationale for the exception's underpinning.[51]

Certainly, the contents of a statement fitting comfortably within the exception by proof of the exception's foundation elements could be a fabrication of the speaker, or the speaker could be mistaken, just as with other statements admitted under a hearsay exception. Notably, the Court of Appeals decisions have shown awareness of this possibility with the excited utterance exception, and the Court has addressed it.[52] Thus, the Court in its excited utterance decisions has been consistent in its admonition to the trial courts to scrutinize the foundation proof for these elements for an out-of-court statement proffered for admission under the exception, lest a jury relies on a fabricated or mistaken statement. They reflect, in other words, "an attitude that borders on a cautious, if not strict, use of the exception,"[53] an attitude consistent with the Court's treatment of other hearsay exceptions,[54] to minimize the admissibility of

[50] People v. Nieves, 492 N.E.2d 109, 115 (N.Y. 1986) (citing People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979)); *see also* People v. Johnson, 804 N.E.2d 402, 405 (N.Y. 2003) ("An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication."). Commentators discern four requirements for admissibility from these observations: the occurrence of an event sufficiently exciting to produce a spontaneous and unreflective statement; the statement was made while under the influence of the exciting event; the statement is about the exciting event; and the declarant personally observed the exciting event or was a participant in it. *See* BARKER & ALEXANDER, *supra* note 4, § 8:31, at 167–68; MARTIN ET AL., *supra* note 14, § 8.3.3.2, at 732, 736.

[51] *See Cummings*, 99 N.E.3d at 881 ("[E]xcited utterances may be admissible because, 'as the impulsive and unreflecting responses of the declarant to the injury or other startling event, they possess a high degree of trustworthiness.'" (quoting People v. Caviness, 342 N.E.2d 496, 499 (N.Y. 1975))); *Nieves*, 492 N.E.2d at 135 ("An utterance made 'as a direct result of sensory perception during that brief period when considerations of self-interest cannot be immediately brought to bear' is deemed sufficiently trustworthy to be admitted into evidence as an expression of the true belief of the declarant with respect to the facts observed." (quoting People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979))); *Edwards*, 392 N.E.2d at 1231 ("Underlying this exception is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication and, accordingly, any utterance he makes will be spontaneous and trustworthy."); People v. Marks, 160 N.E.2d 26, 28 (N.Y. 1959) ("The basis of this exception to the hearsay rule is that the spontaneity of declarations of this kind gives more assurance of veracity than is true of the usual hearsay declaration.").

[52] *See supra* notes 50–51 and accompanying text.

[53] Michael J. Hutter, *Excited Utterances and Present Sense Impressions: Time to Reevaluate?*, N.Y.L.J., Aug. 7, 2014, at 3.

[54] *See* People v. Brown, 610 N.E.2d 369, 374 (N.Y. 1993) ("The admission of a hearsay statement under any exception deprives the defendant of the right to test the accuracy and trustworthiness of the [complainant's] statement by cross-examination. The defendant's only protection against the admission of fabricated testimony or unfounded rumor is that there be sufficient safeguards to assure the statement's reliability."). *But see* Zeidman, *supra* note 7, at 211–12. ("[T]he New York Court of Appeals in the past decade has dramatically reshaped the

statements that are untrustworthy or unreliable. The attitude is evident in the Court's directive to the trial courts that they are to maintain a gatekeeper function of ensuring that there is sufficient proof of the exception's foundation elements, and not to simply allow a jury to assess the statements' reliability; and in making that determination focus, in essence, as to whether the statement is in fact untrustworthy.[55]

The question whether a statement qualifies as an excited utterance is determined by the trial court and is subject to its sound discretion.[56] This practice is consistent with New York's well-established rule that it is for the trial court, and not the jury, to decide questions of fact preliminary to determining the admissibility of evidence.[57] The trial court will thus decide if there is sufficient foundation proof of each element of the excited utterance exception to warrant submitting it to the jury for consideration. If insufficient proof of even one of the elements is present, the statement must be excluded.[58] The jury will not be informed of the trial court's factual or foundation proof in admitting or denying the statement into evidence.[59] When the statement is admitted, the jury will then, as with admitted evidence, decide whether to accept it in whole or in part or reject it. As has been noted elsewhere, the jury "thus sort[s] out what aspects of a spontaneous utterance deserve credence and weight, and what aspects do not deserve credence or weight."[60]

As to the judicial determination to be made, the Court of Appeals has stressed that it is a fact-dependent inquiry which permits the trial court in assessing the proffered proof on the exception's foundation elements to exclude the offered statement if it concludes upon that proof the statement is untrustworthy.[61] The guiding principle is distinguishing between statements that are reflective, which will not be deemed trustworthy, and reflexive, which can be deemed trustworthy.[62] In this connection, the Court of Appeals has

admissibility landscape through common law development, leading to an unprecedented increase in the admission of out-of-court statements.").

[55] BARKER & ALEXANDER, *supra* note 4, § 8:31, at 167–68, 170; MARTIN ET AL., *supra* note 14, § 8.33, at 732–733.

[56] *See Marks*, 160 N.E.2d at 31.

[57] *See* People v. Feldman, 85 N.E.2d 913, 921 (N.Y. 1949) (citing People v. Nitzberg, 38 N.E.2d 490, 492–93 (N.Y. 1941); Kearney v. New York, 92 N.Y. 617, 620 (N.Y. 1883)).

[58] *See Marks*, 160 N.E.2d at 31.

[59] GUIDE Rule 1.11.

[60] Commonweath v. Moquette, 791 N.E. 294, 301 (Mass. 2003).

[61] *See* People v. Vasquez, 670 N.E.2d at 1337; People v. Nieves, 492 N.E.2d at 115 (citing *Edwards*, 392 N.E.2d at 1231); *Edwards*, 392 N.E.2d at 1231.

