

## Federal Rule of Evidence 803(2): Problems with the Excited Utterance Exception to the Rule on Hearsay

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# FEDERAL RULE OF EVIDENCE 803(2): PROBLEMS WITH THE EXCITED UTTERANCE EXCEPTION TO THE RULE ON HEARSAY

## INTRODUCTION

The Confrontation Clause of the Sixth Amendment of the Constitution<sup>1</sup> grants all criminal defendants the constitutional right to confront any witness who testifies against them at their trial.<sup>2</sup> This right preserves the sanctity of the trial because it affords the defendant an opportunity to confront the testimony of the witness and to ensure the veracity of the witness. There are certain exceptions, however, that suspend the Sixth Amendment's guarantee of the right to confront all witnesses.<sup>3</sup> Federal Rule of Evidence 803(2), or the excited utterance exception to the hearsay rule, allows distinct out-of-court statements into evidence, thus permitting the declarant to

<sup>1</sup> See U.S. CONST. amend. VI, which states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury in the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

*Id.*

<sup>2</sup> See *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (stating that Confrontation Clause guarantees defendant face-to-face meeting with all witnesses appearing before trier of fact); see also Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998) (interpreting rights Confrontation Clause grants citizens). *But see* *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)) (stating that Sixth Amendment must occasionally give way to considerations of public policy and necessities of each case).

<sup>3</sup> See FED. R. EVID. 803(2) (allowing hearsay statements into evidence against defendant although declarant will not be present or testifying during trial); see also FED. R. EVID. 801(c), advisory committee's note, (stating rationale behind excluding hearsay as evidence is presence of four dangers associated with testimonial evidence- memory, perception, sincerity, and ambiguity in narration). *But see* *Ohio v. Roberts*, 448 U.S. at 65 (holding that Confrontation Clause demands showing that witness is and that challenged statement bears adequate indicia of reliability before hearsay evidence is admissible against criminal defendants).

abstain from testifying and violating the defendant's right to confrontation.<sup>4</sup> This exception to the hearsay rule is an established principle that is commonly accepted and utilized in our court system.<sup>5</sup> It should be noted, however, that critics take every opportunity to attempt to limit its application or abolish the rule completely.<sup>6</sup> Such critics are not without valid reasoning, as the weaknesses of this rule are found not only in its present day application, but trace back to its roots.<sup>7</sup> In addition to the foundational weaknesses of the rule, its application throughout the years has not been as consistent as its creators had hoped.<sup>8</sup>

This note will discuss the rationale that has allowed Federal Rule 803(2) to overcome the long-standing principles of both

<sup>4</sup> See FED. R. EVID. 803(2) (finding out-of-court statements admissible); U.S. Const. amend. VI (stating defendant should be able to confront all, not some, witnesses before him); James D. Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L. REV. 203, 246 (1995) (finding ease with which courts accept excited utterance exception disturbing in light of Confrontation Clause).

<sup>5</sup> See Eric T. Berkman, *Are Excited Utterances Abused in Criminal Cases? Defense Lawyers Call For Limit On Evidence*, MASS. LAW. WKLY., May 11, 1998, col. 2 (stating that "it's just a plain old rule that you have to live with and when it comes up you have to deal with it" (quoting J. Lawrence Rizman)).

<sup>6</sup> See *Id.*; Aviva Orenstein, "My God!": *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 161 (1997). The author states:

The excited utterance exception has long been subjected to a psychological critique, which questions the wisdom of a doctrine that relies on the stress of the declarant. This criticism claims that stress and excitement are as likely to cloud perception and memory as they are to ensure truthfulness [of the statement].

*Id.* at 161; Moorehead, *supra* note 4, at 203. The author sums up his feelings in hypothetical questions and answers:

Would you entrust your life to the judgment or perception of a person who is acting under extreme stress or trauma? Do you trust your own ability to reason and think clearly under duress? Do you believe that a descriptive statement made at the precise moment of observation is always reliable? . . . This Article argues that the answer to each question should be 'no' and, therefore, that the *res gestae* exceptions should be abolished.

*Id.* at 203.

<sup>7</sup> See Defendant's Trial Brief at 7, *Commonwealth v. Gleizer* (Mass. Dist. Ct) (No. 9609) (citing *Thompson v. Trevanion*, 90 Eng. Rep. 179 (K.B. 1694)) (suggesting that even Wigmore did not know whether to base rule on closeness in time or excitement).

<sup>8</sup> See *United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (finding out-of-court statement admissible five to six hours after exciting event); *State v. Dudley*, 126 N.W. 812, 815 (1910) (finding out-of-court statement made day after exciting event admissible); see also Leon Ruchelsman and Mark Kagan, *Confusion Over Exceptions to the Hearsay Rule*, N.Y.L.J., April 30, 1998, at 1 (stating that "[a] careful reading of recent decisions of the Court of Appeals as well as the Appellate Division, Second Department, reveal uncertainty concerning the current state of evidence law and in particular the 'excited utterance' . . . exception to the hearsay rule"). *But see* *People v. Gray*, 568 N.E. 2d 219, 226 (1991) (finding statement made "immediately after" exciting event to be inadmissible); Wade R. Habeeb, Annotation, *Fact That Rape Victim's Complaint or Statement Was Made in Response to Questions as Affecting Res Gestae Character*, 80 A.L.R. FED. 359, 362 (Supp. 1998) (stating that courts differ in their opinion of whether statements are admissible when made after the declarant was questioned).

hearsay and the Confrontation Clause, and the criticisms thereof. Part I will analyze the basic premise of hearsay in general, including its purposes, underlying principles, and its interaction with Federal Rule 803(2). Part II will discuss the Confrontation Clause, including its intended purpose, and how that purpose is violated by Federal Rule 803(2). Part III will set forth the present day standards for admitting evidence into testimony through Federal Rule 803(2), including the statutory language and additional elements created by years of judicial interpretation. Part IV will study three major areas of criminal law and will show how Federal Rule 803(2) has been erratically applied. Part V will analyze Professor John Henry Wigmore's theory on why Federal Rule 803(2) has a proper place as an exception to the hearsay rule. Part V will also criticize Professor Wigmore's theory through the use of modern psychological studies. Part VI will study the unfairness of the current standard of review for appellate courts when faced with an appeal concerning Federal Rule 803(2) evidence. Finally, this note will conclude by showing why the premise underlying Federal Rule 803(2) is inherently incorrect, and has led us to unpredictability in the courtroom, lack of uniform application, and lack of fairness granted to defendants by the Constitution.

## I. HEARSAY IN GENERAL

Hearsay is an out-of-court statement, used in court, to prove the truth of the matter asserted.<sup>9</sup> Admission of hearsay is governed by the Federal Rules of Evidence,<sup>10</sup> which is complex and multifaceted. The hearsay rule functions to eliminate testimony that is not credible, since the witness is testifying to a statement that does not relate to his personal first hand knowledge.<sup>11</sup> The reason for the general inadmissibility of

<sup>9</sup> See FED. R. EVID. 801(c) (defining hearsay as a statement made by someone besides the person testifying); see also *United States v. Zenni*, 492 F. Supp. 464, 468 (E.D. Ky. 1980) (defining "statement" under FED. R. EVID. 801); Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 U.M.K.C. L. REV. 1, 1-5 (1993) (defining hearsay and enumerating its components).

<sup>10</sup> See FED. R. EVID. 802. The Hearsay Rule states: "Hearsay is not admissible except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

<sup>11</sup> See *Peters v. United States*, 408 F.2d 719, 724 (Ct. Cl. 1969) (asserting probative value of hearsay rests in credibility of witness as to hearsay statement, accuracy of his

hearsay is threefold:<sup>12</sup> it does not allow for cross-examination,<sup>13</sup> hearsay does not allow a jury to view the demeanor of the declarant,<sup>14</sup> and the declarant of the hearsay statement has not sworn to an oath prior to making the statement.<sup>15</sup>

Despite the general rule that hearsay is not admissible, the drafters of the Federal Rules, as well as many courts, have adopted exceptions to this rule.<sup>16</sup> Exceptions to the hearsay rule seemingly stem from the belief that a certain amount of hearsay can be proven reliable.<sup>17</sup> In formulating exceptions to the hearsay rule, the drafters of the Federal Rules of Evidence focused centrally on trustworthiness.<sup>18</sup> Excited utterance, under Federal Rule 803(2), is one such exception.<sup>19</sup> Excited utterances are

recollection of statement or alleged hearsay, and ability or opportunity to observe and hear what was said of hearsay); *see also* CHRISTOPHER MULLER AND LAIRD KIRKPATRICK, *EVIDENCE UNDER THE RULES* 117-118 (1996) (enumerating "risks" of hearsay). *See generally* Olin Wellborn III, *Article VIII: Hearsay*, 30 HOUS. L. REV. 897, 897-899 (1993) (supporting idea that hearsay is subject to "hearsay dangers").

<sup>12</sup> *See generally* Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 547 (1997) (finding problems inherent in hearsay); Wellborn, *supra* note 11, at 902 (discussing dangers of hearsay).

<sup>13</sup> *See* MULLER AND KIRKPATRICK, *supra* note 11, at 117 (noting purpose of cross-examination is testing truth of witnesses testimony and allowing opposing side to bring forth inaccuracies in witnesses testimony). *See generally* Wellborn, *supra* note 11, at 898-899 (permitting cross-examination is one way to control evidence jury receives); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55 (1987) (stating that cross-examining a witness is a fundamental right which helps ensure that testimony is adequately tested to expose defects in the witnesses statement).

