The Unavailability Rule and Its Effects on New York Hearsay Exceptions: The Confusion Surrounding the New York Court of Appeals’ Holding in People v. Sanders

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The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that, in all criminal prosecutions, the accused shall possess the right to confront adverse witnesses. A literal application of this right "would require the exclusion at trial of any statements made by a declarant who was unavailable for cross-examination." Yet, the Confrontation Clause has never been interpreted so as to effectuate a complete abrogation of existing hearsay exceptions. Instead, the Clause merely reflects a strong preference for face-to-face confrontation at criminal trials.

1 U.S. CONST. amend. VI. The Sixth Amendment specifically states: "the accused shall enjoy the right ... to be confronted with the witnesses against him." This right is also guaranteed by the New York Constitution, N.Y. CONST. art. I, § 6. The fair trial requirement exposes witnesses to face-to-face encounters while fostering the most effective truth-determinative tool, cross-examination. People v. Arroyo, 54 N.Y.2d 567, 570, 431 N.E.2d 271, 273, 446 N.Y.S.2d 910, 912-13, cert. denied, 456 U.S. 979 (1982).


3 Roberts, 448 U.S. at 63 (stating that complete abrogation has been "long rejected as unintended and too extreme."); Sanders, 56 N.Y.2d at 63, 436 N.E.2d at 485, 451 N.Y.S.2d at 35. "Indeed, various types of extrajudicial statements have been recognized as admissible evidence notwithstanding the absence of an opportunity to confront and cross-examine the declarant." Id. The recognition of these various hearsay exceptions results from necessity rather than from the Constitution. Barber v. Page, 390 U.S. 719, 722 (1968); WEINSTEIN & BERGER, supra note 2, at 14-16. The cross-examination of a witness has never been considered indispensable. See id.

On the other hand, the narrowest possible interpretation of the Confrontation Clause would suggest that the defendant possesses the right to confront only those witnesses who actually testify against him. Id. This interpretation, however, has also been rejected by the Supreme Court. Id. at 14-17.

4 Roberts, 448 U.S. at 63 (citing California v. Green, 399 U.S. 149, 157 (1970)); see Barber, 390 U.S. at 725 (stating prosecution must make good faith effort to find witness before witness is deemed unavailable); Dowdell v. United States, 221 U.S.
In their attempts to satisfy the requirements of the Confrontation Clause, courts differ as to whether the prosecution, when invoking a hearsay exception, must first prove that the declarant who made the out-of-court statement is unavailable\(^5\) to appear at

325, 330 (1911) (noting well-recognized hearsay exceptions such as former testimony and dying declarations). The right of cross-examination is “a primary interest” secured by the Confrontation Clause. Roberts, 448 U.S. at 63 (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)). The Roberts court concluded:

In short, the Clause envisions “a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”

Roberts, 448 U.S. at 63-64 (citing Mattox, 156 U.S. at 242-43).

While hearsay exceptions and the Confrontation Clause protect similar values and “stem from the same roots,” Dutton v. Evans, 400 U.S. 74, 86 (1970), they are not entirely equitable. Id.; Sanders, 56 N.Y.2d at 64, 436 N.E.2d at 485, 451 N.Y.S.2d at 35 (citing Dutton, 400 U.S. 74). The Confrontation Clause encompasses more than the codification of common law hearsay rules. Id. (citing Green, 399 U.S. at 155); see United States v. Inadi, 475 U.S. 387, 393 n.5 (1986) (stating that overlap between Confrontation Clause and hearsay rules is not complete).

\(^5\) “[A] witness is not ‘unavailable’ for purposes of ... [an] exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” Roberts, 448 U.S. at 74 (citing Barber, 390 U.S. at 724-25). This rule excludes futile attempts. Roberts, 448 U.S. at 74. Thus, if no possibility of producing the witness exists (as would be the case if the witness died), “good-faith demands nothing of the prosecution.” Id. If there is a slight possibility, however, that affirmative acts may procure the witness, the prosecution must undertake such acts. Id. “The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness.” Id. (citations omitted). The prosecution bears the burden of establishing whether the witness is unavailable despite good-faith efforts to procure him. Id.

In People v. McDowell, the witness was a member of the Armed Forces who was soon to be shipped to Germany. People v. McDowell, 88 A.D.2d 522, 449 N.Y.S.2d 981 (1st Dep’t 1982). Fearing that the witness would be out of the country at the time of trial, the prosecution obtained permission to examine the witness conditionally. Id. at 522, 449 N.Y.S.2d at 982. The First Department found that there was no evidence that the Army would have refused to return the witness had the prosecution requested it. Id. The prosecution’s failure to attempt to procure the witness evinced a lack of the requisite good faith. Id. Thus, the court rendered the pretrial testimony inadmissible. Id.

See also United States v. Potamitis, 739 F.2d 784, 789 (2d Cir. 1986) (finding that prosecutor made good faith effort where witness fled to Greece before trial date was set, prosecutor had aid of United States embassy to locate witness, embassy representatives met with witness’ brothers and left copies of subpoenas with them, and hired professional process server licensed in Greece), cert. denied, 469 U.S. 934 (1984); People v. Roman, 212 A.D.2d 390, 392, 622 N.Y.S.2d 47, 49 (1st Dep’t 1995) (holding that evidence that coconspirator’s attorney would have advised him to claim his Fifth Amendment privilege if called to testify was insufficient to establish that coconspirator was unavailable); People v. Rivera, 192 A.D.2d 363, 596 N.Y.S.2d 782 (1st Dep’t 1993) (holding that declarant was rendered unavailable by his invo-
trial. In *Ohio v. Roberts,* the Supreme Court held that in order to satisfy the Confrontation Clause and properly invoke the former testimony exception, the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it seeks to use against the defendant. Thereafter, in *People v. Sanders,* the New York Court of Appeals, purporting to apply the *Roberts* test, held that the *Roberts* unavailability rule applied where the prosecution sought to admit evidence under the coconspirator exception to the hearsay rule.