[62] *Fratello*, 706 N.E.2d at 1175 (citing *Caviness*, 342 N.E.2d at 699); *Caviness*, 342 N.E.2d at 699 (citing *Marks*, 160 N.E.2d at 27–28).

identified several factors that are relevant in making the distinction. They include: the length of time that has elapsed between the exciting event and the utterance; the nature of the startling event; the physical condition of the declarant and claimed trauma; and the presence of questioning preceding the utterance.[63] These factors offer the trial courts considerable flexibility in determining whether a declaration, which appears intuitively to be an excited utterance, is in fact reflective and not reflexive. There is no reason to believe trial courts are not up to this task.[64]

This attitude was shown in the Court's discussion and application of the excited utterance exception in *People v. Cummings*.[65] In *Cummings*, defendant was charged with attempted murder, assault and criminal possession of a weapon.[66] The trial evidence showed that on a March afternoon around 2:28 p.m. a man wearing a hoodie and jeans, and with his face obscured, got out of a minivan and shot three men who were talking together on a street corner in Manhattan.[67] One of the shooting victims called 911 sometime between 2:29 p.m. and 2:32 p.m. seeking help.[68] In the background, an unidentified voice was also heard saying, "Yo, it was Twanek, man! It was Twanek, man!"[69] A woman in the assembled crowd provided the police who responded to the 911 call with a partial license plate number for the minivan.[70] "An officer spotted and stopped a minivan matching the description and partial license plate a short distance from the crime scene."[71] The driver and passenger exited the minivan, and the driver was arrested but the passenger slipped away.[72] Subsequent investigation resulted in the arrest of the passenger, who was identified as Twanek Cummings.[73] His fingerprint was found on the passenger door of the minivan and cell site data was consistent with his presence in the area at the time of the shooting.[74] However, the shooting victims failed to identify the

[63] MARTIN ET AL., *supra* note 14, at 733–35 (discussing factors); MELISSA L. BREGER ET AL., NEW YORK LAW OF DOMESTIC VIOLENCE § 2.121 (3d ed. 2020) (same).
[64] *See* Arthur M. Diamond, *Don't Mess with Present Sense Impression!*, 64 NASSAU LAW. 2, 23 (Oct. 2014).
[65] *See* People v. Cummings, 99 N.E.3d 877, 879 (N.Y. 2018).
[66] *See id.* at 880.
[67] *See id.* at 879.
[68] *Id.*
[69] *Id.* Defendant's first name is Twanek. *Id.* The 911 tape clearly reflected that the unidentified person made these statements excitedly. *See Cummings*, 99 N.E.3d at 882.
[70] *Id.* at 879.
[71] *Id.*
[72] *Id.* at 879–80.
[73] People v. Cummings, 99 N.E.3d 877, 879–80 (2018).
[74] *Id.* at 880.

defendant in a line-up.[75] At the trial, the People offered into evidence the 911 tapes as an excited utterance, but the trial court refused to admit it.[76] The trial ended in a mistrial after the jury deadlocked.[77]

At the retrial before a different judge, the People renewed their application for admission of the unidentified voice statement, but it was denied.[78] After all but the alternate jurors were selected, the judge took ill, and was replaced by another judge.[79] The People once again renewed their application to admit the statement and this time were successful.[80] The new judge allowed admission of the statement as an excited utterance.[81] Defendant was then convicted of assault and criminal possession of a weapon, but acquitted of the murder charge.[82] The Appellate Division First Department affirmed the conviction, concluding, among other things, that the admission of the statement was a proper exercise of the trial court's discretion.[83]

The Court of Appeals reversed, concluding that reversible error was present because of the admission of the statement.[84] The statement was erroneously admitted as an excited utterance because the People failed to establish that the unidentified person personally observed the shooting, an essential foundation element for the exception to apply.[85] The Court made two points about the proof of this element. First, this element was not to be taken lightly since "[d]irect observation by the person making the excited utterances ensures that the declarant is in fact reacting to and 'assert[ing] the circumstances of' the event causing the excitement."[86] Second, the Court stated that while this element can be established by circumstantial evidence, such evidence must be carefully scrutinized to ensure that it provides a basis "from which a reasonable inference can be drawn that the declarant personally observed the incident."[87] This point was clearly evidenced by the court's rejection that the

[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *See* People v. Cummings, 43 N.Y.S.3d 293, 294–95 (N.Y. App. Div. 2016).
[84] *Cummings*, 99 N.E.3d at 883–84. The Court also held that the trial court at the retrial was not bound by the law of the case doctrine to follow the prior rulings excluding the statement. *Id.* at 880–81.
[85] *Id.* at 882–83 (observing there was "no basis from which personal knowledge can be reasonably inferred.").
[86] *Id.* at 882 (citing People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979)).
[87] *Cummings*, 99 N.E.3d at 882–83.

speaker must have personally believed the shooting because the fingerprint evidence corroborated the speaker's identification of the person to be Twanek.[88] The former was rejected because it did not at all "help us" to determine whether the declarants personally observed the shooting,[89] and the latter was rejected because there was, as the trial judge who took ill concluded, "no way to know whether the declarant observed the incident firsthand or whether someone else requested the facts to him and he was just parroting what he was told."[90]

In sum, the Court of Appeals has instructed the trial courts that they are not to give a free pass to statements proffered for admission under the exception, and admit it "for what it's worth."[91] Such an approach would, of course, lead to the likely probability that a jury could credit a statement that is by all accounts untrustworthy, leading to an unjust or irrational verdict. Instead, trial judges are instructed to consider closely a statement proffered under the exception and preclude admission when the foundation elements are not sufficiently established, a failure of proof which indicates the untrustworthiness of the statement. The risk of untrustworthy statements being admitted under the exception is certainly minimized.

*C. Development and Acceptance Post-*Del Vermo *of the Excited Utterance Exception In Other Jurisdictions*

Post-*Del Vermo*, the federal courts and state courts generally accepted the excited utterance exception as articulated in *Del Vermo* and championed by Wigmore. As the commentators have noted, the exception was "time-honored"[92] and "well established" in the case law.[93] Commentary as well reaffirmed Wigmore's rationale for the exception.[94] The exception appeared "for the most part, to have

[88] *Id.* at 883.

[89] *Id.*

[90] *Id.* (citing Miller v. Keating, 754 F.2d 507, 511 (3d Cir. 1985)).

[91] *See generally*, Timothy M. Tippins & Jeffrey P. Wittmann, *A Third Call: Restoring the Noble Empirical Principles of Two Professions*, 43 FAM. CT. REV. 270, 278 (2005).

[92] GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY, AND AUTHORITY § 803.7 at 486 (6th ed. 2011).

[93] JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE, § 272, at 476. (4th ed. 1992).