<sup>14</sup> *See* MULLER AND KIRKPATRICK, *supra* note 11, at 118 (stating that allowing jury to see speaker as he is talking permits them to use instinct to determine whether he is being truthful. . . demeanor refers to voice, intonation, facial expressions, and body language.); Olin Wellborn III, 30 HOUS. L. REV. at 898-899 (allowing jury to be in physical presence of witness).

<sup>15</sup> *See* MULLER AND KIRKPATRICK, *supra* note 11, at 118 (explaining sense of moral and legal obligation which would prevent witness from fabricating any falsehoods after taking oath); Wellborn, *supra* note 11, at 898-899 (noting value of having witnesses take oath).

<sup>16</sup> *See* FED. R. EVID. 803, 804; *see also* *United States v. LeMere*, 22 M.J. 61, 67 (U.S. Mil. App. 1986) (stating that hearsay exceptions are to some extent based on necessity); *United States v. Muscato*, 534 F.Supp. 969, 979 (E.D.N.Y. 1982) (finding that truth is more valuable than a correct application of the rule).

<sup>17</sup> *See* *United States v. Barbati*, 284 F.Supp. 409, 411 (E.D.N.Y. 1968) (stating that courts are willing to characterize evidence as non-hearsay when evidence is highly probative and necessary).

<sup>18</sup> *See* FED. R. EVID. 803 advisory committee note. The committee states that "[t]he present rule proceeds upon the theory of that under the appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify non-production of the person in the trial even though he may be available." *Id.*

<sup>19</sup> *See* *United States v. Kearney*, 420 F.2d 170, 174 (2d Cir. 1969) (admitting excited utterance statement made by police officer morning after being shot); *People v. Brown*, 70 N.Y.2d 513, 520 (1987) (allowing child's statements as excited utterances based upon belief child lacked mental capacity to formulate lie); *State of Hawaii v. Gonclaves*, 5 Haw.

believed to be inherently trustworthy because the declarant is thought to be unable to fabricate a lie since he is speaking while under the trauma of the event.<sup>20</sup> Excited utterances circumvent the prohibition against hearsay, but must still overcome the Confrontation Clause of the 6th Amendment of the United States Constitution.

## II. CONFRONTATION CLAUSE

When applied in criminal cases, Federal Rule 803(2) testimony is inadmissible on the grounds that it violates the Confrontation Clause.<sup>21</sup> The Sixth Amendment to the Constitution, which encompasses the Confrontation Clause, states that all criminal defendants have the right to face their accusers at trial and confront them.<sup>22</sup> Furthermore, it has been held that the Confrontation Clause is not a protection simply offered by federal courts, but has been incorporated into the due process protection afforded by state courts as well.<sup>23</sup>

State and federal courts interpret this right to mean that the accused generally has the right to view the witness while that witness is in court testifying.<sup>24</sup> There is a bifurcated purpose for

App. 659, 666 (1985) (allowing excited utterance statement made by mentally handicapped girl about being raped only after being questioned by her mother).

<sup>20</sup> See *People v. Brown*, 70 N.Y.2d at 520 (allowing child's statements as excited utterances based upon belief child lacked mental capacity to formulate lie); *State of Hawaii v. Gonclaves*, 5 Haw. App. at 666 (allowing excited utterance statement made by mentally handicapped girl about being raped only after being questioned by her mother).

<sup>21</sup> See generally *White v. Illinois*, 502 U.S. 346, 352 (1992) (allowing excited utterance by child to be entered into testimony despite Confrontation Clause); *Webb v. Lane*, 922 F.2d 390, 392-95 (7th Cir. 1991) (allowing victim's statement naming person who shot him as excited utterance); *Ferrier v. Duckworth*, 902 F.2d 545, 547-48 (7th Cir. 1990) (allowing witness to recant statement by defendant's brother made while defendant committed offense regarding his brother's intentions); *Stidum v. Trickey*, 881 F.2d 582, 584-86 (8th Cir. 1989) (permitting gunshot victim's statement identifying attacker to be entered under excited utterance exception to hearsay without violating Confrontation Clause); *Pulico v. Vose*, 830 F.2d 1197, 1206 (1st Cir. 1987) (stating that excited utterance does not conflict with Confrontation Clause).

<sup>22</sup> See U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

<sup>23</sup> See, e.g., *Douglas v. State of Alabama*, 380 U.S. 415, 418 (1965) (holding that confrontation rights had been violated). See generally *Pennsylvania v. Ritchie*, 480 U.S. 39, 46 (1987) (citing Sixth Amendment and holding that it is obligatory on States through Fourteenth Amendment.); *Kentucky v. Stincer*, 482 U.S. 730, 744 (1987) (holding that defendant's Confrontation Clause rights were neither violated pursuant to sixth amendment or due process clause of Fourteenth Amendment which applies it to states).

<sup>24</sup> See generally *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (stating that face to face confrontation reduces the risk that witness will implicate an innocent person); *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (holding that right to face your accuser is guaranteed

having the witness appear in court. First, there is the belief that, due to human nature, it is difficult to lie about someone while they are present.<sup>25</sup> Second, and perhaps more importantly, appearance of the witness provides the accused an opportunity to cross-examine the witness and highlight inaccuracies in the witness' testimony,<sup>26</sup> ensuring that the witness' statements are truthful.<sup>27</sup>

It appears that the hearsay rule and the Confrontation Clause serve the same purpose with regard to entering a witness' statement into evidence. In reality, however, the two purposes are quite different. The Confrontation Clause requires that a witness be unavailable to testify before allowing their statement into evidence, while hearsay does not necessitate that the declarant be unavailable.<sup>28</sup> They are similar, however, in that if

in both federal and state court); *California v. Green*, 399 U.S. 149, 157 (1970) (recognizing that long-standing tradition of literal right to confront witness at time of trial is furthered by Confrontation Clause); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (stating that "[t]here is something deep in the human nature that regards face-to-face confrontation between the accused and the accuser as essential to a fair trial in a criminal prosecution")

<sup>25</sup> See *Coy v. Iowa*, 487 U.S. 1011, 1016 (1994) (holding that it is more difficult to lie about a person to his face than behind his back); Nicholas J. Weilhammer, *Face to Face: The Crime Lab Exception of Rule 803(8) of the Montana Rules of Evidence and the Montana Confrontation Clause*, 60 MONT. L. REV. 167, 198 (1999) (stating that face-to-face confrontation ensures witnesses who would lie are exposed); Elizabeth J.M. Strobel, *Play it Again, Counsel: The Admission of Videotaped Interviews in Prosecutions for Criminal Sexual Assault of a Child*, 30 LOY. U. CHI. L.J. 305, 307 (1999) (stating that Supreme Court has held right to confront witnesses face-to-face is inherent because witnesses may not feel comfortable changing facts before defendant).

<sup>26</sup> See generally *Henry v. Speckard*, 22 F.3d 1209, 1217 (2d Cir. 1994) (holding that Confrontation Clause mandates opportunity for cross-examination); *United States v. Owens*, 484 U.S. 554, 558 (1988) (stating that Confrontation Clause generally satisfied when defense is given full and fair opportunity to probe and expose infirmities through cross-examination); *Delaware v. Fensterer*, 475 U.S. 673, 686 (1985) (finding that disallowing cross-examination prevents exploration of bias, thus violating Confrontation Clause); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (stating that primary right secured by Confrontation Clause is cross-examination)

<sup>27</sup> See, e.g., *Lee v. McCaughtry*, 892 F.2d 1318, 1323 (7th Cir. 1990) (stating that Confrontation Clause affects the truth finding process of criminal justice system); *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (allowing child witness in child abuse case to testify and be cross-examined via live circuit television holding it would not impair truth finding purpose of Confrontation Clause). See generally *United States v. Inadi*, 475 U.S. 387, 389 (1986) (holding that purpose of Confrontation Clause is to ensure accuracy of out-of-court statements); *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (stating that Confrontation Clause's mission is to advance accuracy of truth-determining process in criminal trials); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (stating that Confrontation Clause's purpose is to ensure truthfulness of out-of-court statement for jury).

<sup>28</sup> See, e.g., *United States v. Cree*, 778 F.2d 474, 484 (8th Cir. 1985) (stating that simply because out-of-court statement might be admissible as hearsay it does not automatically come within Confrontation Clause); *Barker v. Morris*, 761 F.2d 1396, 1397 (9th Cir. 1985) (affirming ruling that permitted previously recorded statement from witness who had died prior to the trial to be admitted into evidence); see also *Sanson v.*

the witness cannot be produced at trial, courts may allow a prior statement to be entered into evidence provided it is offered as trustworthy.<sup>29</sup>

More specifically, the Confrontation Clause calls for an “indicia of reliability” to admit a witness’ prior statement into evidence.<sup>30</sup> In other words, the statement needs to be proven trustworthy.<sup>31</sup> In certain instances, the courts have made it quite easy for this “indicia of reliability” to be proven. For example, when a prosecutor attempts to enter into evidence a statement under one of the enumerated hearsay exceptions, the “indicia of reliability” is immediately satisfied.<sup>32</sup> Courts have also held that actually qualifying for one of the hearsay exceptions further demonstrates that the “indicia of reliability” has been met.<sup>33</sup> The excited utterance exception is one such hearsay exception where courts admit testimony into evidence without a separate and distinct showing of trustworthiness.<sup>34</sup> Courts base this on the belief that certain hearsay exceptions are so firmly rooted within the judicial system that there need not be a separate showing to

United States, 467 U.S. 1264, 1265 (1984) (holding that introduction of hearsay against criminal defendants will not violate Confrontation Clause if prosecution demonstrates unavailability of declarant); MUELLER AND KIRKPATRICK, *supra* note 11, at 63 (stating that hearsay exceptions apply regardless of whether declarant is available as witness).