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7 *448* U.S. 56 (1980).

8 CPLR § 4517 governs the use of former testimony in civil actions. N.Y. CIV. PRAC. L. & R. § 4517 (McKinney 1994). It provides that, under certain enumerated circumstances which render a witness unavailable, "his testimony, taken or introduced in evidence at a former trial, ... may be introduced in evidence by any party upon any trial of the same subject-matter in the same or another action between the same parties ..." *Id.* As long as the underlying issue is substantially the same and the same person had the opportunity to confront and cross-examine the unavailable witness, the former testimony will be admitted. *Fleury v. Edwards*, 14 N.Y.2d 334, 339, 200 N.E.2d 550, 553, 251 N.Y.S.2d 647, 651 (1964).

N.Y. CRIM. PROC. LAW § 670.10, however, governs the admission of former testimony in criminal proceedings. N.Y. CRIM. PROC. LAW § 670.10 (McKinney 1995). It provides that the former testimony of an unavailable witness may be admitted at a criminal proceeding where such testimony was initially taken at either a trial of an accusatory instrument, a hearing upon a felony complaint, or a conditional examination of the witness. *Id.*

9 *Roberts*, 448 U.S. at 65. In *Roberts,* the prosecution invoked the former testimony exception to the hearsay rule and introduced into evidence the preliminary hearing testimony of a witness who was not present to testify at trial. *Id.* at 59. The defendant asserted a violation of the Confrontation Clause. *Id.* The Supreme Court found, "in the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant" and the hearsay must bear adequate indicia of reliability. *Id.* at 65-66. (citations omitted).


11 The coconspirator exception permits out-of-court statements of one coconspirator made in the furtherance of the conspiracy to be received against all of his coconspirators. *Richard T. Farrell, Prince, Richardson on Evidence* § 8-236 (11th ed. 1995); see *People v. Castillo*, ___ A.D.2d ___, 637 N.Y.S.2d 84 (1st Dep't 1996) (finding coconspirator exception applied when declarant was fugitive during trial); *People v. Acevedo*, 192 A.D.2d 614, 596 N.Y.S.2d 151 (2d Dep't 1993) (admitting tape recording made by non-testifying codefendant); cf. *People v. Roman*, 212 A.D.2d 390, 622 N.Y.S.2d 47 (1st Dep't 1995) (finding attorney's testimony that he would have advised declarant not to testify insufficient to show unavailability).
In *United States v. Inadi*, however, the Supreme Court re-evaluated its *Roberts* decision and confined *Roberts* to the facts of that case. In effect, *Roberts* only applied where the prosecution sought to admit the statements of a declarant under the former testimony exception to the hearsay rule. The Court held that the *Roberts* unavailability requirement did not apply to the coconspirator exception since such statements derive their indicia of reliability from the circumstances in which they were made.

Since its *Sanders* decision, the Court of Appeals has not revisited the unavailability issue in the context of nontestifying co-conspirators. As a result, lower courts have struggled with the question of whether they should continue to follow the *Sanders* rule, despite the Supreme Court's clarification of *Roberts* in *Inadi*. Moreover, the confusion in New York surrounding the applicability of the unavailability requirement seems to have infiltrated other hearsay exceptions, such as the excited utterance, present sense impression, and business records exceptions.

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12 *Sanders*, 56 N.Y.2d at 65, 436 N.E.2d at 486, 451 N.Y.S.2d at 36. In *Sanders*, the recorded statements of a coconspirator were admitted into evidence at the defendant's trial. *Id.* at 61, 436 N.E.2d at 484, 451 N.Y.S.2d at 34. Because the coconspirator died prior to the trial, the Court of Appeals found him to be unavailable as required by *Roberts*. *Id.*


14 *Id.* at 392-93.

15 *Id.*. In *Inadi*, the Supreme Court confronted the identical issue that was before the Court of Appeals in *Sanders*—"whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying coconspirator ...." *Id.* at 391. The Supreme Court concluded that the *Sanders* court erred in its application of *Roberts*. *Id.* at 392. *Roberts* did not set forth a "clear constitutional rule" as the Court of Appeals contended. *Id.* Moreover, the Supreme Court noted that, if it adopted the Court of Appeals' misinterpretation of *Roberts*, then no out-of-court statement would be admissible without a showing of unavailability—a result clearly unintended by the *Roberts* decision. *Id.*

16 *Inadi*, 475 U.S. at 393-95. See infra notes 62-69 and accompanying text (discussing rationale of *Inadi*).


18 Compare *People v. Tai*, 145 Misc. 2d 599, 603, 547 N.Y.S.2d 899, 992 (Sup. Ct. N.Y. County 1989) (holding that, after *Inadi*, unavailability of nontestifying coconspirator need not be established) with *Persico*, 157 A.D.2d at 345, 556 N.Y.S.2d at 266 (holding that, despite *Inadi*, *Sanders* remains New York rule and thus unavailability of nontestifying coconspirator must be established).