[94] *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 8:68 at 585–586 (4th ed. 2013) (noting that "[i]n short, risks of insincerity and memory lapse are removed"); WEISSENBERGER & DUANE, *supra* note 92, at § 803.7, at 485 ("Statements made in reaction to a startling stimulus are considered more trustworthy than hearsay generally on the dual grounds that, first, the stimulus renders the declarant incapable of fabrication and,

functioned as designed: admitting certain hearsay statements containing at least some indicia of reliability that might assist jurors in appropriately deciding a case."[95]

The current excited utterance exception as codified in the Federal Rules of Evidence provides that the hearsay rule does not exclude "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[96] The evidence codifications of forty-three states track the FRE 803(2) verbatim or nearly so,[97] and the remaining states follow FRE 803(2) as part of their common law.[98] The Federal Rules Advisory Committee proposed the exception on the theory that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[99] Thus, spontaneity was the cornerstone of the excited utterance's perceived trustworthiness.[100]

The Supreme Court in 1992 finally endorsed the excited utterance exception in *White v. Illinois*.[101] Writing for the majority, Chief Justice Rehnquist observed that the exception was over 200 years old, and was recognized in the Federal Rules of Evidence, and in nearly all of the states.[102] This recognition was premised on the belief that an excited utterance was "so trustworthy that adversarial testing can be expected to add little to its reliability."[103] As a final observation, Chief Justice Rehnquist emphasized that the essence of the exception was that the declarant had not had "the opportunity to reflect on the consequences of [his/her] exclamation."[104]

As can readily be seen, *Del Vermo* was not an outlier in the United States. Rather, *Del Vermo* was in the mainstream of evidence law in the United States.

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second, the impression on the declarant's memory at the time of the statement is still fresh and intense.").

[95] Williams, *supra* note 4, at 728.

[96] FED R. EVID. 803(2).

[97] CLIFFORD S. FISHMAN & ANNE T. MCKENNA, 4 JONES ON EVIDENCE § 28.10 (7th ed).

[98] *See id.* at § 28.11.

[99] FED. R. EVID. 803(2) Advisory Committee Note.

[100] *Id*. ("Spontaneity is the key factor . . . .").

[101] White v. Illinois, 502 U.S. 346, 355 (1992). In *Idaho v. Wright*, the Supreme Court had indicated in dicta evidence would be admissible as against a Confrontation Clause challenge because "[t]he basis for the 'excited utterance' exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation." 497 U.S. 805, 820 (1990).

[102] *White*, 502 U.S. at 355 n.8.

[103] *Id*. at 357.

[104] *Id*. at 356.

D. Overarching Presence of Crawford

The Sixth Amendment of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the [a]ssistance of [c]ounsel for his defense."[105] These three clauses protect an accused's right to defend against criminal charges. The first clause of the Confrontation Clause bears directly on the prosecution's use of hearsay against the accused. In *Crawford v. Washington*,[106] the Supreme Court held that a declarant who makes a testimonial hearsay statement is a witness against the defendant and that statement cannot be introduced for its truth unless the witness is unavailable and the defendant had prior opportunity to examine the witness.[107] A list of statements that are clearly testimonial includes affidavits; *ex parte* in-court testimony; uncrossed depositions and other prior sworn testimony that defendant was unable to cross-examine; formal stationhouse statements or custodial examinations; statements made at the scene of the crime after the emergency has passed; and reports indicating the illegal nature of a substance or other conclusion against the defendant.[108]

On the other side of the coin, courts have identified statements that are clearly "non-testimonial." They include: statements made during an emergency to secure assistance; casual remarks made to friends; statements of co-conspirators in furtherance of a conspiracy; medical reports prepared for treatment purposes; regularly kept business records; a clerk's certification that a copy is a true and complete copy of an original or file in the clerk's office; and documents prepared in the regular course of maintaining and calibrating laboratory equipment.[109]

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[105] U.S. CONST. amend. VI.

[106] Crawford v. Washington, 541 U.S. 36 (2004).

[107] *See id.* at 59. A full discussion of Crawford is beyond the scope of this article. For in depth analysis of Crawford, *see* MUELLER & KIRKPATRICK, *supra* note 94, at §§ 8:29-8:36. This article will highlight a few aspects of Crawford as they pertain to the admission of excited utterances.

[108] *See* ROGER C. PARK, ET AL., EVIDENCE LAW § 11.07, at 573-74 (Thompson West eds. 2d ed. 2004). *See also Testimonial Hearsay*, JUD. EDUC. CTR., UNIV. OF N.M., http://jec.unm.edu/education/online-training/stalking-tutorial/testimonial-hearsay [https://perma.cc/HHL9-BN9L].

[109] *Id.* at § 11:07, at 573-74. *See Testimonial Hearsay*, *supra* note 108.

In other situations, not falling within these two categories, it is necessary to apply the primary purpose test.[110] The New York courts have identified two factors that are "especially important" in determining whether a statement is testimonial under this primary purpose test: "first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing."[111]

What does all of this mean to the admissibility of a statement which fits a statement sought to be admitted as an excited utterance? The first takeaway is that the New York courts have recognized that the status of out-of-court statements as an excited utterance does not preclude a finding that the statement is testimonial. As observed by a leading commentator, a sensible view recognizes that just because a declarant is excited does not mean that the statement was not testimonial in nature.[112] Second, whether the excited utterance is testimonial will depend on a consideration of the primary purpose factors, and not a mere characterization of the statement.[113] A third takeaway is that when the statements are made after police inquiry, this is a critical factor.[114] Suffice it to say this will involve a factual hearing.[115] Lastly, it provides a defendant in a criminal action a second opportunity to keep out evidence a trial court has admitted under the exception upon questionable foundation proof by now arguing the statement is testimonial, and thus barred by *Crawford*.

III. EMERGENCE OF CRITICISM OF THE EXCITED UTTERANCE EXCEPTION AND CALLS FOR ITS ABOLITION

*A. Pre-*United States v. Boyce

The general acceptance of the excited utterance exception and Wigmore's rationale supporting it did not mean the exception was immune from criticism. To the contrary, contemporary commentary

[110] People v. John, 52 N.E.3d 1114, 1122 (2016) (quoting People v. Pealer, 985 N.E.2d 903, 906 (2013).

[111] People v. Rawlins, 884 N.E.2d 1019, 1033 (2008), *cert. den. sub nom* Meekins v. New York, 557 U.S. 934 (2009). *See also* Geier v. California, 557 U.S. 934 (2009).

[112] Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK L. REV. 241, 270-71 (2005).