<sup>29</sup> See, e.g., *Idaho v. Wright*, 497 U.S. 805, 816 (1990) (holding that hearsay evidence may meet Confrontation Clause even if it does not fall within hearsay exception by being proven reliable); *United States v. McKinney*, 707 F.2d 381, 383 (9th Cir. 1982) (stating that Confrontation Clause is not absolute impediment to introduction of extra judicial statements that may be introduced if necessary and reliable).

<sup>30</sup> See *Idaho v. Wright*, 497 U.S. at 814 (allowing witness’s statement only if it bears adequate ‘indicia of reliability’); *Sherman v. Scott*, 62 F.3d 136, 140 (5th Cir. 1995) (stating that Confrontation Clause requires showing witness is unavailable and statement bears indicia of reliability to be admissible).

<sup>31</sup> See *Idaho v. Wright*, 497 U.S. at 814 (allowing witness’s statement only if it bears adequate ‘indicia of reliability’); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding that if declarant is not available for cross-examination at trial, Confrontation Clause normally requires actual showing of unavailability, as well as reliability of statement.); *Sherman v. Scott*, 62 F.3d at 140 (stating that Confrontation Clause requires showing witness is unavailable and statement bears indicia of reliability to be admissible).

<sup>32</sup> See *Idaho v. Wright*, 497 U.S. at 815 (stating that reliability is inferred when evidence falls within firmly rooted hearsay exception); *Bourjaily v. United States*, 483 U.S. 171, 172 (1987) (holding that no independent inquiry into reliability necessary when evidence falls within firmly rooted hearsay exception); *Ohio v. Roberts*, 448 U.S. at 66 (holding that hearsay must have ‘indicia of reliability’ to be admitted without violating Confrontation Clause).

<sup>33</sup> See *Ohio v. Roberts*, 448 U.S. at 66 (finding that ‘indicia of reliability’ may be found when hearsay falls within firmly-rooted exception to rule against hearsay).

<sup>34</sup> See, e.g., *White v. Illinois*, 502 U.S. 346, 347 (1992) (stating that hearsay is firmly rooted exception); *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (stating that spontaneous declarations is over two hundred years old, and therefore, firmly rooted).

allow the statement into evidence, even in the face of the Confrontation Clause.<sup>35</sup>

### III. PRESENT DAY STANDARDS FOR ADMITTING EVIDENCE THROUGH 803(2)

Although 803(2) creates an exception for statements relating to an exciting event, made while the declarant was under the stress of excitement from that event, there are other elements which must be satisfied before a court will allow an out-of-court statement into testimony.<sup>36</sup> These requirements form a three-prong test.<sup>37</sup> We believe the most controversial prong is that the declarant must remain in an excited state while making his statement. The rationale underlying this prong of the test is that, due to the excited state of mind of the declarant, he will not fabricate a statement, and his declaration is therefore presumed truthful.<sup>38</sup> As the court in *People v. Edwards*<sup>39</sup> determined, the purpose of this exception is to allow the statement under these

<sup>35</sup> See FED. R. EVID. 803(2) (defining "excited utterance"; see also *Idaho v. Wright*, 497 U.S. at 806 (discussing firmly rooted hearsay exceptions); *Hansen v. Heath*, 852 P.2d 977, 978 (Utah 1993) (stating whether evidence meets the requirements of 803(2) is in 'sound discretion' of court, and varies depending on particular issues in any given case).

<sup>36</sup> See *Idaho v. Wright*, 497 U.S. at 817 (1990) (concluding that firmly rooted exceptions carry sufficient indicia of reliability to satisfy reliability requirement posed by Confrontation Clause); *Bourjaily*, 483 U.S. at 182 (holding that certain hearsay exceptions are so "steeped in our jurisprudence" that they have become 'firmly rooted'); *Sanson v. United States*, 467 U.S. 1264, 1265 (1984) (stating that reliability may be inferred in case where evidence falls within firmly rooted hearsay exception); *Ohio v. Roberts*, 448 U.S. at 66 (holding that independent inquiry into reliability is not necessary when evidence comes within 'firmly rooted' hearsay exception because it is commonplace in our jurisprudence).

<sup>37</sup> See *United States v. Scarpa*, 913 F.2d 993, 1017 (finding that three prong test requires exciting event, declarant under stress from event when making utterance, and utterance concerns exciting event.); see also *Gross v. Greer*, 773 F.2d 116, 120 (7th Cir. 1985) (discussing similar test as found in *United States v. Scarpa*); Michelle H. Zehnder, *A Step Forward: Rule 803(25), A New Approach to Child Hearsay Statements*, 20 WM. MITCHELL L. REV. 875, 905 (1994) (restating rule found in *United States v. Scarpa*).

<sup>38</sup> See, e.g., *United States v. Tocco*, 135 F.3d 116, 127 (2d Cir. 1998) (explaining that excitement of event limits declarant's capacity to fabricate statement, thereby offering guarantee of reliability); *Atencio v. City of Albuquerque*, 911 F. Supp. 1433, 1442 (D.N.M. 1995) (stating that excited utterance can only be made when declarant is under the stress of the event because this prevents him from having the reflective ability to fabricate); *United States v. Reggio*, 40 M.J. 694, 699 (N.-M.C.M.R. 1994) (stating that basis for excited utterance exception is that declarant is less likely to fabricate statement when laboring under stress and excitement of recent startling event or condition); *People v. Marks*, 160 N.E.2d 26, 28 (N.Y. 1959) (stating that theory behind rule is spontaneity of declarations of this type gives more assurance of veracity than with usual hearsay declaration).

<sup>39</sup> 392 N.E. 2d 1229 (N.Y. 1979).

circumstances because the capacity for fabrication is no longer present.<sup>40</sup> The other two prongs are much less controversial, easily satisfied, and generally accepted by the courts: (1) an exciting event and (2) the declarant's statement must relate to the exciting event.<sup>41</sup>

The 803(2) exception's greatest flaw inheres in the fact that there is no objective method of determining how much time may pass between the exciting event and the excited utterance.<sup>42</sup> Courts have, however, agreed that the excited statement does not need to be made contemporaneously or even on the same day as the exciting event.<sup>43</sup> This lack of objectivity leaves us with a rule that is lacking in uniformity, full of unpredictable, and unfair.<sup>44</sup>

<sup>40</sup> See *People v. Edwards*, 392 N.E.2d at 1231 (finding lack of motivation to fabricate a lie).

<sup>41</sup> See, e.g., *United States v. Reggio*, 40 M.J. at 700 (stating examples of excited utterance); *United States v. Ansley*, 24 M.J. 926, 928 (A.C.M.R. 1987) (citing *United States v. Lemere*, 22 M.J. 61, 67 (C.M.A. 1986) (stating subjectivity of determining whether exciting event occurred); *United States v. Moore*, 791 F.2d 566, 571-75 (7th Cir. 1986) (discussing admissibility under excited utterance exception).

<sup>42</sup> See *United States v. Grant*, 38 M.J. 684, 691 (A.F.C.M.R. 1993) (stating statement must be made contemporaneously with excitement of stress caused by event, and not contemporaneously with event itself); see also *United States v. Phelps*, 168 F.3d 1048, 1054 (8th Cir. 1999) (discussing time between event and utterance); Moorehead, *supra* note 4, at 203 (stating historically, the justification of *res gestae* hearsay was that exclamations spontaneously uttered during the excitement of a stressful event are made without forethought and therefore trustworthy); *White v. Illinois*, 502 U.S. 346, 356 (1992) (discussing spontaneous declarations); *United States v. Ironshell*, 633 F.2d 77, 86 (8th Cir. 1980) (indicating statement must be spontaneous).

<sup>43</sup> See e.g., *United States v. Tocco*, 135 F.3d at 127 (stating excited utterance need not be contemporaneous with startling event to be admissible under exception); *United States v. Moore*, 791 F.2d at 572 (stating that excited statement must be made contemporaneously with excitement resulting from event, not necessarily with event itself); *United States v. Kearney*, 420 F.2d 170, 174-75 (D.C. Cir. 1969) (involving twelve hour delay between event and utterance); *Guthrie v. United States*, 207 F.2d 19, 22-23 (D.C. Cir. 1953) (involving eleven hour delay between event and utterance).

<sup>44</sup> See, e.g., *Idaho v. Wright*, 497 U.S. 805, 822 (declining to accept test guaranteeing trustworthiness of Confrontation Clause); John G. Douglas, *Beyond Admissibility: Real Confrontation Virtual Cross-Examination and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 206 (1999) (describing courts' application of hearsay as unpredictable); Neal R. Ferguson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 16-17 (1997) (describing how emotion factors into whether hearsay evidence is admitted); Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145, 170 (1991) (stating that standard under Federal Rules necessarily results in unpredictable application because very notion of reliability possesses significant intuitive component).

