

New York Court of Appeals Adopts the Present Sense Impression Exception to the Rule Against Hearsay

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DEVELOPMENTS IN THE LAW

New York Court of Appeals adopts the present sense impression exception to the rule against hearsay

The present sense impression exception to the hearsay rule refers to a statement that describes or explains an event while the event is being perceived.¹ Because the statement is made contemporaneously with the event, the risk of fabrication and memory loss are diminished.² Scholars and courts disagree on the amount and type of corroboration, if any, required to assure the reliability of a present sense impression.³ Similarly, disagreement exists over whether such a statement may be admitted if made by an

¹ See CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 271, at 211-15 (John W. Strong ed., 4th ed. 1992) (discussing developments of present sense impression exception).

The present sense impression exception to the rule against hearsay was first articulated by James B. Thayer. James B. Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae* (pts. 1 & 2), 14 AM. L. REV. 817, 15 AM. L. REV. 1, 71 (1880-81) [hereinafter Thayer I and Thayer II, respectively]. Thayer proposed that statements made near in time to that which they seek to prove are reliable and should be acknowledged as an exception to the hearsay rule. Thayer II, *supra*, at 71,107.

The Federal Rules of Evidence have codified the present sense impression exception as follows: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FED. R. EVID. 803(1); see also William G. Passannante, Note, *Res Gestae, The Present Sense Impression Exception and Extrinsic Corroboration under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 FORDHAM URB. L.J. 89, 99 n.66 (1989) (analogizing present sense impression to baseball game commentary).

² MCCORMICK, *supra* note 1, § 271, at 211-12. The risk of fabrication is diminished because the declarant has no time for reflection, and the risk of memory loss is eliminated because the utterance occurred while the event was taking place. *Id.*; see also *infra* note 23 (discussing contemporaneity requirement).

³ See *People v. Brown*, 80 N.Y.2d 729, 736, 610 N.E.2d 369, 373, 594 N.Y.S.2d 696, 700 (1993); *infra* notes 25-28 and accompanying text (discussing confusion surrounding corroboration requirement).

Both Thayer and Morgan favored a strict corroboration requirement. See Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236 (1922); Thayer II, *supra* note 1, at 107. Morgan stated that the declaration is usually made to a third party who testifies to the declaration on the witness stand and is therefore subject to cross-examination. *Id.* at 236. See generally Passannante, *supra* note 1, at 100-05 (questioning whether present sense impression exception contains corroboration requirement); Franci Neely Beck, Note, *The Present Sense Impression*, 56 TEX. L. REV. 1053, 1068-74 (1978) (proposing corroboration requirement under Federal Rule of Evidence 803(1) only when declarant is available); Note, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 NW. U. L. REV. 666, 676-77 (1976) [here-

unidentified declarant,⁴ particularly if the statement is admitted against a criminal defendant who has a constitutional right to confront an accuser.⁵

Recently, in *People v. Brown*,⁶ the New York Court of Appeals adopted the present sense impression exception to the hearsay rule, thereby resolving these issues insofar as New York evidence law is concerned.⁷ The *Brown* court held that the exception encompassed "spontaneous descriptions of events made substantially contemporaneously with the observations [when the] description is substantially corroborated by other evidence."⁸ The court added that the present sense testimony may be admitted

inafter *Hearsay*] (proposing corroboration be required sufficient to prove declarant actually perceived event).

⁴ See *Hearsay*, *supra* note 3, at 675. One commentator argued that identification of the declarant is not necessary because it is possible to establish that he perceived the event without establishing his identity. *Id.* The author reasoned that if it can be corroborated circumstantially that the declarant was a percipient witness, then the identity of the declarant is irrelevant. *Id.*

Another commentator stated that courts which have excluded present sense impressions of unidentified declarants have done so because the proponent of the declaration was unable to establish the declarant's percipience, not because the declarant was unidentified. See Beck, *supra* note 3, at 1063. Normally this proof is established circumstantially by a corroborating witness. *Id.*; see also Jon R. Waltz, Note, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 878 (1981) (stating that declarant need not be identified); Kathryn E. Wohlsen, Comment, *The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 DICK. L. REV. 347, 357 (1978) (explaining that courts' hesitancy to admit present sense impressions of unidentified bystanders based on failure to establish declarants' percipience).