19 Under this exception, an excited utterance, also known as a spontaneous declaration, permits the out-of-court statements made by a witness in a moment of excitement to be admitted in court. *People v. Caviness*, 38 N.Y.2d 227, 230-31, 342 N.E.2d 496, 499, 379 N.Y.S.2d 695, 698-99 (1975). The statements are admissible if
It is submitted that the unavailability requirement should not be applied when the coconspirator exception is invoked. Likewise, as the Court of Appeals has recently stated, the unavailability rule should not be applicable to the excited utterance, present sense impression or business records exceptions. Part I of this Article focuses on how the lower courts of New York have addressed the coconspirator exception after the Sanders decision. Part II discusses how the Court of Appeals’ misinterpretation of Roberts in Sanders has created confusion in the application of other hearsay exceptions. Part III argues that the unavailability rule should be abandoned when invoking the coconspirator exception, as well as the various other hearsay exceptions where courts have erroneously applied the rule. Finally, Part IV discusses how hearsay statements should be treated when the declarant actually does testify.

I. THE COCONSPIRATOR EXCEPTION AFTER SANDERS

After Sanders, the New York rule was readily apparent—the prosecution must either produce or demonstrate the unavailability of the nontestifying coconspirator before his out-of-court statements may be admitted into evidence. After Inadi’s clarification made during a continuing period of excitement or fear without “time to contrive and misrepresent ...” People v. Brooks, 71 N.Y.2d 877, 878, 522 N.E.2d 1051, 1051, 527 N.Y.S.2d 753, 753 (1988) (citations omitted); see generally Robert A. Barker, 1993-94 Survey of New York Law, Evidence, 45 SYRACUSE L. REV. 361, 374-83 (1994) (describing case law on present sense impression and excited utterances).

20 In People v. Brown, the New York Court of Appeals held that “spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence. Further, such statements may be admitted even though the declarant is not a participant in the events and is an unidentified bystander.” People v. Brown, 80 N.Y.2d 729, 734-35, 610 N.E.2d 369, 373, 594 N.Y.S.2d 696, 700 (1993).

22 See infra Part II (discussing how issue of unavailability has caused confusion in application of other hearsay exceptions).

21 A business record will be admitted if it was made in the regular course of business, it was the regular course of such business to make the record, and the record was made at or about the time of the event. N.Y. CIV. PRAC. L. & R. section 4518(a) (McKinney 1992).

24 People v. Sanders, 56 N.Y.2d 51, 64-65, 436 N.E.2d 480, 486, 451 N.Y.S.2d 30,
ification of Roberts, however, New York lower courts became uncertain whether Sanders remained the law in New York. In People v. Tai, for example, the Supreme Court of New York County concluded that Inadi had in fact changed the Sanders rule and held that the unavailability of a nontestifying coconspirator need not be established prior to the admission of his out-of-court statements under the coconspirator exception. Similarly, in People v. Tarantino, the First Department, following Inadi, held that proof of unavailability is not required prior to admitting the hearsay statements of a nontestifying coconspirator.

Less than one year later, however, the First Department overruled its Tarantino decision and concluded that Sanders remained the law in New York despite Inadi. Since then, every

36 (1982); see People v. Rawlins, 105 A.D.2d 552, 553, 481 N.Y.S.2d 500, 501 (3d Dep't 1984) (applying Roberts decision as interpreted in Sanders). 25 See infra notes 26-31 and accompanying text (discussing various court decisions). One court avoided deciding the issue by holding that, even if the Roberts test applied after Inadi, it was satisfied since the nontestifying coconspirator was in fact unavailable. People v. Warren, 156 A.D.2d 972, 973, 549 N.Y.S.2d 263, 264 (4th Dep't 1989).


27 Id. at 602, 547 N.Y.S.2d at 992. In Tai, the nontestifying coconspirator was incarcerated at the time of trial. Id. Although the prosecution asserted that the court's evaluation of the unavailability requirement was irrelevant since the coconspirator was in fact unavailable, the prosecution had failed to attempt to subpoena the coconspirator from State prison. Id. Thus, the admission of the coconspirator's statements turned on whether the court adhered to Sanders or followed Inadi. Id.

28 156 A.D.2d 244, 548 N.Y.S.2d 504 (1st Dep't 1989), overruled by People v. Roman, 212 A.D.2d 390, 622 N.Y.S.2d 47 (1st Dep't 1995).

29 Id. at 244, 548 N.Y.S.2d at 505. In Tarantino, the defendant contended that the admission of the out-of-court statements, introduced through the testimony of other witnesses, was improper. Id. Relying on Inadi, the court concluded the statements were not "rendered inadmissible simply because of the declarant's availability as a witness." Id. Thus, the court held that the statements were properly admitted under the coconspirator exception. Id.

It is noteworthy that the Tarantino court made absolutely no reference to the Sanders decision. It merely applied the unavailability rule as set forth in Inadi. This may have been due to the court's failure to recognize the existence of the conflict between the New York Court of Appeals and the Supreme Court. Cf Tai, 145 Misc. 2d at 601-04, 547 N.Y.S.2d at 991-93 (evaluating history of unavailability requirement from Roberts to Sanders and ending with Inadi).