[113] People v. Nieves-Andino, 815 N.Y.S.2d 577, 578 (N.Y. App. Div. 2006) (whether the excited utterance is testimonial will "depend[] upon the circumstances"), *aff'd,* 872 N.E.2d 1188, 1190-93 (N.Y. 2007). *See also Guide to New York Evidence: Article 8: Hearsay*, *supra* note 49.

[114] People v. Diaz, 798 N.YS.2d 21, 27 (App. Div. 2005), *appeal dismissed,* 857 N.E.2d 47 (2006).

[115] *Compare* People v. Bradley, 862 N.E.2d 79, 81 (2006) (excited utterance made to police not testimonial) *with* People v. Allen, 98 N.Y.S.2d 820, 826 (Sup. Ct. 2019) (excited utterance made to police testimonial).

questioned the wisdom of the exception. The initial criticism was put forth in 1928 in an oft-cited law review article authored by Professor Robert M. Hutchins and Donald Slesinger, "Some Observations on the Law of Evidence."[116] In this article, the authors raised practical and psychological concerns about the judicial recognition of the excited utterance exception.[117] In their view, "[w]hat the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation."[118] Nonetheless, in their opinion excited utterances were, as a general proposition, admissible when relevant.[119]

Professor Edmund M. Morgan entered the fray with his explicit disapproval of the excited utterance exception as created by the addition of a startling event for the *res gestae*.[120] In his view, the requirement "seems a decided mistake, for it insists upon an element which has a positive tendency to produce inaccurate observation—and inaccuracy of observation is one of the greatest obstacles to the discovery of facts in litigation."[121]

Subsequently published psychological evidence raised questions concerning the reliability of excited utterances.[122] This evidence tended to show that "[w]hile psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the [excited utterance] declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgment."[123]

Academic scholarship weighed in on the excited utterance relying upon the aforementioned psychological evidence. For the most part, it was critical of the exception and called for its abolition, or, at the

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[116] Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 25 COLUM. L. REV. 432 (1928).

[117] *See id.* at 435, 437.

[118] *Id.* at 439.

[119] *Id.* at 440.

[120] *See* Edmund M. Morgan, *Res Gestae*, 12 WASH. L. REV. & ST. B. J. 91, 94–95 (1937).

[121] *Id.* at 98.

[122] *See* Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 178–83 (1997) (discussing the positions of psychologists); Stanley A. Goldman, *Distorted Vision: Spontaneous Exclamations as a 'Firmly Rooted' Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453, 459 (1990) ("After considerable study, authorities in the field have found that the accuracy of an individual's perception of an event may vary widely as a result of an infinite number of potential variables."); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L. J. 305, 315, 315 n.52 (discussing the questionable psychology underlying the exception).

[123] MCCORMICK, *supra* note 93, § 272.

very least, substantial modification.[124] The criticism is best summed up by a question posed by one commentator: "Would you entrust your life to the judgment or perception of a person who is acting under extreme stress or trauma?" and the commentator's response is "No."[125] Thus, the exception should be abolished.

On this judicial front, there was little discussion of the ongoing academic criticism of the excited utterance exception. However, it was noted. Thus, in *Odemns v. United States*,[126] the District of Columbia Court of Appeals observed:

> The entire basis for the [excited utterance] exception is, of course, subject to question. While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant's statement, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgment.[127]

However, as the exception became part of the "warp and woof" of evidence law, the Court did not challenge it.[128]

In *Lust v. Sealy, Inc.*,[129] the Seventh Circuit, in an opinion authored by Judge Richard A. Posner, noted that evidence offered at trial might have been admissible under one of the spontaneity exceptions found in "Federal Rules of Evidence 803(1)-(3)."[130] He opined in a brief but significant passage of dicta:

> As with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are

[124] *See* Angela Conti & Brian Gitnik, *Federal Rule of Evidence 803(2): Problems with the Excited Utterance Exception to the Rule on Hearsay*, 14 ST. JOHN'S J. LEGAL COMMENT. 227, 244 (1999) ("The Excited Utterance Exception to Hearsay Does Not Have A Proper Basis In The Law"); James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 246 (1995) ("Modern scholars have almost universally attacked . . . [the underlying rationale] and the continued admission of res gestae hearsay casts doubt on judgments which appear to rely heavily on such statements."); I. Daniel Stewart, Jr., *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Rules of Evidence*, 1970 UTAH L. REV. 1, 28 (1970) ("The most unreliable type of evidence admitted under hearsay exceptions is the excited utterance.").

[125] Moorehead, *supra* note 124, at 203.

[126] Odemns v. United States, 901 A.2d 770 (D.C. 2006).

[127] *Id.* at 778 n.7 (quoting 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 272, at 205 (5th ed. 1999)).

[128] *Odemns*, 901 A.2d at 778.

[129] Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004).

[130] *Id.* at 588.

> entirely capable of spontaneous lies in emotional circumstances. "Old and new studies agree that less than one second is required to fabricate a lie." It is time the law began paying attention to such studies. But that is story for another day . . . .[131]

That time came ten years later in *United States v. Boyce*.[132]

B. United States v. Boyce

1. Facts

The defendant in *Boyce* was charged with being a felon in possession of a firearm and ammunition.[133] The conviction arose from the following incident:

> [The declarant] called 911 . . . asking that police come to her residence because her child's father [the defendant] had just hit her and was "going crazy for no reason." The 911 operator asked, "Any weapons involved?" to which [the declarant] responded, "Yes." The operator asked what kind, and [the declarant] said, "A gun." The operator said, "He has a gun?", then "Hello?", and [the declarant] responded, "I, I think so. 'Cause he just, he just." After the operator said, "Come on," [the declarant] responded, "Yes!" twice. The operator again inquired, "Did you see one?" and [the declarant] replied, "Yes!" The operator then cautioned [the declarant] that if she wasn't telling the truth, she could be taken to jail. [The declarant] responded, "I'm positive." After giving a description of what [the defendant] was wearing, the operator asked where he was at the moment. [The declarant] responded that she "just ran upstairs to [her] neighbor's house" and didn't know whether [the defendant] had left her house yet.[134]

At defendant's trial, the recording of the 911 call was admitted over defendant's objection on the ground it was admissible as a present sense impression under Federal Rule of Evidence 803(1) and an

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131 *Id.* at 588 (citation omitted).
132 United States v. Boyce, 742 F.3d 792 (7th Cir. 2014).
133 *Id.* at 794.
134 *Id.* at 793.