⁵ The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI. The Sixth Amendment is binding on the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965). When the declarant is unidentified, the criminal defendant has no opportunity to impeach the declarant or learn if the accuser maintains any bias; hence, it is suggested that the criminal defendant's Sixth Amendment rights are violated. See *infra* note 43 and accompanying text. See generally McCORMICK, *supra* note 1, § 252 at 440; Passannante, *supra* note 1, at 94-95 (discussing Sixth Amendment concerns against admitting hearsay in criminal proceeding).

⁶ 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993).

⁷ *Id.* at 731, 610 N.E.2d at 370, 594 N.Y.S.2d at 697. For a recent civil case recognizing the present sense impression exception to the hearsay rule, see *Berger v. City of New York*, 157 Misc. 2d 521, 597 N.Y.S.2d 555 (Sup. Ct. N.Y. County 1993) (citing *People v. Brown*, 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993)).

⁸ *Brown*, 80 N.Y.2d at 734, 610 N.E.2d at 373, 594 N.Y.S.2d at 700.

under the exception even though the declarant "is an *unidentified* bystander."⁹

In *Brown*, police received a 911 call from a man who stated that he was observing a burglary in progress at a restaurant across the street from his apartment.¹⁰ Approximately three minutes after the call, two police officers arrived at the scene and observed two males fleeing the restaurant who fit the caller's description.¹¹ The officers pursued and apprehended the defendant on the roof of the restaurant.¹² The caller then telephoned 911 a second time and reported that the other suspect was still on the roof, where he was subsequently apprehended.¹³ Although the caller identified himself as "Henry" and reported his phone number,¹⁴ this information later proved to be false.¹⁵

Over the defendant's objection, the Supreme Court, Bronx County, admitted the 911 tapes as present sense impressions.¹⁶ The jury found the defendant guilty of burglary in the third degree, criminal mischief, and resisting arrest.¹⁷ The Appellate Division, First Department, unanimously affirmed and granted leave to appeal.¹⁸

The Court of Appeals affirmed the decision below holding that the 911 tapes were admissible as present sense impressions.¹⁹ The court reasoned that the contemporaneity of the caller's statements and his observations of the burglary left the caller with no time for reflection, thus eliminating the likelihood of deliberate fabrication or memory loss.²⁰ The court, however, also emphasized the need for additional indicia of reliability to provide sufficient assurance

⁹ *Id.* at 734-35, 610 N.E.2d at 373, 594 N.Y.S.2d at 700 (emphasis added); see *People v. Cook*, 603 N.Y.S.2d 979, 984-85 (Sup. Ct. Kings County 1993) (admitting 911 tape of unidentified declarant as present sense impression exception).

¹⁰ 148 Misc. 2d 70, 71, 559 N.Y.S.2d 772, 773 (Sup. Ct. Bronx County 1989).

¹¹ *Brown*, 80 N.Y.2d at 731, 610 N.E.2d at 371, 594 N.Y.S.2d at 698.

¹² *Brown*, 148 Misc. 2d at 71-72, 559 N.Y.S.2d at 773.

¹³ *Id.* at 72, 559 N.Y.S.2d at 773.

¹⁴ *Id.* at 71, 559 N.Y.S.2d at 773.

¹⁵ *Id.* at 72, 559 N.Y.S.2d at 774. After an unsuccessful attempt to verify the caller's name and phone number, police officers searched the only building from which the caller could have witnessed the burglary, but could not locate him. *Id.*

¹⁶ *People v. Brown*, 148 Misc. 2d 70, 559 N.Y.S.2d 772 (Sup. Ct. Bronx County 1989).

¹⁷ *Id.* The court subsequently denied the defendant's motion to set aside the verdict. *Id.* at 75, 559 N.Y.S.2d at 775.

¹⁸ *People v. Brown*, 179 A.D.2d 485, 485, 579 N.Y.S.2d 15, 15 (1st Dep't 1992).

¹⁹ *Brown*, 80 N.Y.2d at 731, 610 N.E.2d at 370, 594 N.Y.S.2d at 697.

²⁰ *Id.* at 732-33, 610 N.E.2d at 371-72, 594 N.Y.S.2d at 698-99.

that the statements were trustworthy.²¹ This corroboration, the *Brown* court explained, was provided by the testimony of the police officers who arrived at the scene only three minutes after the first 911 call.²²

As a relatively new hearsay exception, the present sense impression has gained favor with courts because the contemporaneity of the statement and the event leave the declarant with little or no time for reflection, thus eliminating the risk of fabrication or memory failure.²³ Additionally, the statement will often be made

²¹ *Id.* at 736, 610 N.E.2d at 374, 594 N.Y.S.2d at 701.