30 People v. Persico, 157 A.D.2d 339, 345, 556 N.Y.S.2d 262, 266 (1st Dep't 1990). In Persico, the First Department concluded, "[s]o far as can be discerned from this State's precedents, Sanders ... remains good law and it would appear that the test set forth in Sanders for judging the admissibility of coconspirator hearsay has, in fact, retained some currency in recent intermediate appellate decisions." Id. (citations omitted). In People v. Roman, 212 A.D.2d 390, 392, 622 N.Y.S.2d 47, 49
New York court confronted with this issue has held that the unavailability of a nontestifying declarant must be established in order to admit hearsay under the coconspirator exception.\(^3\)

II. THE SPREAD OF SANDERS' UNAVAILABILITY DOCTRINE TO NEW YORK HEARSAY EXCEPTIONS

A. Excited Utterance

The New York Court of Appeals has long recognized the excited utterance exception to the hearsay rule.\(^3\) Nevertheless, the court has failed to address whether the prosecution must first prove that the declarant was unavailable before the excited utterance may be admitted into evidence.\(^3\) In contrast, the United States Supreme Court, in *White v. Illinois*,\(^3\) another post-*Roberts* decision, analogized the excited utterance exception to the coconspirator exception involved in *Inadi*.\(^3\) Specifically, the Court held that the prosecution need not establish the unavailability of a nontestifying declarant prior to the admission of the declarant's excited utterance.\(^3\)

(1st Dep't 1995), the First Department explicitly overruled Tarantino by stating, "[i]n light of the foregoing precedent ... *Tarantino* ... should not be followed."


\(^3\) See *People v. Marks*, 6 N.Y.2d 67, 71, 160 N.E.2d 26, 27, 188 N.Y.S.2d 465, 467 (1959) (finding that spontaneous declaration is "a true exception to the hearsay rule"), *cert. denied*, 362 U.S. 912 (1960); *People v. DelVermo*, 192 N.Y. 470, 483, 85 N.E. 690, 695 (1908) ("Evidence is admissible of exclamatory statements declaratory of the circumstances of an injury when uttered by the injured person immediately after the injury.").

\(^3\) Perhaps this was due to the fact that in *Marks* the declarant was actually available and testified in court to her out-of-court excited utterance. *Marks*, 6 N.Y.2d at 70, 160 N.E.2d at 27, 188 N.Y.S.2d at 466.

\(^3\) See *People v. Marks*, 6 N.Y.2d 67, 71, 160 N.E.2d 26, 27, 188 N.Y.S.2d 465, 467 (1959) (finding that spontaneous declaration is "a true exception to the hearsay rule"), *cert. denied*, 362 U.S. 912 (1960); *People v. DelVermo*, 192 N.Y. 470, 483, 85 N.E. 690, 695 (1908) ("Evidence is admissible of exclamatory statements declaratory of the circumstances of an injury when uttered by the injured person immediately after the injury.").

\(^3\) In *White*, the petitioner was tried for the alleged sexual assault of a four year old. *Id.* at 349. At trial, the Court permitted the child's mother, the babysitter, and the police officer who had arrived on the scene to testify to several statements made by the child immediately after the alleged assault. *Id.* at 350. The petitioner objected on hearsay grounds since the child, who was available, did not testify. *Id.* The Supreme Court, after revisiting *Inadi*, concluded that, like coconspirator statements, excited utterances have "substantial probative value, ... that could not be duplicated simply by the declarant later testifying in court." *White* 502 U.S. at 353-56. See infra notes 62-69 and accompanying text (evaluating *Inadi* rationale).
In the wake of this clear pronouncement, New York courts once again debated whether to follow the Supreme Court’s lead and not require proof of unavailability, or to analogize the excited utterance exception to the Court of Appeals’ holding in Sanders and impose the unavailability rule.\footnote{Compare People v. Torres, 196 A.D.2d 758, 601 N.Y.S.2d 919 (1st Dep’t 1993) (requiring proof of unavailability) with People v. Buie, 86 N.Y.2d 501, 658 N.E.2d 192, 634 N.Y.S.2d 415 (1995) (dispensing with proof of unavailability) and People v. Victor R., 161 Misc.2d 212, 613 N.Y.S.2d 567 (Sup. Ct. Kings County 1994) (same) and People v. Cook, 159 Misc. 2d 430, 603 N.Y.S.2d 979 (Sup. Ct. Kings County) (same), aff’d, A.D.2d, 632 N.Y.S.2d 193 (2d Dep’t 1995).} Thus, one court found that the unavailability of the declarant must be established,\footnote{See Torres, 196 A.D.2d 758, 601 N.Y.S.2d 919 (requiring proof of unavailability). In Torres, a police officer testified that the victim, who was unavailable at the time of trial, screamed, “That’s him!,” when police brought the defendant back to the scene within five minutes of the shooting. \textit{Id.} at 758, 601 N.Y.S.2d at 920. In holding that the trial court properly admitted the statement as an excited utterance, the First Department found “[t]he admission of this excited utterance did not violate defendant’s constitutional right of confrontation, as the People satisfactorily established, at a pretrial hearing, … that the declarant was unavailable at the time of trial despite good faith efforts to obtain his presence ….” \textit{Id.} (citing Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)).} while others found that proof of unavailability was not required.\footnote{See People v. Cook, 159 Misc. 2d 430, 603 N.Y.S.2d 979 (Sup. Ct. Kings County 1993), aff’d, A.D.2d, 632 N.Y.S.2d 193 (2d Dep’t 1995). In Cook, the court found “[u]nless an exception is ‘firmly rooted,’ the New York Constitution requires proof of ‘unavailability’ ….” \textit{Id.} at 437-38, 603 N.Y.S.2d at 984 (quoting Persico, 157 A.D.2d 339, 556 N.Y.S.2d 262). Concluding the excited utterance exception was “firmly rooted,” the court held that unavailability need not be established. \textit{Id.} at 440, 603 N.Y.S.2d at 985-86. See also Victor R., 161 Misc. 2d 212, 613 N.Y.S.2d 567 (Sup. Ct. Kings County 1994). The court in Victor R. concluded “[t]he excited utterance exception to the hearsay rule is a long standing and firmly rooted one and its use does not depend on a showing that the declarant is unavailable to testify in court.” \textit{Id.} at 214, 613 N.Y.S.2d at 568-69 (citing White, 502 U.S. at 346; Cook, 159 Misc. 2d at 431, 603 N.Y.S.2d at 979).}
B. Business Records Exception

It appears the confusion also spread to the business records exception. In *United States v. Davis*, the Second Circuit held that admission of a business record is not contingent upon the presence of its declarant at trial.