## IV. AREAS OF CRIMINAL LAW

## A. Child Abuse Cases

Federal Rule 803(2) is most effective when a child witness has made the statement shortly after the abusive incident. This is due to the emotional effect that such a situation has on a declarant.<sup>45</sup> This does not necessarily mean, however, that children are or should be treated differently from adults when dealing with a potential statement's admissibility under 803(2).<sup>46</sup> Irrespective of how children are compared to adults with regard to 803(2) evidence, the rule is in a confused state, even to the point of not knowing which standard to use when dealing with out-of-court statements of children in cases of abuse.<sup>47</sup> According to one author courts routinely use hearsay exceptions to allow in out-of-court statements in child abuse cases even if the statement does not exactly fall within an exception.<sup>48</sup>

<sup>45</sup> See Zehnder, *supra* note 37, at 905 (explaining effectiveness of 803(2) in regards to children); see, e.g., Hon. Barbara Gilleran-Johnson, *The Criminal Courtroom: Is it Child Proof*, 26 LOY. U. CHI. L.J. 681, 701 (1995) (stating that child may be unavailable if event is traumatic). *But see* Morgan v. Foretich, 846 F.2d 941, 947 (4th Cir. 1988) (stating that, because they do not always understand nature of sexual contact by adults to be shocking, children should be allowed some leeway in spontaneity requirement of 803(2)); Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1756 (1983) (stating major problem with 803(2) exception in regards to child abuse cases is undue reliance on spontaneity, as indicator of trustworthiness, to exclusion of equally valid indicia of reliability).

<sup>46</sup> See e.g., Morgan v. Foretich, 846 F.2d 947, 947 (4th Cir. 1988) (discussing criticism some courts have received by placing undue emphasis on spontaneity requirement in child sexual abuse cases); United States v. Lemere, 22 M.J. 61, 68 (C.M.A. 1986) (rejecting argument that stress is often present for longer period in children than in adults). *But see* Eleanor Swift, *The Hearsay Rule at Work: Has it Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 493 (1992) (stating that, when courts are faced with child abuse cases where out-of-court statement was made by a child, courts have responded by expanding exception granted by 803(2)).

<sup>47</sup> See Krista MacNevin Jee, *Hearsay Exceptions in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?*, 19 WHITTIER L. REV. 559, 567 (1998) (stating to ensure child's statement is reliable court should consider child's nature); see also Jo Ellen S. McComb, *Unavailability and admissibility: Are a child's out-of-court statements about sexual abuse admissible if the child does not testify at trial?*, 76 KY. L.J. 531, 556-57 (1988) (stating that relying solely upon time lapse between event and spontaneity may limit excited utterance exception); Sheryl K. Peterson, *Sexual Abuse of Children- Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 817-818 (1983) (stating that courts often interpret available hearsay exceptions broadly in order to admit evidence of sexual abuse in cases which do not fit within exceptions' technical requirements).

<sup>48</sup> See State v. Canida, 480 P.2d 800, 802 (Wash. 1971) (purporting reason and logic demonstrate reliability of statement); Jee, *supra* note 47, at 559 (discussing different hearsay rule for children).

When considering the admissibility of statements made after an exciting event has occurred, courts will generally use the same criteria in analyzing a child's statement as they do when considering an adult's statement.<sup>49</sup> The common criteria used by courts, however, has resulted in anything but uniform determinations concerning the admissibility of evidence under 803(2).<sup>50</sup> Even more startling is the theory upon which the court in *United States v. Muirhead*<sup>51</sup> based its conclusion. The court allowed a child's statement into evidence eight days after the child had witnessed an exciting event: "[t]he statement must be *spontaneous*, excited or impulsive, rather than the product of reflection and deliberation." (emphasis added).<sup>52</sup> Many other courts have based their decisions upon this theory, and the results have been varied, adding more confusion to the rule as it applies to children's out-of-court statements.<sup>53</sup> While many courts have concurred with and utilized the theory as set forth in

<sup>49</sup> See e.g., *Idaho v. Wright*, 497 U.S. 805, 806 (1990) (listing four factors which could help trial courts determine admissibility of a child's out-of-court statements); see also *State v. Lonan*, 459 N.W. 2d 656, 661 (Minn. 1990), *cert. denied*, 498 U.S. 1033 (1991) (relying upon spontaneity, lack of motive to fabricate, and reliability of witness among other factors); *Zehnder*, *supra* note 37, at 902 (observing courts today recognize traditional hearsay exceptions apply in child sexual abuse cases in same way that these exceptions apply in any other case); *Yun*, *supra* note 45, at 1755-56 (stating that children's statements should be analyzed differently from statements made by adults).

<sup>50</sup> See, e.g., *United States v. Muirhead*, 48 M.J. 527, 532 (N.-M.C.M.R. 1998) (allowing child's statement into evidence under 803(2) after eight days had passed since exciting event); *United States v. Knox*, 46 M.J. 688, 695 (N.-M.C.M.R. 1997) (finding victim child's statements to mother more than one year after abusive conduct allegedly occurred was not admissible under 803(2)). *But see* *Territory of Guam v. Ignacio*, 10 F.3d 608, 614 (9th Cir. 1993) (determining admitted statements made by two year old, several hours after exciting event, while should be inadmissible, was harmless error).

<sup>51</sup> 48 M.J. 527 (1988).

<sup>52</sup> *United States v. Muirhead*, 48 M.J.527, 532 (1998), (citing *United States v. Ironshell*, 633 F. 2d 77 at 86 (8th Cir. 1980)); see also, Jason H. Ehrlinspiel, *Heflin v. State- Admission of the Hearsay Statements of Child Sexual Abuse Victims Through Manipulation of the Excited Utterance Exception: The Right Result, but the Wrong Means*, 64 MISS. L.J. 801, 803-4 (1995) (discussing time lapse between statement and event); Susan K. Datesman, *Survey of Developments in North Carolina Law, 1985: VII. Evidence: State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases*, 64 N.C. L. REV., 1352, 1362 (1986) (stating that courts occasionally stretch limits of hearsay exception to admit information).

<sup>53</sup> See *United States v. Merrill*, 484 F.2d 168, 170-71 (8th Cir. 1972), *cert. denied*, 414 U.S. 1077 (1973) (finding out-of-court statement that occurred concurrently with exciting event admissible); *Haggins v. Warden*, 715 F.2d 1050, 1057-58 (6th Cir. 1983) (analyzing factors necessary for admission of excited utterance); *United States v. Fountain*, 449 F.2d 629, 631-32 (8th Cir. 1971), *cert. denied*, 405 U.S. 929 (1972) (admitting statement of victim made several hours after his vicious attack); see generally, Jean L. Kelly, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U. L. REV. 1021, 1035 (1985) (stating courts are inconsistent in applying excited utterance exception).

*Muirhead*, others continue to deny admission to out-of-court statements, even when made in a time period much closer to the exciting event.<sup>54</sup> In *Territory of Guam v. Ignacio*,<sup>55</sup> the court refused evidence of a two year old victim's statements only hours after the exciting event had occurred.<sup>56</sup> The court in both these instances partially based their rationales on the spontaneity requirement of 803(2), thus demonstrating the inconsistency in the law with regard to out-of-court statements made by children, and the potential for misapplication in future cases.<sup>57</sup>

### B. Homicide Cases

Federal Rule of Evidence 803(2) provides an exception for statements bearing upon an exciting event, if the declarant is the victim of a homicide. This is so because there may be no witnesses to the crime, except the defendant, who can testify to the excited utterance made by the victim.<sup>58</sup> Many times, in fact, 803(2) is not applicable in this area, because of the coverage and scope of Federal Rule of Evidence 804, which allows statements

<sup>54</sup> See *Idaho v. Wright*, 497 U.S. 805, 812-813 (1990) (denying admissibility 2-3 days after exciting event); *State v. Quinnild*, 42 N.W.2d 409, 413-14 (Minn. 1950) (finding no excited utterance in lapse of two hours); *United States v. Fink*, 32 M.J. 987, 991 (A.C.M.R. 1991) (holding that victim's out-of-court statements are inadmissible as excited utterance even though event took place evening before and morning of report); *Territory of Guam v. Ignacio*, 10 F.3d at 614. (denying admissibility after only several hours).

<sup>55</sup> 10 F.3d 608 (9th Cir. 1993).

<sup>56</sup> See *Territory of Guam v. Ignacio*, 10 F.3d at 614 (stating reason for finding child's statement inadmissible was because child victim was no longer in excited state at time out-of-court statement was made); *Brown v. United States*, 152 F.2d 138, 139 (1945) (holding that statement is inadmissible for lack of spontaneity). *But see* *United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979) (holding that statements by three year old child to mother hours after exciting event are admissible).

<sup>57</sup> See Anna Frissell and James M. Vukelic, *Application of the Hearsay Exceptions and Constitutional Analysis to the Admission of a Child's out-of-court Statement in the Prosecution of Child Sexual Abuse Cases in North Dakota*, 66 N.D. L. REV. 599, 620-621 (1990) (finding use of excited utterance exception in child abuse case to be stretch); Myra S. Raeder, *Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, U. TOL. L. REV. 43, 80-81(1982) (discussing difficulty in strictly applying spontaneity requirement).