excited utterance under Federal Rule of Evidence 803(2).[135] The 911 call was relied upon by the prosecution to prove that defendant had a gun.[136] The jury found defendant guilty on both counts as charged.[137]

On appeal, the Seventh Circuit affirmed both the trial court's evidentiary ruling and defendant's conviction.[138] Judge A. Williams authored the opinion for the Court,[139] and Judge Posner concurred with Judge Williams in upholding the district court's application of Federal Rules of Evidence 803(1) and 803(2) to the 911 recording, but concurred solely to reiterate his concerns about the rules as expressed in *Sealy*.[140]

2. Opinions

a. Lead Opinion

Judge Williams initially found it unnecessary to determine whether the 911 call recording was admissible as a present sense impression as she concluded that the district court did not abuse its discretion in admitting the call as an excited utterance.[141] Citing to Seventh Circuit precedent, she noted that for the excited utterance exception to apply, "the proponent must demonstrate that: '(1) a startling event occurred; (2) the declarant makes the statement under the stress of the excitement caused by the startling event; and (3) the declarant's statement relates to the startling event.'"[142] These foundation elements were sufficiently established:

> Here, the startling event of a domestic battery occurred. [The declarant] called 911 and reported that [the defendant] had just hit her and was "going crazy for no reason" and that he had a gun. Next, [the declarant] made her 911 call while under the stress of the excitement caused by the domestic battery. She made the call right after the battery, telling the operator that she had "just" run upstairs to her neighbor's house. [The officer's] testimony that [the declarant] appeared

[135] *See id.* at 796.
[136] *See id.* at 794.
[137] *Id.*
[138] *Id.* at 793.
[139] *Id.*
[140] *Id.* at 799–801 (Posner, J., concurring).
[141] *Id.* at 798 (majority opinion).
[142] *Id.* (quoting United States v. Joy, 192 F.3d 761, 766 (7th Cir. 1999)).

> emotional, as though she had just been in an argument or fight, further supports the district court's conclusion that [the declarant] made the call while under the stress or excitement of the startling event. . . . [The declarant] provided the dispatcher with information about her assailant and the danger she experienced just minutes before the call. This description of the threat posed by the man who battered her relates to the incident which produced her agitated state.[143]

This conclusion is as unremarkable as it sounds, and if this were the end of the Court's pronouncements on the exception, the decision would be just another *sui generis* application of the excited utterance exception. However, Judge Williams also expressed doubts about the underlying rationale for the excited utterance exception as well as the present sense impression.[144] Initially, as to the excited utterance exception, Judge Williams expressed skepticism about the traditional justification for the exception, citing to Judge Posner's prior decision in *Sealy*.[145] She noted that "psychologists . . . have questioned whether" the declarant's supposed sincerity "might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgment."[146] Nevertheless, Judge Williams conceded that the exception is "well-established" and as defendant did not ask the Court to find the exception "utterly invalid," she made no assessment as to the continuing validity of the exception.[147]

b. Judge Posner's Conclusion, Opinion

Judge Posner took the occasion to "express concern with Federal Rules of Evidence 803(1) and [803](2) . . . . That concern is expressed in a paragraph of the majority opinion; I seek merely to amplify it."[148]

Initially, Judge Posner addressed the present sense impression exception, declaring "[i]t is time the law awakened from its dogmatic slumber" and rejected the exception as "it has neither a theoretical nor an empirical basis; and it's not even common sense—it's not even good folk psychology."[149] He then turned his attention to the excited

[143] *Boyce*, 742 F.3d at 798.
[144] *Id.* at 796.
[145] *Id.*
[146] *Id.* (internal quotation marks omitted) (quoting KENNETH S. BROWN, ET AL., 2 MCCORMICK ON EVIDENCE § 272 (7th ed. 2013)).
[147] *Id.* at 796–97.
[148] *Id.* at 799–800 (Posner, J., concurring).
[149] *Id.* at 801.

utterance exception, contending that the Advisory Committee Note for Federal Rule of Evidence 802(3) provided no "convincing justification" for its recognition.[150] In this connection, he asked, "even if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable?"[151] He answered his question by quoting Professor Hutchins and Slesinger's 1928 article: "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation."[152] In sum, the exception "rests on no firmer ground than judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas."[153]

After noting his lack of confidence that "unreflective utterance[s], provoked by excitement, [are] reliable," Judge Posner concluded his concurring opinion by setting forth a proposal which would dramatically change the way hearsay would be treated in the federal courts.[154] His proposal is that "Rule 807 ('Residual Exception') [should] shallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee."[155] Federal Rule of Evidence, as amended in 2019, provides in pertinent part that a hearsay statement may be admissible if:

> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.[156]

In essence, Judge Posner noted the trial court, upon a hearsay objection, would apply a general reliability approach based upon the

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[150] *Id.*
[151] *Id.*
[152] United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (quoting Hutchins & Slesinger, *supra* note 116, at 437).
[153] *Id.* at 802.
[154] *Id.*
[155] *Id.*
[156] FED. R. EVID. 807(a). The amendment did not change the substance of the Rule as cited to by Judge Posner. *See Boyce*, 742 F.3d at 802.

circumstances surrounding the making of the statement to determine admissibility.

Suffice it to say, Judge Posner's harsh criticism of the excited utterance exception triggered renewed examination of the exception as well as his residual exception proposal. A review of these responses shows a mixed reaction.

IV. RESPONSES TO JUDGE POSNER'S CRITICISM AND PROPOSAL

In October 2016, the Advisory Committee on Rules of Evidence declined to adopt Judge Posner's residual hearsay exception proposal, describing it as an "all-out discretion fest."[157] Specifically, the Committee stated:

> One can hope that there is a sweet spot somewhere between outright rejection of a residual exception—which could result either in the loss of a good deal of reliable evidence or an unwelcome expansion and misshaping of the standard exceptions—and an all-out discretion fest as championed by Judge Posner.[158]

At this meeting, the Committee referenced the minutes of its Spring 2016 Meeting, which indicated that at a Hearsay Symposium held in October 2015 at the John Marshall Law School the "Committee heard repeatedly from lawyers that they wanted predictable hearsay exceptions—judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases."[159]

The Advisory Committee at its 2014 Spring Meeting had previously considered Judge Posner's suggestion that the exception be abolished

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[157] *See Minutes of the Oct. 21, 2016 Judicial Conference Advisory Committee on the Rules of Evidence*, U.S. CTS. at 118, https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf [https://perma.cc/LR5N-DNKM].