Previously, however, in *McGee v. Walters*, the New York Court of Appeals reached a potentially conflicting result when it considered the implications of the business records exception on the Confrontation Clause. In *McGee*, a parole report was offered by a hearing officer at a parole revocation hearing. The court held that upon a specific finding of good cause, adverse statements may be admitted without affording the parolee an opportunity to confront the declarant/preparer of the report.

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40 767 F.2d 1025 (2d Cir. 1985).
41 Id. at 1031-32. In *Davis*, the defendant argued that the admission of Swiss bank records at trial violated his right to confront the witnesses who had appeared at the authentication period. Id. at 1031. The court rejected the defendant's claim, recognizing that "the Confrontation Clause does not preclude the admission of all extra-judicial statements when the declarant is not present at trial." Id. The Confrontation Clause is satisfied as long as the business records "bear sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration." Id. at 1032.
44 *McGee*, 62 N.Y.2d at 320, 465 N.E.2d at 343, 476 N.Y.S.2d at 804. The report, admitted under the business records exception, described the relator's various parole violations. Id. The relator's parole officer prepared the report, but left the employ of the Division of Parole prior to the parole hearing. Id. The hearing officer made no finding that the parole officer was unavailable to testify. Id. at 321, 465 N.E.2d at 344, 476 N.Y.S.2d at 805.
45 Id. at 323, 465 N.E.2d at 345, 476 N.Y.S.2d at 806. The court found that, when deciding whether confrontation was required, a hearing officer must consider: (1) the general policies favoring confrontation; (2) the objective or subjective nature of the contents of the report; (3) the extent to which cross-examination will further the fact-finding process; (4) whether the evidence was cumulative; and (5) the burden which would result from requiring the parole officer to be procured. Id. at 323, 465 N.E.2d at 345, 476 N.Y.S.2d at 806. For example, when "otherwise admissible evidence is merely cumulative or its substance is objective factual material compiled under circumstances indicating it to be inherently reliable, no undue burden should
Since no such finding was made, the court concluded that the parolee's due process rights were violated.\textsuperscript{46} The McGee court, however, did not explicitly state whether unavailability must be proven—the court merely set forth the proper criteria that must be evaluated prior to dispensing with the right of confrontation.\textsuperscript{47}

Thus, New York courts have continued to struggle with the issue of unavailability in the context of the business records exception.\textsuperscript{48} In \textit{People v. Bridges},\textsuperscript{49} the Fourth Department, relying on \textit{Roberts} and \textit{Sanders}, found that the unavailability of the preparer of the business record must be established before the business record exception may be properly invoked.\textsuperscript{50} Yet, in 1995,
the First Department stated that proof of unavailability of the record preparer is not required.\(^{51}\)

**C. Present Sense Impression**

The confusion stemming from *Sanders* had also spread to the present sense impression exception. After *Sanders*, most courts concluded that proof of unavailability was required.\(^{52}\) Yet, in 1994, the Supreme Court, Kings County, held that unavailability need not be established prior to the admission of hearsay under the present sense impression exception.\(^{53}\)

In October of 1995, the New York Court of Appeals addressed the issue in *People v. Buie.*\(^{54}\) The court held that "the present sense impression exception does not require a showing of the declarant’s unavailability as a *sine qua non* to admissibility, though that factor may be weighed by trial judges in assessing

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\(^{51}\) See *People v. Vanterpool*, 214 A.D.2d 429, 430, 625 N.Y.S.2d 38, 39 (1st Dep’t 1995). The court, in *dicta*, stated that “where the hearsay exception is justified by its compelling reliability—as in the business records exception—then the evidentiary rule is congruent with the values of the Confrontation Clause and the unavailability of the declarant is not required.” *Id.* at 430, 625 N.Y.S.2d at 39 (citing *People v. Persico*, 157 A.D.2d 339, 348, 566 N.Y.S.2d 262, 268 (1st Dep’t 1990)); see also *People v. Buie*, 86 N.Y.2d 501, 506, 658 N.E.2d 192, 195, 634 N.Y.S.2d 415, 418 (1995) (Naming the business record exception as one example of hearsay exception that does not require proof of unavailability prior to admission at trial).

\(^{52}\) See *People v. Crampton*, 107 A.D.2d 998, 999, 484 N.Y.S.2d 721, 722-23 (3d Dep’t 1985). In *Crampton*, the defendant wanted the opportunity to cross-examine the declarant on the out-of-court statements which were admitted under the present sense impression exception. *Id.* at 998, 484 N.Y.S.2d at 722. The court found the State was required to establish the unavailability of the declarant. *Id.* at 999, 484 N.Y.S.2d at 723; see also *Cook*, 159 Misc. 2d 430, 438, 603 N.Y.S.2d 979, 984 (Sup. Ct. King’s County 1993) (holding prosecution must establish unavailability of non-testifying declarant of present sense impression statements), aff’d, 632 N.Y.S.2d 193 (2d Dep’t 1995); N.Y. LAW REVISION COMMISSION, PROPOSED CODE OF EVIDENCE, § 804(b)(4) at 220 (1992) (stating declarant of present sense impression must be unavailable prior to admission of hearsay).