<sup>58</sup> See *People v. Ireland*, 70 Cal.2d 522, 523 (1969) (stating that hearsay statements made by victim on the day of homicide are inadmissible); see also Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 231 (1998) (arguing that courts do not rule on admissibility of dying declarations with requisite careful reflection); Donna Merideth Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 118-19 (1997) (stating that, if threats occurred only in secret, listener may die and leaving no witness).

into testimony after the declarant has died.<sup>59</sup> Determining which hearsay exception applies is only the beginning of the court's analysis, as courts struggle with competing social norms, lack of uniform precedents, and want for a black letter rule to apply in cases concerning statements of homicide victims.<sup>60</sup>

Courts have generally held that the most important element in determining the admissibility of out-of-court statements made, when dealing with homicide cases, is time.<sup>61</sup> One should not infer, however, that all courts have similar beliefs, or utilize the same principles, in determining the duration of time which may pass before an out-of-court statement becomes barred from admissibility.<sup>62</sup> The advisory committee recognizes this inconsistency, and even states in the notes to Federal Rule 803(2) that there are no 'pat answers' to how much time may pass, and that a 'slight lapse' is allowable.<sup>63</sup> In fact, many state and federal

<sup>59</sup> See FED. R. EVID. 804(b)(2). This rule permits admission of dying declarations in "a prosecution for homicide [when] . . . a statement [was] made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." FED. R. EVID. 804(b)(2); see also Matthews, *supra* note 58, at 165 (stating courts "admit threat, fear, and abuse hearsay under patchwork of exceptions, while they exclude vital portions of victim's words").

<sup>60</sup> See Matthews, *supra* note 58, at 119. The author addresses this problem quite clearly:

Often, the words the domestic homicide victim has spoke to others cannot be heard in the trial of her accused murderer. Courts admit certain statements by victims when they fit into existing categorical exceptions to the hearsay rule. However, when they do admit threat hearsay, many courts appear to contort the rules in order to do so, and which statements the find admissible *varies state to state*. (emphasis added) Further, most threat hearsay comes in under the state-of-mind exception to the hearsay rule, which does not admit the statements as substantive evidence and subjects them to limiting instructions.

*Id.* at 119.

The author also stated that "[these cases] demonstrate the inconsistent manner in which courts apply the excited utterance in domestic homicide cases." *Id.* at 140-41.

<sup>61</sup> See Matthews, *supra* note 60, at 139 (stating that "courts hold that the time between the stressful event and the declaration must be quite short, and that the declarant still be under significant stress of the recent event when she makes the statement"); see also Wade R. Habeeb, Annotation, *Admissibility As Res Gestae, of Accusatory Utterances Made by Homicide Victim Before Act*, 74 A.L.R. FED. 963, 972 (Supp. 1998) (stating that as time increases between event and statement it is less likely to be admitted). *But see* Morgan v. Foretich, 846 F.2d 941, 947 (4th Cir. 1988) (quoting United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981)) ("The lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive in the application of rule 803(2).")

<sup>62</sup> See W.A. Harrington, Annotation, *Time Element as Affecting Admissibility of Statements or Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance*, 89 A.L.R. FED. 102 (Supp.1998) (stating that courts must generally look to factual situation presented); see also *Iron Shell*, 633 F.2d at 85-86 (stating that time element is not dispositive).

<sup>63</sup> See FED. R. EVID. 803, advisory committee's note (stating that only a momentary

court determinations of out-of-court statements in homicide cases have been just as erratic, unpredictable, and dangerous for defendants as they have been in child abuse cases.<sup>64</sup>

The criminal justice system has been anything but consistent in ruling on the admissibility of excited utterance evidence, as their rulings, theories, and ideas about spontaneity vary on a case by case basis.<sup>65</sup> In *State v. Anderson*<sup>66</sup> and *Commonwealth v. Burke*,<sup>67</sup> the courts encountered statements made approximately thirty minutes after the exciting event, and both courts admitted their respective statements into evidence under Federal Rule 803(2).<sup>68</sup> In *State v. Ellis*<sup>69</sup> and *United States v. Velentas*,<sup>70</sup> however, the victims' statements were made only minutes after the respective exciting events, and both courts denied admission of the statements into evidence under 803(2).<sup>71</sup> It appears after a review of these cases that the courts are in an unpredictable posture concerning out-of-court statements made by the victims of homicides.<sup>72</sup> It follows that while the courts have determined

lapse is allowable, otherwise precise contemporaneity is necessary); see also M.C. Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 243 (1961) (commenting on how long excitement may prevail); Richard Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L. J. 667, 700 (1987) (citing FED. R. EVID. 803(2) advisory committee notes).

<sup>64</sup> See *United States v. Velentzas*, 1993 WL 37339, \*4 (E.D.N.Y. 1993) (denying admissibility of statement made only minutes after victim shot); *State v. Ellis*, 297 A.2d 91, 94 (Me. 1972) (denying admissibility of statement made only minutes after threats on victims life were made and minutes before threats were actually carried out). *But see State v. Anderson*, 732 P.2d 464, 468 (Wash. App. 1986) (admitting statement made 30 minutes after exciting event); *State v. Woodward*, 908 P.2d 231, 239 (N.M. 1995) (admitting victims statements made to her therapist approximately ten years prior to homicide should have been inadmissible, but was held harmless to admit).

<sup>65</sup> See Jason H. Ehrlenspiel, *Heflin v. State- Admission of the Hearsay Statements of Child Sexual Abuse Victims Through Manipulation of the Excited Utterance Exception: The Right Result, but the Wrong Means*, 64 MISS. L.J. 801, 811 (1995) (stating courts need more direct approach).

<sup>66</sup> 723 P.2d 464 (Wash. App. 1986).

<sup>67</sup> 159 N.E.2d 856 (Mass. 1959).

<sup>68</sup> See *Anderson*, 723 P.2d at 468 (admitting testimony because victim was still upset when making statement to officer, and had no opportunity to deliberate); *Commonwealth v. Burke*, 159 N.E.2d 856, 864 (Mass. 1959) (holding that victims statement made thirty minutes after incident was admissible without giving a basis for its admissibility).

<sup>69</sup> 297 A.2d 91 (Me. 1972).

<sup>70</sup> 1993 WL 37339, \*4 (E.D.N.Y. 1993)

<sup>71</sup> See *Ellis*, 297 A.2d at 94 (requiring that statement meet test of spontaneity); *Velentzas*, 1993 WL 37339 at \*5-6 (holding that statement was not admissible because declarant might have lacked personal knowledge despite fact that all three requirements for excited utterance were present).

<sup>72</sup> Compare *Burke*, 159 N.E.2d at 864 (holding that statement "arrest him, arrest him" made by deceased wife to approaching witness to be res gestae admissible) and *State v. Woodward*, 908 P.2d 231, 239 (N.M. 1995) (holding declarant's out-of-court statements

that the amount of time between the exciting event and the excited statement is the most important element in determining admissibility, courts continue to differ in their decisions concerning admissibility from jurisdiction to jurisdiction.<sup>73</sup>

### C. Rape Cases

In addition to problems concerning admissibility of out-of-court statements with regard to homicide and child abuse victims, there is just as much speculation concerning statements made by victims of rape. An individual who has recently been raped is subject to a wide array of emotions.<sup>74</sup> Psychologists have identified Rape Trauma Syndrome, in which they have determined that a rape victim is likely to be emotionless and uncommunicative following the rape.<sup>75</sup> This withdrawal and lack

defendant wanted to kill her was admissible as excited utterance) *with Ellis*, 297 A.2d at 941 (holding that deceased person's statement, describing threat made by defendant to be inadmissible) and *Velentzas*, 1993 WL 37339 at \*4 (holding that statements made shortly after incident admissible as excited utterance).

<sup>73</sup> See Wade R. Habeeb, *supra* note 61, at 972 (stating that lapse of time between utterance and event is of primary significance); see also Eric T. Berkman, *Are 'Excited Utterances' Abused in Criminal Cases? Defense Lawyers Call For Limit on Evidence*, MASS. LAW. WKLY., May 11, 1998, col. 2 (stating that out of court statements should be made in the heat of the moment and not later to police officers); *But see* United States v. Iron Shell, 633 F. 2d, 77 85 (8<sup>th</sup> Cir. 1980) (asserting that "the lapse of time between the startling event and the out-of-court statement, although relevant is not dispositive in the application of rule 803(2)"); United States v. Rivera, 43 F.2d 1291, 1296 (9<sup>th</sup> Cir. 1995) (quoting *Iron Shell*, 633 F.2d at 85) (considering other factors, other than lapse of time, in determining whether victim "was still under the stress or excitement of the rape when she made the statement"); United States v. Moses, 15 F.3d 774, 777 (8<sup>th</sup> Cir. 1994), *cert. denied*, 1994 U.S. Lexis \*4567 (1994) (quoting *Iron Shell*, 633 F.2d at 85-86) (considering time lapse as well as seriousness of victim's wound); *Morgan v. Foretich*, 84 F.2d 941, 947 (1988) (enumerating several factors other than time lapse to be considered).

<sup>74</sup> See Orenstein, *supra* note 6, at 200 (stating rape victims may initially be hysterical or subdued and later experience nightmares, phobias and sexual fears). See generally Patricia A. Frazier and Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 L. & HUM. BEHAV. 293, 299-300 (1992) (stating that it takes time before rape victims can verbalize what has occurred); Deborah A. Dwyer, *Expert Testimony on Rape Trauma Syndrome: An Argument for Limited Admissibility*, 63 WASH. L. REV. 1063, 1064 (1988) (noting wide range of emotions experienced by rape victims); Ann Wolbert Burgess and Linda Lytle Holstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 983 (1974) (stating immediately after rape, victim's reactions can manifest humiliation, fear, embarrassment, self-blame, and fear of violence and death).