[158] *Id*. The Committee was committed "to find that sweet spot." *Id*.

[159] *Id*. at 110–11. A transcript of the panel discussion at the Symposium is available at Symposium, *The Philip D. Reed Lecture Series*, *Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323 (2016).

but rejected it.[160] The basis for its rejection was that the case for its abolition had not been made.[161]

On top of all this, a prominent evidence scholar, Ronald J. Allen, endorsed the Advisory Committee's criticism of Judge Posner's and added his own, describing his proposals as "preposterous."[162] Professor Allen considered Judge Posner's residual exception proposal to be flawed as there is "no data that indicates that trial judges can do a better job of picking and choosing what hearsay is reliable than its rules presently do, and in any event the rules give them the power to adjust things at the margins."[163] Professor Allen specifically criticized Judge Posner's call for abolition of the excited utterance exception as unsupportable based as it is upon his reliance on "folk psychology of 100 years ago" without reference to any supporting modern imperial study.[164] In conclusion, he agreed that the law should be "awakened from its dogmatic slumber" but that the slumber that it should awake from is something else:

> [T]he slumber that it should awake from is represented by, and what the committee should look at, is not either the accuracy of 100 year old speculation about folk psychology or the irrelevant empiricism cited by Judge Posner but the consistent line of work showing that jurors, not actually being as dumb as they are treated by courts, pretty effectively manage hearsay.[165]

After receiving this criticism, Judge Posner authored a law review article and "appeared to be more restrained."[166] He stated that he is "not yet ready to endorse the abolition of the hearsay rule."[167] While Judge Posner backed away from his proposal that the entire hearsay rule should be abolished, he nonetheless still argued that the excited utterance and present sense impressions exceptions should be abolished.[168]

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[160] *See Minutes of the April 4, 2014 Judicial Conference Advisory Committee on the Rules of Evidence*, U.S. CTS. at 5–6, https://www.uscourts.gov/sites/default/files/fr_import/2014-04-Evidence-Minutes.pdf [https://perma.cc/8GB5-2ALE].

[161] *See id*.

[162] Ronald J. Allen, *The Hearsay Rule as A Rule of Admission Revisited*, 84 FORDHAM L. REV. 1395, 1396 (2016).

[163] *Id*. at 1401.

[164] *See id*. at 1403–04.

[165] *Id*. at 1404–05.

[166] Gary Dunn, *The Residual Exception's Renaissance*, 17 GEO. J. L. & POL'Y, 737, 741 (2019).

[167] Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1467 (2016).

[168] *See id*. at 1470.

As to legal scholarship, it has been observed that post-*Boyce* "one would be hard-pressed to find a modern commentator who wholeheartedly endorses" the excited utterance's treatment and underlying justification.[169] In this regard, Professor Steven Baicker-McGee argues that the exception should be abolished.[170] He makes a scientifically grounded argument against the exception, contending that studies suggest stressful events can lead to deceptive statements and trauma leads to witnesses distorting what they perceive, making "excited witness perceptions . . . unreliable for many reasons."[171]

Professor Alan G. Williams commented that Judge Posner rightfully criticized the excited utterance exception, based on the psychological data and his conclusion that an excited utterance can in fact be falsified.[172] However, unlike Professor Baicker-McKee, Professor Williams does not call for the abolition of the exception. Rather, he proposes the exception be retained but with certain modifications, including a requirement of corroboration and unavailability of the declarant.[173]

Another post-*Boyce* approach to the excited utterance exception was made by Professor Liesa Richter.[174] Assuming that Judge Posner's criticism of the excited utterance exception is well-taken, she questioned his alternative residual exception approach. Using an "economic lens" to examine Judge Posner's proposal, she specifically highlighted the costs and benefits of the purely discretionary approach he proposed.[175] In her considered opinion, the proposal is "inferior to the existing hearsay regime from the standpoint of litigation economics and justice."[176] Professor Richter instead suggested that there are many alternatives that merit exploration.[177] In a subsequent article, she proposed expanding the

[169] Edward J. Imwinkelried, *The Case for the Present Sense Impression Hearsay Exception: The Relevance of the Original Version of Federal Rule of Evidence 803 to Judge Posner's Criticism of the Exception*, 54 U. LOUISVILLE L. REV. 455, 466 (2016); *see also* Dunn, *supra* note 166, at 750.

[170] Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111, 178 (2017).

[171] *Id.* at 114.

[172] Williams, *supra* note 4, at 735–39, 741–45. His conclusions have been examined and cogently questioned. *See* Timothy T. Lau, *Reliability of Excited Utterance Hearsay Evidence*, 87 MISS. L. REV. 599, 621–24 (2018).

[173] Williams, *supra* note 4, at 757–59. For a discussion and criticism of the proposal, *see* Mara D. Afzali, *Letting Sleeping Dogmas Lie: A Response to Judge Posner's Call to Reform the Res Gestae Exceptions to the Rule Against Hearsay*, 80 ALB. L. REV. 595, 607–609 (2017).

[174] Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1865 (2015).

[175] *Id.*

[176] *Id.* at 1882.

[177] *Id.* at 1904–07.

"trustworthiness" exception set forth in Federal Rules of Evidence 803(6), (7) and (8)[178] to Federal Rule of Evidence 803(2).[179]

Relatedly, the Federal Judicial Center in March 2016 submitted to the Advisory Committee on Rules of Evidence a memorandum entitled "Review of Scientific Literature on the Reliability of Present Sense Impressions and Excited Utterances," authored by Timothy Lau, a member of the Research Division of the Federal Judicial Center.[180] The memorandum reviewed the research on the susceptibility of the excited utterance exception, as well as the present sense impression, "to fabrication, coaching, or confabrication, as well as the probable accuracy of underlying observations."[181]

Initially, the memorandum noted the absence of research that directly and empirically tested the assumptions underlying the excited utterance exception.[182] The memorandum then, upon a review of the present research, concluded that the research did not "yield firm and unequivocal conclusions about the resistance of [excited utterances] hearsay evidence to the negative effects of fabrication . . . ."[183] Yet, the memorandum did not recommend conducting experiments about the accuracy of observation underlying [excited utterances] hearsay evidence."[184] The reason was that the difficulty, if not impossibility, of providing a valid test of the circumstances in which excited utterances evidence arises.[185] Notably, the memorandum also concluded that until there is further research showing that fabrications are more widespread than is now known, further expertise at this time would be unnecessary.[186] In essence, the Federal Judicial Center supported the trustworthiness of the exception post-*Boyce*.