\(^{53}\) See *People v. Victor R.*, 161 Misc. 2d 212, 214-16, 613 N.Y.S.2d 567, 569-70 (Sup. Ct. King’s County 1994). In *Victor R.*, the defendant argued that 911 tapes were inadmissible under the present sense impression exception since the declarant was actually present in court and testified during the trial. *Id.* at 215, 613 N.Y.S.2d at 569. Given the independent significance of the tapes, the court concluded their admission was not contingent upon the unavailability of the declarant. *Id.* at 215-16, 613 N.Y.S.2d at 569-70.

\(^{54}\) 88 N.Y.2d at 503, 658 N.E.2d at 193, 634 N.Y.S.2d at 416. In *Buie*, the prosecution sought to admit 911 tapes which were recorded when the victim called the police from his cellular phone as he followed a fleeing burglar from his house. *Id.* at 504-05, 658 N.E.2d at 194, 634 N.Y.S.2d at 416. At trial, both the tapes were admitted and the victim testified in court to the 911 conversation. *Id.*
the traditional probativeness versus undue prejudice calculus for allowing evidence before a petit jury.

III. WHEN UNAVAILABILITY SHOULD NOT BE REQUIRED

A. The Coconspirator Exception

Although the Court of Appeals failed to justify explicitly its Sanders ruling, requiring proof of the unavailability of the non-testifying coconspirators, the subsequent lower courts which have continued to follow Sanders, despite Inadi, have attempted to demonstrate why such a rule is necessary. In People v. Persico, for example, the First Department reasoned that “the only possible rationale for dispensing with [cross-examination] is that the statements [sought] to be admitted ... are so reliable as to make cross-examination unnecessary.” The court concluded that “the declarations of coconspirators are likely to be fraught with inaccuracies,” and therefore, coconspirator statements were found to be unreliable. Similarly, in People v. Glenn, the

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55 Id. at 506, 658 N.E.2d at 195, 634 N.Y.S.2d at 418. Thus, while Buie has foreclosed the unavailability issue in the context of the present sense impression exception, the pre-Buie present sense impression cases illustrate the confusion surrounding the applicability of the unavailability rule.

56 See People v. Sanders, 56 N.Y.2d 51, 64-65, 436 N.E.2d 480, 486, 451 N.Y.S.2d 30, 36 (1982). The Sanders court, without explanation, seems to have blindly applied the Roberts test to the coconspirator exception. Id.


58 Id. at 346, 556 N.Y.S.2d at 267. The First Department reasoned that such a rule was necessary “given the critical importance of cross-examination to the end which the Confrontation Clause exists to insure, namely, the integrity of the truth-seeking process.” Id.

59 Id. The court reasoned:

It is true that coconspirators are not, at the time of the conspiracy, subject to the particular inducements to fabrication present in the context of a prosecution; they will not yet be tempted to seek exoneration or leniency at the expense of their former partners in crime. No one would suggest, however, that, but for the near prospect of penal sanctions, criminals are otherwise to be trusted.

Id. The court found that coconspirators are likely to lie so as to mislead the listener into believing the conspiracy is stronger than it actually is, with more members and different aims. Id. Moreover, the court noted that coconspirator’s statements are frequently based on incomplete or erroneous knowledge since the extent of the conspiracy is often not fully revealed to all of its individual members. Id. at 346-47, 556 N.Y.S.2d at 267. Thus, the court concluded such ambiguities reflect the need for perhaps the most effective truth-determinative tool—cross-examination. Id. at 347, 556 N.Y.S.2d at 267-68.

60 185 A.D.2d 84, 592 N.Y.S.2d 175 (4th Dep’t 1992).
Fourth Department concluded that the statements of a co-conspirator were unreliable because coconspirators often have a great motive to lie—the desire to avoid prosecution. 61

These decisions, however, overlook the unique value of co-conspirator statements which other hearsay exceptions lack. 62 Since such statements are made during the course of the conspiracy, they "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." 63 Importantly, the statements derive their legal significance from the circumstances in which they were made. 64 Additionally, a coconspirator declarant, who may himself be facing prosecution, will have little incentive to help either the prosecution or the defendant. 65 Furthermore, it is submitted

61 Id. at 88, 592 N.Y.S.2d at 178.
62 See United States v. Inadi, 475 U.S. 387, 394 (1986). For example, "former testimony often is only a weaker substitute for live testimony." Id. It rarely has independent evidentiary significance of its own. Id. It is merely intended to replace live testimony. Id.

If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

Id. (citations omitted).

Moreover, unlike coconspirator statements, "strong similarities" exist between the testimony given at the prior judicial proceeding and the live testimony given at trial. Id. at 395. Such strong similarities do not exist, however, between coconspirator statements made during the course of the conspiracy and the coconspirator's live testimony at trial. Id. "To the contrary, co-conspirator [sic] statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." Id. at 395-96.

63 Id. at 395.
64 Id. In Inadi, the authorities had lawfully intercepted and recorded several telephone conversations between various participants in a drug dealing conspiracy. Id. at 390. The Supreme Court opined, "[w]hen the Government ... offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made." Id. at 395. Coconspirators are likely to speak differently to their coconspirators in order to further their illegal aims than when testifying in court. Id. "Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy." Id.