<sup>75</sup> See Laura E. Boeshen, Bruce D. Sales, and Mary P. Koss, *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL'Y & L. 414, 416-17 (1998) (describing original model of rape trauma syndrome consisted of acute phase which occurs immediately after rape, and later reorganizational phase with varied symptomatology); Orenstein, *supra* note 6, at 199-200 (stating that since rape victim is usually numb and uncommunicative, she is unlikely to make prompt outcry required by the excited utterance exception); see also Ann Wolbert Burgess and Linda Lytle Holmstrom, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227, 229 (1996) (stating that

of immediate communication on behalf of the rape victim contradicts the premise of making an immediate statement which would fall within rule 803(2).<sup>76</sup> In fact, it has been discovered that a rape victim often tries to block the experience from their memory, and it may take a significant amount of time before the victim actually remembers the event as it actually took place.<sup>77</sup> Therefore, a rape victim may be calm directly following the incident and subsequently become agitated when feeling safe.<sup>78</sup> It is when the victim feels safe that the victim will be likely to report the details of the crime.<sup>79</sup> Some psychologists feel that even with the time delay the declaration is trustworthy.<sup>80</sup>

rape victim's responses may be calm and composed, and therefore, mask true feelings); Jeffrey T. Waddle and Mark Parts, *Rape Trauma Syndrome: Interest of the Victim and Neutral Experts*, U. CHI. LEGAL F. 399, 400 (1989) (stating that first phase of rape trauma syndrome is known as acute phase which is marked by extreme fear, victim may not express fear but mask observable reactions to appears calm).

<sup>76</sup> See FED. R. EVID. 803(2) (admitting hearsay statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"); see also Orenstein, *supra* note 6, at 200 (stating that rape survivors are often too traumatized by attack to provide information); Howard Egeth, *Emotion and the Eyewitness in Heart's Eye: Emotional Influences in Perception and Attention*, 249 (P.M. Neidenthal & S. Kitayama eds. 1994) (stating that traumatic events become imprinted in memory after sufficient time passes); Christopher B. Muller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 371 (1992) (stating that excited utterance is admitted since it is thought stressed person cannot lie).

<sup>77</sup> See Orenstein, *supra* note 6, at 200 (stating that it takes time for rape survivor to process memories); Laura Etlinger, Comment, *Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use*, 58 A.L.B. L. REV. 1259, 1297 (1995) (noting legal significance of symptoms associated with rape trauma syndrome are "[u]sed to help explain behavior that might otherwise appear inconsistent with having been raped"); Nicole Rosenberg Economou, *Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim*, 42 HASTINGS L.J. 1143, 1146 (1991) (describing "long-term reorganization process" of rape victim during which victim may experience sexual fears, phobias, and nightmares).

<sup>78</sup> See *State v. Parker*, 730 P.2d 921, 924 (Idaho 1986) (asserting facts about sexual assault likely remain with victim due to fact that it is one of most distressing events person can have, until victim feels comfortable to talk about it); see also Orenstein, *supra* note 6, at 201 (stating rape survivor is more likely to be calm shortly after incident and is more likely to delay reporting crime.); Economou, *supra* note 77, at 1145 (noting women may possibly be calm following rape incident); Burgess and Holstrom, *supra* note 75, at 228 (defining rape trauma syndrome).

<sup>79</sup> See Orenstein, *supra* note 6, at 200 (stating that "only over time do most survivors process memories, begin to overcome the psychic numbing, and start talking to friends and counselors"); JOHN C. YUILLE AND PATRICIA T. TOLLESTRUP, A MODEL OF THE DIVERSE EFFECT OF EMOTION OF EYEWITNESS MEMORY, IN THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY 209 (Suen-Ake Christianson ed. 1992) (citing woman who recalled being raped after several months).

<sup>80</sup> See Orenstein, *supra* note 6, at 200-01 (noting that excited utterance exception "has the psychology backwards" because rape survivors often delay in reporting crime); Barbara Duffy Stewart et al., *The Aftermath of Rape: Profiles of Immediate and Delayed Treatment Seekers*, 175 J. NERVOUS & MENTAL DISEASE 90, 92 (1987) (noting that women

Aside from these psychological dimensions, courts struggle with several other factors when deciding whether to classify a rape victim's statement as an excited utterance.<sup>81</sup> While cases do exist where the victim immediately tells the name of the attacker, a majority of rape cases involve victims who are questioned prior to making their declaration.<sup>82</sup> According to the rationale of rule 803(2), however, it should not matter whether a declarant has responded to a question or made the statement upon their own volition. While courts focus their rationale on various factors, the essential inquiry is whether the declarant is still under the influence of the event in determining if they have the reflective capacity to fabricate a lie.<sup>83</sup>

In *People v. Taylor*,<sup>84</sup> a sixteen year old girl was forced into the defendant's car and raped. After this event, she was let out of the car and walked to a fire station where she asked to use the telephone to call her father. Upon her arrival at the fire station a fireman repeatedly asked her if something was wrong because, he claimed, that she appeared nervous. Subsequently, the girl told the fireman that she had been raped. The court held this declaration to be inadmissible due to a lack of spontaneity.

often delay in seeking treatment).

<sup>81</sup> See *United States v. Sherlock*, 865 F.2d 1069, 1083 (9th Cir. 1989) (holding that statement made by rape victim one hour after crime was inadmissible); *Parker*, 730 P.2d at 924 (noting that rape victims often delay reporting event); *State v. Martineau*, 114 N.H. 552, 557 (1974) (questioning by officer not enough to take statement out of excited utterance exception's grasp because her condition was sufficient to satisfy excited state requirement); *Baber v. United States*, 324 F.2d 390, 393 (D.C. Cir. 1963) (declining to decide whether twenty-five minute delay in reporting rape fell within excited utterance exception).

<sup>82</sup> See *State v. Smith*, 857 S.W.2d 1, 9 (Tenn. 1993) (stating excited utterance made as result of questioning may still fall under hearsay exception); *Sanders v. State*, 586 So. 2d 792, 795-96 (Miss. 1991) (holding rape victim's statement admissible even though she was questioned by police before making it); *People v. Velasco*, 575 N.E. 954, 959 (Ill. 1991) (finding questioning does not destroy spontaneity of statement); *State v. Whitney*, 159 Ariz. 476, 483 (1989) (allowing statements as excited utterances even though in response to questions); *People v. Brown*, 70 N.Y.2d 513, 521 (1987) (holding that responses to formalized police questioning may constitute excited utterances).

<sup>83</sup> See, e.g., *United States v. Tocco*, 135 F.2d 116, 118 (2d Cir. 1998) (holding that courts must determine if reason to believe declarant based on situation exists); *United States v. Rivera*, 43 F.3d 1291, 1296 (9th Cir. 1994) (finding that courts look to whether rape victim is under stress of event when applying excited utterance exception); *United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (requiring excited utterance declarant be under influence of event when making statement); *Gross v. Greer*, 773 F.2d 116, 119-20 (7th Cir. 1989) (admitting statement twelve hours after event because person was under stress of event); *United States v. Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980) (holding that lapse of time between startling event and out-of-court statement, while relevant, is not dispositive in applying excited utterance exception).

<sup>84</sup> 268 N.E.2d 865 (Sup. Ct. Ill. 1971).

Furthermore, the court reasoned that had the girl not been questioned the statement would never have been made.<sup>85</sup> It seems another court could very easily have determined that the girl was still under the influence of the event since the fireman reported that she appeared nervous and may simply have been hesitant to confide in a stranger after having been raped.

Comparing these cases alongside Rape Trauma Syndrome it seems to us that psychologists are correct in their view that rape victims frequently allow time to pass before making a declaration. One may decide that if such a time lapse is preventing courts from allowing the statements to come into evidence, then the present interpretation of the excited utterance rule vastly limits the number of declarations that may be properly admitted.

#### V. THE EXCITED UTTERANCE EXCEPTION TO HEARSAY DOES NOT HAVE A PROPER BASIS IN THE LAW

The foundation for the excited utterance exception to the hearsay rule is based upon the idea that because the declarant made the declaration so close in time to the exciting event, there is no time for the declarant to fabricate a lie or forget what has just occurred.<sup>86</sup> This stems from the former *res gestae* notion that a verbal response can be considered part of the event which causes it when made almost simultaneous to the event.<sup>87</sup> Time is of the essence.<sup>88</sup> Courts, however, have failed to focus on time

<sup>85</sup> See *People v. Taylor* 268 N.E.2d 885, 868 (Ill. 1971) (finding questioning destroys spontaneity of statement); *People v. Damen*, 193 N.E.2d 464, 471-72 (1963) (stating that statement cannot come as result of questioning).

<sup>86</sup> See *Orenstein*, *supra* note 6, at 168 (noting that justification for excited utterance exception is startling event negates reflection necessary to lie); *Moorehead*, *supra* note 4, at 232 (noting that excited utterance exception is based on premise exciting nature of event guarantees sincerity).