One last commentary must be mentioned. Mara D. Afzali, upon a review of the post-*Boyce* landscape, observed:

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[178] FED. R. EVID. 803(G)(E), (7)(C), (8)(B) (providing that an opponent may prevent the admission of a business or public record by showing that the information lacks trustworthiness).

[179] Liesa L. Richter, *Reality Check: A Modest Modification to Rationalize Rule 803 Hearsay Exception*, 84 FORDHAM L. REV. 1473, 1479 (2016). Professor Richter's proposal is fully analyzed in Afzali, *supr*a note 173, at 610–11.

[180] *Minutes of the Apr. 29, 2016 Judicial Conference Advisory Committee on the Rules of Evidence*, U.S. CTS. at 283, https://www.uscourts.gov/sites/default/files/2016-04-evidence-agenda_book_final_0.pdf [https://perma.cc/S2JC-WD8B].

[181] *Id.* at 285.

[182] *Id.* at 285, n.4.

[183] *Id.* at 296.

[184] *Id.* at 304.

[185] *Id.* at 296–304.

[186] *Id.* at 304.

> [W]hen the relevant statistical evidence is unsettled and inconsistent, the best approach is to play it safe, so to speak. Although Posner's 2014 concurring opinion in Boyce has sparked conversations among scholars and prompted the publication of numerous articles, at this point there is no need to continue "sounding the alarm." The "excited utterance" and "present sense impression" exceptions to the rule against hearsay should, for now, be left to rest.[187]

V. COURT OF APPEALS RESPONSE TO JUDGE POSNER

As previously mentioned,[188] the Court of Appeals had before it, post–*Boyce*, two appeals raising the issue of whether an out-of-court statement had been improperly admitted as an excited utterance: *People v. Cummings*[189] and *People v. Almonte*.[190] In *Cummings*, the Court held the trial court erred in admitting an out-of-court statement as an excited utterance and that the error was not harmless, resulting in a reversal of the defendant's conviction.[191] In *Almonte*, the Court, assuming that error was present in the admission of an out-of-court statement as an excited utterance, held the error was harmless.[192] While no argument was made by the defendant in *Cummings* that the excited utterance exception should be abolished, the defendant in *Almonte* made such an argument,[193] but the Court held the argument had not been preserved for appellate review because it was not raised before the trial court.[194]

Judge Posner's criticism of the excited utterance exception was initially raised by Judge Rivera *sua sponte* in her concurring opinion in *Cummings*,[195] notwithstanding the Court's reversal of defendant's conviction because of the error in admitting the out-of-court statement as an excited utterance, and her dissenting opinion on

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187 Afzali, *supra* note 173, at 615.

188 *See supra* notes 8–12 and accompanying text.

189 People v. Cummings, 99 N.E.3d 877, 879 (N.Y. 2018).

190 People v. Almonte, 130 N.E.3d 873, 875 (N.Y. 2019).

191 *Cummings*, 99 N.E.3d at 883.

192 *Almonte*, 130 N.E.3d at 875 (citing People v. Kello, 746 N.E.2d 166, 168 (N.Y. 2001); People v. Crimmins, 326 N.E.2d 787, 793–94 (N.Y. 1975)).

193 Brief for Appellant-Defendant at 30, People v. Almonte, 130 N.E.3d 873 (N.Y. 2019) (0923/12).

194 *Almonte*, 130 N.E.3d at 875.

195 *See Cummings*, 99 N.E.3d at 884–86 (Rivera, J., concurring) (quoting United States v. Boyce, 742 F3d 792, 801–02 (7th Cir 2014) (Posner, J., concurring)).

Almonte,[196] despite the fact the argument was, concededly, not preserved for oral argument. No judge joined in her concurring opinion in *Cummings*,[197] but Judge Rowan Wilson joined in her dissenting opinion in *Almonte* in a separate dissenting opinion.[198]

Judge Rivera in her concurring opinion in *Cummings* called for the abolition of the excited utterance exception.[199] In support, she cited to Judge Posner's concurring opinion in *Boyce*,[200] and two law review articles, Professor Baicker-McKee's article, previously discussed,[201] and an article published by Professor Melissa Hamilton.[202] Judge Rivera then opined: "It appears that only tenuous support exists for the proposition that a declarant's event-concurrent statements should evade traditional evidentiary requirements, and thus for this judicially-created 'excited utterance' exception. Science, fact, and common sense suggest that we should cabin, if not outright abandon, the exception."[203] Notably, Judge Rivera makes no mention whatsoever of the contemporary scholarship, previously discussed, which questioned the lack of a compelling need to abolish the exception and the criticisms directed to those who advocated for abolition.[204]

In *Almonte*, Judge Rivera continued in her dissenting opinion her assault on the excited utterance exception. Initially, she noted the defendant's argument that the exception "should be abolished,"[205] and the supporting authorities for that argument, namely, her own concurring opinion in *Cummings*,[206] Judge Posner's concurring opinion in *Boyce*,[207] Professor Baicker-McKee's article,[208] and two sources not cited by her in *Cummings*—Professor Williams's article, previously discussed,[209] and a pre-*Boyce* article written by Professor

[196] *See Almonte*, 130 N.E.3d at 885–86 (Rivera, J., dissenting) (citing *Cummings*, 99 N.E.3d at 884–85 (Rivera, J., concurring); *Boyce*, 742 F3d at 801–02 (Posner, J., concurring)).
[197] *Cummings*, 99 N.E.3d at 886 (Rivera, J., concurring).
[198] *Almonte*, 130 N.E.3d at 886 (Wilson, J., dissenting).
[199] *See Cummings*, 99 N.E.3d at 886 (Rivera, J., concurring).
[200] *See id.* (quoting Boyce, 742 F3d at 801–02 (Posner, J., concurring)).
[201] *See Cummings* 99 N.E.3d at 886 (Rivera, J., concurring) (citing Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U.L. REV. 111, 114 (2017). *See supra* notes 170–171 and accompanying text.
[202] *See Cummings* 99 N.E.3d at 885–86 (Rivera, J., concurring) (citing Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 STAN. L. & POL. REV., 269, 304 (2015)).
[203] *Cummings*, 99 N.E.3d at 886 (Rivera, J., concurring).
[204] *See supra* notes 157–58 and accompanying text.
[205] *Almonte*, 130 N.E.3d at 885 (Rivera, J., dissenting).
[206] *Id.* (citing *Cummings*, 99 N.E.3d at 884–85 (Rivera, J., concurring)).
[207] *Almonte*, 130 N.E.3d at 885–86 (citing United States v. Boyce, 742 F.3d 792, 801–02 (Posner, J., concurring)).
[208] *Almonte*, 130 N.E.3d at 886 (citing Baicker-McKee, *supra* note 170, at 163).
[209] *Almonte*, 130 N.E.3d at 886 (citing Williams, *supra* note 4, at 719–20). *See supra* notes 172–173 and accompanying text.