65 Inadi, 475 U.S. at 395. The positions of the parties at trial will have changed substantially from the time the statements were made. Id. The declarant and the defendant, once partners in crime, will have become suspects or defendants in a criminal trial, each with information capable of incriminating the other. Id. "The
that an unavailability rule should not bar the admission of co-conspirator statements for fear of possible ambiguities or inaccuracies within the statements; rather, such factors should go to the weight of the evidence.

Moreover, there appears to be little, if any, benefit from the imposition of the Court of Appeals' unavailability rule. Coconspirator hearsay statements are admissible whether the declarant is proven unavailable, or if he is available and actually testifies. Finally, "an unavailability rule is not likely to produce much testimony that adds anything ... over and above what would be produced without such a rule," since most often, only those declarants that neither side believes would be helpful to their position would not be subpoenaed.

It is also submitted that the Glenn court erred in its analysis. In Glenn, a coconspirator made several statements to a police officer which were sought to be admitted at trial under the coconspirator exception. Statements made to the authorities, declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime." Id. Thus, it is highly unlikely the declarant's testimony will "recapture the evidentiary significance of statements made when the conspiracy was operating in full force. Id. at 396 (explaining that whether declarant is available and produced by prosecution or unavailable, statements can be introduced).

"Thus, the unavailability rule cannot be defended as a constitutional 'better evidence' rule, because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness." Id (citations omitted).

Id. at 398 n.7. First, the interests of the prosecution and the coconspirator seldom run together. Id. at 397. Moreover, since the position of each coconspirator is potentially harmful to the other, it is unlikely the defendant would desire to call a coconspirator to testify. Id. at 398 n.7.


Id. at 86-88, 592 N.Y.S.2d at 176-78. The police officer pulled over a car driven by the defendant because it lacked a rear license plate. Id. at 86, 592 N.Y.S.2d at 176. When his suspicions were aroused due to several blatant lies by both the defendant and the declarant (the sole passenger), the officer received their permission to search the trunk. Id., 592 N.Y.S.2d at 176-77. Upon discovering a suitcase with a combination lock on it, the officer asked the declarant for the combination. Id. at 86-87, 592 N.Y.S.2d at 177. The declarant stated that he would have to get the combination from the defendant. Id. at 87, 592 N.Y.S.2d at 177. At trial, the
however, are not within the scope of the coconspirator exception.\textsuperscript{72} Thus, while it is correct that the \textit{Glenn} statements were likely to be falsified, the court improperly classified them as falling within the coconspirator exception.\textsuperscript{73}

\textbf{B. Excited Utterance, Present Sense Impression and Business Records Exceptions}

The justifications for dispensing with an unavailability rule in the context of the coconspirator exception apply with equal force to the excited utterance and present sense impression exceptions.\textsuperscript{74} Such statements derive their legal significance from the circumstances in which they were made.\textsuperscript{75} A statement offered in a moment of excitement or when witnessing the occurrence of a criminal act—made without an opportunity to reflect—"may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the court—"

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\textsuperscript{72} In applying the \textit{Roberts} test, the \textit{Glenn} court concluded the statements were inadmissible given the declarant's great motive to lie to the police officer so as to convince him that the suitcase belonged to the defendant. \textit{Id.} at 88, 592 N.Y.S.2d at 178. Such statements made to police officers are not covered by the coconspirator exception since they are not made to someone with whom the declarant was engaged in a joint criminal enterprise. See supra note 11 (discussing coconspirator exception).

\textsuperscript{73} It is submitted that the court erred both by concluding that the statements fell within the coconspirator exception and by applying the \textit{Roberts} test to determine whether they were admissible. Rather, it is suggested that the court should have held the statements to be outside the exception and, as such, \textit{Roberts} analysis would have been unnecessary.

\textsuperscript{74} See supra notes 62-69 and accompanying text (discussing reasons for dispensing with unavailability rule in coconspirator cases).

\textsuperscript{75} See \textit{White v. Illinois}, 502 U.S. 346, 356-57 (1992) (revisiting \textit{Inadi} rationale and holding it applies with same force under spontaneous declaration exception). Notably, such statements are made in contexts that virtually guarantee their trustworthiness. \textit{Id.} at 355. "But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony." \textit{Id.} at 355-56. See \textit{also supra} note 39 (discussing how Court of Appeals has stated, in \textit{dicta}, that excited utterance is one example of hearsay exception that does not require unavailability rule).

The unavailability rule should not be imposed where the business records exception is invoked. As with the excited utterance and present sense impression exceptions, the business records exception “carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.” Moreover, even courts that incorrectly require an unavailability rule in other hearsay exceptions concede that such a rule is not required “where the hearsay exception is justified by its compelling reliability—as in the business records exception.”

IV. THE ADMISSION OF HEARSAY WHEN THE DECLARANT TESTIFIES

Under several hearsay exceptions, if the declarant does testify at trial, the hearsay is rendered inadmissible. By analogy, some courts have seemed to suggest that out-of-court statements sought to be admitted under the coconspirator, excited utterance, present sense impression or business records exceptions would also be inadmissible if the declarant testifies at trial. In People v. Vanterpool, 214 A.D.2d 429, 430, 625 N.Y.S.2d 38, 39 (1st Dep't 1995) (citing People v. Persico, 157 A.D.2d 339, 348, 556 N.Y.S.2d 262, 268 (1st Dep't 1990)). The Vanterpool court stated that where justified by its “compelling reliability,” the “evidentiary rule is congruent with the values of the confrontation clause” and unavailability is not required. Id.; see also White, 502 U.S. at 357 (stating “firmly rooted” hearsay exceptions have evidentiary value and are sufficiently reliable); United States v. Inadi, 475 U.S. 387, 400 (1986) (holding Confrontation Clause does not require unavailability as condition to coconspirator admission); Perfetto, 898 F. Supp. at 111-12 (finding that firmly rooted hearsay exceptions do not require showing of unavailability to satisfy Confrontation Clause).