<sup>87</sup> See *Keefe v. State*, 72 P.2d 425, 427 (Ariz. 1937) (stating that *res gestae* is "[a]utomatic and undesigned incidents of the particular act in issue"); *Orenstein*, *supra* note 6, at 168 (stating literal meaning of excited utterance of hearsay rule is "things done" or "things happened"); see also BLACK'S LAW DICTIONARY 1305 (6th ed. 1990) (defining *res gestae* to be "considered as an exception to the hearsay rule. In its operation it renders acts or declarations which constitute a part of the things done and said admissible in evidence, even though they would otherwise come within the rule excluding hearsay evidence or self-serving declarations"); MCCORMICK ON EVIDENCE 244, 268 (John William Strong eds., 4th ed. 1992) (stating that courts in 1800's used *res gestae* to refer to spontaneous statements that were accompanied by legally relevant acts).

<sup>88</sup> See, e.g., *McClory v. Schneider*, 51 S.W.2d 738, 740-41 (1959) (holding *res gestae* credible when statement spontaneous and concurrent to event); *Klein v. Montgomery*

when interpreting the excited utterance doctrine. Instead, courts repeatedly hold that the focus should be on the declarant's reflective capacity during the time between the exciting event and the declaration relating to it.<sup>89</sup> For instance, courts look to see if the speaker has the reflective ability to fabricate a lie.<sup>90</sup> Courts reason that presumably if one is still agitated or nervous, or has a strong emotional reaction after an event, that person is not being influenced by any outside stimuli.<sup>91</sup> Therefore, most courts focus little on the time that has actually passed between the two events. Instead, they require a showing that the declarant remained in an agitated state between the occurrence and the statement.

Furthermore, some courts have held that once the emotion has died a trigger can again elicit the previous emotion and at that point a declaration would also be trustworthy.<sup>92</sup> This is known as "re-excitement." Our understanding of this court-made exception is that since the declarant is again under the influence of the event, the declarant is incapable of fabricating a lie.

In accepting the excited utterance rationale, which differs from the former *res gestae* doctrine, courts have neglected to consider

Ward & Co., 263 Wis. 317, 320 (1953) (stating that time is of essence of *res gestae* doctrine); Carroll v. Guffey, 20 Ill. App.2d 470, 475-76, (1932) (stating *res gestae* is admissible when simultaneous to event); see also Orenstein, *supra* note 6, at 169 (stating that "because excited utterances are connected so closely in time to the event and the excitement flows from the event, excited utterances were deemed part of the action and hence admissible despite the hearsay rule"). But see Olison v. State, 92 Tex. Crim. 86, 90 (1922) (claiming that time alone is not essence of *res gestae* doctrine).

<sup>89</sup> See United States v. Tocco, 135 F.2d 116, 127 (2d Cir. 1998) (noting that excited utterance exception hinges on excitement of event limiting declarant's reflective capacity); United States v. Scarpa, 913 F.2d 993, 1017 (2d Cir. 1990) (noting that length of time between event and declaration is only one factor to take into consideration when ascertaining whether declarant is under stress of event); United States v. Kearney, 720 F.2d 170, 171, 174-75 (D.C. Cir. 1969) (admitting statement although there was twelve hour delay).

<sup>90</sup> See Tocco, 135 F.2d at 127 (finding importance of time); Scarpa, 913 F.2d at 1017 (finding time to be but one factor of many); Kearney, 720 F.2d at 171 (showing arbitrariness of time element).

<sup>91</sup> See, e.g., Webb v. Lane, 922 F.2d 390, 395 (7th Cir. 1991) (admitting excited utterance made 1-2 hours after shooting when shock was renewed); Orenstein, *supra* note 6, at 159, 169 (stating that excited utterance exception allows for statements made under influence of exciting event to be admitted for truth of matters they assert).

<sup>92</sup> See Scarpa, 913 F.2d at 1017 (admitting statement when declarant heard sister scream and realized his assailant came to hospital six hours after attack); United States v. Napier, 518 F.2d 316, 317-318 (9th Cir. 1975) (holding victim's statement to sister admissible after sister showed victim newspaper containing picture of assailant seven weeks after event); But see United States v. Knox, 46 M.J. 688, 695 (N.-M.C.C.A. 1997) (holding that victim's statement to mother more than one year after any abusive conduct was inadmissible).

the true psychological effects that stress has on people. Instead, seemingly without any form of investigation, courts and the drafters of the Federal Rules of Evidence accepted Professor John Henry Wigmore's theory.<sup>93</sup> Wigmore examined *res gestae* and molded it to invent the spontaneous declaration, now commonly known as the excited utterance.<sup>94</sup> He reasoned that a startling event has the ability to still one's reflective capacities thereby allowing the statement to be truthful.<sup>95</sup> Wigmore also turned the court's attention away from the time consideration because he believed it was the declarant's stress that should be considered and not the time lapse.<sup>96</sup>

There have been opponents to Wigmore who have expressed their distaste for Wigmore's excited utterance theory from its inception.<sup>97</sup> Furthermore, much of the scientific knowledge on which Wigmore based his legal theories has been discredited.<sup>98</sup>

<sup>93</sup> See MCCORMICK ON EVIDENCE 216 (John W. Strong eds., 4th 1992) (stating rationale for exception and attributing much of theory behind exception to Wigmore).

<sup>94</sup> See Orenstein, *supra* note 6, at 169-170 ("In his multi-volume treatise on evidence, Wigmore developed in intricate detail what he termed the 'spontaneous exclamation' exception to hearsay, which we recognize today as the excited utterance exception"); see also, Moorehead, *supra* note 4, at 232 (stating that exception may be traced directly to Wigmore's beliefs).

<sup>95</sup> See Orenstein, *supra* note 6, at 169-170. The author purports how Professor Wigmore explained his policy of the exception as follows:

This general principle is based on the experience that, under certain 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. The witness' state of nervous tension was of utmost importance in Wigmore's analysis.

*Id.* at 169-170.

<sup>96</sup> See Orenstein, *supra* note 6, at 171. The author criticizes Professor Wigmore's theory:

Wigmore postulated that precise contemporaneousness was not required to meet the excited utterance exception and believed that the doctrine did not have a fixed time limit between the startling event and the excited utterance. He disdained the timing issue and decried the "lamentable waste of time" expended by various state and high courts trying to pin down precise temporal limits for the doctrine's application. He believed that duration of stress, rather than exact timing, played the dominant role justifying this exception to the hearsay rule.

*Id.* at 171.

<sup>97</sup> See generally Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 260 (1989) (listing situations when hearsay is excluded); Michael B. Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 189 (1993) (indicating when hearsay exception is allowed); Lawrence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 965 (1974) (stating event and closeness in time to event has little to do with speaker's perception).

<sup>98</sup> See *Batson v. Kentucky*, 476 U.S. 79, 89-90 (1986) (forbidding preemptory jury selection challenges based on race); Sheri L. Johnson, *The Color of Truth: Race and the*

For example, his belief that race and national origin effect truthfulness, or his belief that a woman's chastity and veracity were connected have been discredited.<sup>99</sup> Considering that those ideas have been discredited, his theory regarding the spontaneous declaration, as well as its theoretical underpinnings, should be re-examined.

The idea that stress stills the reflective capacities and enables the declarant's statement to be truthful is also disputed by many psychologists.<sup>100</sup> Psychologists believe that Wigmore's theory is counterintuitive and that high levels of stress can cause confusion.<sup>101</sup> Studies show that stress does increase an observer's performance.<sup>102</sup> Specifically, once an extreme amount of stress is applied, the observer is no longer able to function optimally.<sup>103</sup>

*Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 328 (1996) (analyzing racial stereotypes and how they violate the Equal Protection Clause). See generally Defendant's Trial Brief at 9, Commonwealth v. Gleizer (Mass. Dist. Ct.) (No. 9609) (discrediting Wigmore).

<sup>99</sup> See Defendant's Trial Brief at 9-10, Commonwealth v. Gleizer (Mass. Dist. Ct.) (No. 9609) (noting Wigmore's theory was based upon misrepresentation of controlling cases and overstatement, if not actual restatement, of common law and the role of the excited utterance with the common law) see also Sakthi Murphy, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CALIF. L. REV. 541, 550 (1991) (discussing use of sexual history to discredit woman's veracity); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Court Room*, 77 COLUM. L. REV. 1, 61 n. 360 (1977) (discussing problems with testifying victims).

<sup>100</sup> See Robert F. Scherer and Philip M. Drumheller, *Consistency in Cognitive Appraisal of a Stressful Event over Time*, 132 J. SOC. PSYCH. 553, 558 (1992) (stating that person's recall of event is influenced by stress); Daniel Stewart, *Perception, Memory, and Hearsay*, UTAH L. REV. 1, 28 (1970) (stating that excitement is not guarantee against lying); Gordon Van Kessel, Symposium, *Truth and its Rivals: Evidence Reform and the Goals of Evidence Law*, 49 HASTINGS L.J. 477, 499 (1998) (stating that people are likely to speak accurately under stress is not supported by empirical evidence or common sense).

<sup>101</sup> See Robert J. Urasano and Carol S. Fullerton, *Cognitive and Behavioral Responses to Trauma*, 20 J. APP. SOC. PSYCH. 1766, 1768 (1990) (finding that people will go to great lengths in attempting to rationally explain trauma); see also Laurence Walker and John Monehan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 579 (1987) (stating researchers conclude stress distorts recall); KENNETH A. DEFFENBACHER, THE INFLUENCE OF AROUSAL ON RELIABILITY OF TESTIMONY IN EVALUATING WITNESS EVIDENCE 235 (Sally M. Lloyd-Bostock & Brian R. Clifford ed. 1983) (stating that confusion is caused by stress).