Aviva Orenstein.[210] Needless to say, the citation to the Williams article is curious as he does not call for the abolition of the exception, but rather a modification to overcome what he considers to be a questionable basis for the exception,[211] as is the citation to the Orenstein article since Professor Orenstein questions the existence of the exception on the ground it shows a bias to disadvantaged groups such as poor and African Americans,[212] and then proposes the continuation of the exception with a modification and a new exception to the hearsay rule encompassing statements made by victims of sexual violence.[213]

After noting the lack of appellate preservation for defendant's argument, Judge Rivera then faulted defendant for not developing "a record below on the state of the science."[214] In an apparent plea for defendants in the future challenging the continued existence of the exception, she urged defendants to either submit the research questioning the underlying theory of the exception or conducting a Frye-type hearing assessing whether the exception's theory is generally accepted by the relevant scientific community.[215]

It is notable that no appeals court or appellate judge in the United States, other than Judge Rivera, has called for the abolition of the excited utterance exception since *Boyce* was decided in 2014 or even an examination of its continued existence. Research discloses only two post-*Boyce* decisions that even mention the issue, *Commonwealth v. Wilson*[216] and *Mayhand v. United States*,[217] but they do not express any view on the issue.

VI. WHITHER NEW YORK?

Should New York abolish the excited utterance exception? On the present record, the answer is an emphatic "No." It should not even be subject to any modification. There are many reasons for so concluding.

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[210] *See Almonte*, 130 N.E.3d at 886 (citing Orenstein, *supra* note 122, at 178).
[211] *See* Williams, *supra* note 4, at 759–60.
[212] Orenstein, *supra* note 121, at 196.
[213] *See id.* at 164–65.
[214] *Almonte*, 130 N.E.3d at 886.
[215] *See id.*; *see also* People v. Wesley, 633 N.E.2d 451, 454 (N.Y. 1994).
[216] *See* Commonwealth v. Wilson, 113 N.E.3d 902, 912 n.9 (Mass. App. Ct. 2018) (first quoting Commonwealth v. McLaughlin, 303 N.E.2d 338, 346 (Mass. 1973); then citing Rocco v. Boston-Leader, 163 N.E.2d 157, 158 (Mass. 1959)).
[217] *See* Mayhand v. United States, 127 A.3d 1198, 1207 n.10 (D.C. 2015) (first quoting Odemns v. U.S., 901 A.2d 770, 778 n.7 (D.C. 2006); then quoting Hallums v. United States, 841 A.2d 1270, 1276 (D.C. 2001)).

First of all, there is no evidence, empirical research or even anecdotal evidence, that the exception is being used as a vehicle to get before the jury evidence of questionable reliability, leading to wrongful convictions or unacceptable conclusions of liability. To be sure, there is the possibility that despite the gatekeeping role of a trial court that an unreliable statement will be presented to the jury and the jury will credit it. But that possibility is hardly a reason to abolish the exception. The risk of misperception "seems not to be serious enough to discard the exception. One reason is that the exciting event or condition is likely to focus the attention of the speaker, and concentration may be a countervailing force limiting the risk of misperception."[218] In fact, any risk could be minimized by the admission of expert testimony concerning the reliability of identifications made within an excited utterance[219] or appropriate jury instructions.[220]

Second, common sense informs us that many excited utterances are certainly trustworthy.[221] For example, consider the situation where the victim of an assault shouts out the name of his/her assailant while the assault is ongoing, and there is corroboration of the assault by others and the assailant as identified is seen running from the scene. Do we preclude the admissibility of the victim's statement merely because of psychological studies that show generally that excitement may skew an identification? The phrase "throwing the baby out with the bathwater" certainly comes to mind.[222]

Third, it is reasonable to say,

> [T]he startling event is often an accident or violent crime that injures or claims the life of the speaker. Often he [she] was in the best position to see and report, and excluding the statement would mean doing without good evidence and would have the unattractive consequence of shutting out the cries of the victim.[223]

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[218] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:68, at 586 (4th ed. 2013).

[219] *See, e.g.*, People v. Boone, 91 N.E.3d 1194, 1199 (2017) (using expert testimony regarding reliability of cross-racial identification); People v. Lee, 750 N.E.2d 63, 66–67 (2001) (using expert testimony regarding reliability of eyewitness identification).

[220] Diamond, *supra* note 64, at 23.

[221] *See* Timothy T. Lau, *Reliability of Excited Utterance Hearsay Evidence*, 87 MISS. L.J. 599, 632–33 (2018); Diamond, supra note 64, at 23.

[222] *See* Richter, *supra* note 174, at 1908.

[223] MUELLER & KIRKPATRICK, *supra* note 94, § 8:68.

Lastly, and perhaps most importantly, the reason why the exception should not be abolished is that abolition will undermine, if not preclude, the prosecution of violent crimes, especially crimes of domestic violence.[224] In this regard, the excited utterance is invoked extensively in these prosecutions because the victims cannot or will not testify about what happened to them.[225] As Mr. Lau has opined: "[i]t is impossible and irresponsible for hearsay reform not to somehow account for domestic violence situations in any suggestion to replace or scrap the [excited utterance] hearsay exception."[226]

In sum, this article concludes that the case for abolition of New York's excited utterance exception, or even its modification as urged by Judge Rivera, echoing Judge Posner's position, has not been made. There is no *ave atque and vale*!

[224] Lau, *supra* note 221, at 634–36.

[225] See BREGER ET AL., *supra* note 63, at 2.121 (illustrating numerous cases where New York prosecutors used the excited utterance exception in domestic violence prosecutions); Celeste E. Byrom, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 23 REV. OF LITIG. 409, 428 (2005).

[226] Lau, *supra* note 221, at 640.