76 White, 502 U.S. at 356.
77 Id.; see also Perfetto v. Hoke, 898 F. Supp. 105, 111-12 (E.D.N.Y. 1995) (explaining business records hearsay exception is firmly grounded due to inherent reliability and does not require showing of unavailability); United States v. Keplinger, 572 F. Supp. 1068, 1071 (N.D. Ill. 1983) (stating admission of business records without showing of unavailability is justified because of “inherent reliability” of business records).
78 People v. Vanterpool, 214 A.D.2d 429, 430, 625 N.Y.S.2d 38, 39 (1st Dep't 1995) (citing People v. Persico, 157 A.D.2d 339, 348, 556 N.Y.S.2d 262, 268 (1st Dep't 1990)). The Vanterpool court stated that where justified by its “compelling reliability,” the “evidentiary rule is congruent with the values of the confrontation clause” and unavailability is not required. Id.; see also White, 502 U.S. at 357 (stating “firmly rooted” hearsay exceptions have evidentiary value and are sufficiently reliable); United States v. Inadi, 475 U.S. 387, 400 (1986) (holding Confrontation Clause does not require unavailability as condition to coconspirator admission); Perfetto, 898 F. Supp. at 111-12 (finding that firmly rooted hearsay exceptions do not require showing of unavailability to satisfy Confrontation Clause).
79 One such example is the former testimony exception. See N.Y. CRIM PROC. LAW § 670.10(1) (McKinney 1995). Once the declarant appears in court, the prior testimony is inadmissible. Id. Another example is the declarations against interest exception. See N.Y. CRIM. PROC. LAW § 60.10(141) (McKinney 1995) (requiring declarant be unavailable before declaration against interest is admissible).
80 See, e.g., People v. Cook, 159 Misc. 2d 430, 439, 603 N.Y.S.2d 979, 985 (Sup. Ct. Kings County 1993) (stating how trial court found, if declarant testifies, there is “no justification” for admission of hearsay), aff'd, __ A.2d __, 632 N.Y.S.2d 193 (2d Dep't 1995).
v. *Buie*,

However, the Court of Appeals addressed the present sense impression exception and concluded, given the independent significance of the out-of-court present sense impression statements, the declarant's testimony at trial does not preclude the admission of the hearsay.

Similarly, it is submitted that hearsay sought to be admitted under the coconspirator, business records or excited utterance exceptions should also be admissible despite the declarant's in-court testimony. Such statements have an independent evidentiary purpose that is not capable of replication via the declarant's testimony. Moreover, in *Inadi*,* the Supreme Court, addressing the coconspirator exception, concluded that coconspirator hearsay is admissible despite the in-court testimony of the declarant.

**CONCLUSION**

Given the unique evidentiary value of coconspirator state-

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82 *Id.* at 507, 658 N.E.2d at 195, 634 N.Y.S.2d at 418. The testimony of the declarant does not otherwise preclude the admission of the present sense impression evidence. *Id.* The concurrence in *Buie* argued that, in *People v. Brown*, the Court held, if an independent witness is available to testify, "there is certainly no pressing need for the hearsay testimony." *Id.* at 514, 658 N.E.2d at 200, 634 N.Y.S.2d at 423 (Simons, J., concurring) (quoting *People v. Brown*, 80 N.Y.2d 729, 736, 610 N.E.2d 369, 373, 594 N.Y.S.2d 696, 700 (1993)). However, the *Buie* majority properly distinguished that argument, contending the statement referred to the "equally percipient witness" requirement discussed and rejected in the *Brown* decision. *Buie*, 86 N.Y.2d at 508-09, 658 N.E.2d at 196, 634 N.Y.S.2d at 419.

Furthermore, the Court held that the admission of the 911 tape in addition to the declarant's in-court testimony did not amount to improper bolstering, as contended by the defendant. *Id.* at 509-10, 658 N.E.2d at 197-98, 634 N.Y.S.2d at 420-21. The Court reasoned that the character of the tapes was "different from typical prior consistent statement material and did far more than 'mimic' the in-court recollective testimony." *Id.* at 509, 658 N.E.2d at 197, 634 N.Y.S.2d at 420. "Also, because the 911 tape at issue is admissible under an independent hearsay exception, and because of this Court's well-established preference for cross-examination of hearsay declarants, we reject the bolstering concept as inapplicable in this case." *Id.*

83 See supra notes 62-69 and accompanying text (discussing independent value of such evidence).


85 *Id.* at 396. The *Inadi* Court, in doubting the benefits of an unavailability rule, concluded that if the declarant is unavailable or is available and testifies, his hearsay statements would be admissible in either event. *Id.* Even under a rule requiring the production of an unavailable coconspirator declarant, it would only be when the prosecution mistakenly failed to call him that his hearsay would not be admissible. *Id.*
ments, it is submitted that the Court of Appeals should overrule its Sanders decision and dispense with its present requirement of proof of unavailability prior to the admission of coconspirator out-of-court statements. This would be consistent with the Court's reasoning in People v. Buie, where it recognized the substantive value of present sense impression statements and, thus, refused to make their admission contingent upon satisfying an unavailability rule.

Similarly, the independent value of business records and excited utterances also necessitates the abandonment of any unavailability rules which may serve to preclude their admission.

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