<sup>102</sup> See Julie M. Kosmond Murray, *Repression, Memory, and Suggestibility: A call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477, 498 (1995) (indicating that research shows stress has adverse effect on memory, contrary to popular belief); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 961, n.69 (1989) (finding witness' memory being susceptible to distortion is well documented); Roger Park, *A Subject Matter Approach to Hearsay*, 86 MICH. L. REV. 51, 75 (1987) (positing that excited utterances are less reliable than unexcited ones).

<sup>103</sup> See Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 961, n.69 (1989) (finding witness' memory being susceptible to distortion is well documented); ELIZABETH F. LOFTUS AND JAMES M. DOYLE, EYEWITNESS

Instead, the observer's perception and memory become impaired.<sup>104</sup> Needless to say that rape, homicide, and child abuse cause an extreme amount of stress. Stress can elicit personal feelings which can affect one's perception.<sup>105</sup> Therefore, while a declarant may honestly believe that he or she is telling the truth, the statement may be marred and distorted due to the declarant's confusion and perception.<sup>106</sup>

Additionally, Wigmore's theory lacks a basis for putting forth any time period to determine how long it takes to invent a lie.<sup>107</sup> Once again there is want for a psychological foundation. Psychologists feel that the statement would have to be spoken simultaneously with the event to ensure against deception.<sup>108</sup> This lends support not to Wigmore's theory, but to the original theory under *res gestae*. Nonetheless, courts continue to improperly use the excited utterance exception to hearsay presented by Wigmore when determining whether to admit statements. As seen in the aforementioned cases this has resulted in a wide array of conflicting holdings.

TESTIMONY: CIVIL AND CRIMINAL 47-51 (1987) (explaining psychological theory that states that stress causes people to perform at optimum level, however, that if put under too much stress, person becomes confused, disorganized, and has memory and perception impairment).

<sup>104</sup> See Orenstein, *supra* note 6, at 178-79 (finding perception altered by exciting event); ELIZABETH F. LOFTUS AND JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 32 (1987) (noting exciting event may affect perception of event and memory).

<sup>105</sup> See Orenstein, *supra* note 6, at 178 (stating that distracting excitement itself may be strong personal feelings evoked by startling event that affect memory and perception); see also Sven-Ahe Christianson, *Emotional Stress and Eye Witness Memory: A Critical Review*, 112 PSYCHOL. BULL. 284, 290-294 (1992) (stating witnesses will suppress unpleasant memories as defensive mechanism); Elizabeth F. Loftus and James M. Doyle, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 32 (1987) (indicating personal disaster will affect memory).

<sup>106</sup> See Orenstein, *supra* note 6, at 180-81 (stating that "the declarant's startled utterances may be honest declarations of what they thought they saw, but the very stress that makes them so honest can also interfere with their ability to perceive, transcribe and remember events"); see also Edmund M. Morgan, *Res Gestae*, 12 WASH. L. REV. 91, 98 (1937) (stating startling events effect persons ability of observation).

<sup>107</sup> See Orenstein, *supra* note 6, at 178 (stating psychological research does not backup Wigmore's Theory that person did not have time to think of lie); see also Defendant's Trial Brief at 3, *Commonwealth v. Gleizer* (Mass. Dist. Ct.) (No. 9609) (stating that psychological research "clearly contradicts the notion that a person would not have time to think up a lie before making an excited utterance").

<sup>108</sup> See H. BRUTT, LEGAL PSYCHOLOGY 71-76 (1931) (stating that hesitation of few seconds could suffice to develop falsehood).

## VI. ARBITRARY DECISIONS: STANDARD OF REVIEW

It is well settled policy that the standard of review for courts at the appellate level when determining questions of admitting 803(2) evidence is an abuse of discretion.<sup>109</sup> The theory behind this court-made rule is that the trial judge is in the best position to weigh competing factors and interests in determining the admissibility of certain evidence.<sup>110</sup> While true, this particular standard of review does not have a proper place in this instance because of the ultimate ramifications it will most likely have on defendants.<sup>111</sup> Research has shown that it is a rare occurrence when a trial courts admission of evidence will be overturned, heavily tipping the scales in favor of prosecutors.<sup>112</sup> It has been stated that one reason for Appellate Courts failure to reverse is

<sup>109</sup> See *United States v. Thomas*, 149 F.3d 111, 119 (10th Cir. 1998) (stating that appellate review of District Court determinations of evidentiary measures on abuse of discretion); *United States v. Trujillo*, 136 F.3d 1388, 1394 (10th Cir. 1998) (stating that review of District Court's decision to deny Mr. Trujillo's new trial motion would be under abuse of discretion); *Reliant Airlines Inc. v. Broome County*, 122 F.3d 1057, 1057 (2d Cir. 1997) (stating that District Court did not abuse discretion admitting statements as excited utterances).

<sup>110</sup> See *Reliant Airlines*, 122 F.3d. at 1060 (citing *United States v. Scarpa*, 913 F.2d 993, 1015 (2d Cir. 1990) (recognizing that trial judge is in best position to weigh competing interests in deciding whether to admit certain evidence); *United States v. Roldan-Zapata*, 916 F.2d 795, 805 (2d Cir. 1990) (stating that trial judge has broad discretion and his decisions are sustained absent manifest error); see also *United States v. Sun Myung Moon*, 718 F.2d 1210, 1232 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) (acknowledging 'long held view' that trial judge is in best position to weigh competing interests in deciding whether to admit certain evidence).

<sup>111</sup> See, e.g., *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (*en banc.*), *cert. denied*, 435 U.S. 905 (1978) (stating that lower court's admission may be upheld if they did not act "arbitrarily or irrationally" ); see also Eric T. Berkman, *Are Excited Utterances Abused In Criminal Cases? Defense Lawyers Call For Limit On Evidence*, MASS. LAW. WKLY., May 11, 1998, col.2 (recognizing difficulty of revising trial court's decision to admit excited utterance); Myrna S. Raeder, *The Hearsay Rule at Work: Has It Been Abolished De Facto By Judicial Discretion?*, 76 MINN. L. REV. 507, 518 (1992) (stating that party convincing trial court to adopt its position has very little chance of being overturned on appeal); David P. Leanord, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 974 (1990) (stating that there are few appellate reversals on basis of evidentiary error).

<sup>112</sup> See Eleanor Swift, *The Hearsay Rule At Work: Has It Been Abolished De Facto By Judicial Discretion?*, 76 MINN. L. REV. 473, 479-80 (1992) (finding that only eleven percent of twenty-seven federal cases studied were found to have reversible errors). Compare Orenstein, *supra* note 6, at 196 (claiming that criminal defendants are disadvantaged with regard to marshaling evidence which favor prosecution) with Roger C. Park, *Hearsay, Dead or Alive?*, 40 ARIZ. L. REV. 647, 656 (1998) (indicating that courts have ruled in favor of defendants even though prosecution had respectable hearsay evidence).

because they seem to have a harder time holding that trial judges abused their discretion than holding that they made errors of law.<sup>113</sup> It seems that this is as unfair as the arbitrary application of the 803(2) exception itself. If Appellate Courts began to specifically justify the reasons for their evidentiary decisions, a logical progression would develop that would foster a greater uniformity in the law.

### CONCLUSION

Federal Rule of Evidence 803(2) is clearly a rule that needs to be amended. The requirements of the rule are quite clear: an exciting event, no time for reflection, and the statement to refer to that event. The current predicament inheres in the 'no time for reflection' element, as courts make arbitrary and discretionary determinations which conflict with the judicial tradition of continuity and predictability. Consequently, with regard to homicide, rape, and child abuse cases, courts utilize differing standards when applying the excited utterance exception, thereby resulting in unpredictable decisions.

Additionally, the psychological underpinnings upon which the courts rely so heavily have proven unsubstantiated. Stress does not prevent fabrication or inaccuracies. Stress does, however, lead to distortion, confusion, and misperception. These are the factors that influence which statements courts allow in to testimony as excited utterances. Federal Rule 803(2) is a legal doctrine based upon a psychological theory, and modern psychology has proven its core element to be a falsehood. In order to ensure the veracity of our system of jurisprudence a change is required.

Our proposed rule for the excited utterance exception to hearsay is to revert to its original application under *res gestae*, where time again is the essential ingredient. A much simpler test is needed in order to properly apply the excited utterance rule. Since the only out-of-court statements that can be said to have been made without reflection are those made

<sup>113</sup> See *Cooter & Gell v. Hartmarx, Corp.*, 496 U.S. 384, 403-04 (1990) (stating that courts rarely overturn trial court's discretion on evidentiary matters); *United States v. Cherry*, 938 F.2d 748, 757 (7th Cir. 1991) (stating that even if trial court errs allowing testimony, error is harmless and sustainable absent abuse of discretion).

simultaneously, those are the only statements which should be admissible under 803(2). The hearsay exception that has been carved out is “excited utterances,” and the utterances which courts allow in to evidence ought to remain just that—excited. In addition, we suggest that there be no such phenomenon as “re-excitement,” that is, falling back into an excited state, hours, days, or weeks after the event. As many researchers have concluded that this hearsay exception may not even have a place in the law, we feel that the above limitations are more than fair.

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