²² *Id.* at 736-37, 610 N.E.2d at 374, 594 N.Y.S.2d at 701. The police officers testified that the suspects: (1) fit the description given by the caller, (2) were seen running from the restaurant's broken glass door, and (3) were apprehended on the roof where the caller reported them to be. *Id.* Therefore, the court concluded, the officers' testimony corroborated what was clear from the tapes themselves, that the caller's statements were both spontaneous and contemporaneous with the observed events. *Id.*

²³ See McCORMICK, *supra* note 1, § 271, at 211-15; *supra* note 2. Thayer believed that the contemporaneity of the out of court declaration guaranteed a statement's trustworthiness. Thayer II, *supra* note 1, at 107. Wigmore, however, believed that only a startling event could guarantee trustworthiness. 6 JOHN H. WIGMORE EVIDENCE § 1750, at 195 (James H. Chadbourne rev., 1976). While the courts began to apply Wigmore's rationale, Thayer's contemporaneity theory gained favor with Morgan, another prominent scholar. See Morgan, *supra* note 3, at 236-37 n.19. Morgan stated that the safeguards presented by contemporaneity were sufficient on their own, dispensing with the need for the additional safeguard produced by a startling event. *Id.* at 237.

As reflected in Federal Rule of Evidence 803(1), most courts today take the position that a state of excitement is not necessary and that the contemporaneity of the declaration guarantees sufficient trustworthiness. McCORMICK, *supra* note 1, § 271, at 213; see FED. R. EVID. 803 advisory committee's note (underlying theory of present sense impression is that "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation"); *Berger v. City of New York*, 157 Misc. 2d 521, 522, 597 N.Y.S.2d 555, 556 (Sup. Ct. N.Y. County 1993).

Exactly how contemporaneous the declaration and event must be to meet the requirement has been disputed. Thayer stated, "it is enough that the declaration be substantially contemporaneous; it need not be literally so." Thayer II, *supra* note 1, at 107. The Federal Rules of Evidence adopted Thayer's reasoning. FED. R. EVID. 803 advisory committee's note. The present sense impression exception reflects that exact contemporaneity will not always be possible and therefore permits a slight time lapse. *Id.* In this way, a court may accept present sense impression hearsay when the declarant needed time to "translate his observation into speech." McCORMICK, *supra* note 1, at 211-15; see *People v. Jardin*, 154 Misc. 2d 172, 176, 584 N.Y.S.2d 732, 734-35 (Sup. Ct. Bronx County 1992) (allowing for slight time lapse between event and declaration).

Quantitative studies have been conducted tending to show how much time lapse is allowable before risk of fabrication exists. See Robert M. Hutchins & Donald Slesinger, *Some Observations On The Law Of Evidence*, 28 COLUM. L. REV. 432, 436-37 (1928). See generally Hearsay, *supra* note 3, at 669-72 (calling for strict contemporaneity).

to a third party who also had the opportunity to observe the situation as it occurred—thereby furnishing corroboration.²⁴

Authorities are split on the degree of corroboration necessary to assure the reliability of a present sense impression.²⁵ Courts' views generally fit into one of the following three categories: strict corroboration requiring bolstering testimony from an equally percipient witness,²⁶ corroboration sufficient to ensure reliability

²⁴ McCORMICK, *supra* note 1, § 271, at 214-15. The third party who hears a declaration usually witnessed the event and can provide corroboration as well as be subjected to cross-examination, allowing the fact finder to judge the witness credibility. *Id.* at 215; Wohlsen, *supra* note 4, at 355 (discussing corroborating witness after having substantial opportunity to observe event); see *Houston Oxygen Co. v. Davis*, 161 S.W.2d 474, 477 (Tex. Ct. App. 1942) (requiring corroboration of testifying witness as prerequisite to admissibility of present sense impression); see also *Morgan*, *supra* note 3, at 237 (discussing corroboration provided by third party; *infra* note 26 (discussing equally percipient witness)).

²⁵ The Federal Rules of Evidence do not explicitly require corroboration. FED. R. EVID. 803(1). However, some federal courts have read a corroboration requirement into the rule. Compare *United States v. Parker*, 936 F.2d 950 (7th Cir. 1991) (requiring corroboration); *United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979) (same) with *First State Bank v. Maryland Cas. Co.*, 918 F.2d 38 (5th Cir. 1990) (no corroboration required); *United States v. Medico*, 557 F.2d 309 (2d Cir.) (same), *cert. denied*, 434 U.S. 986 (1977); *United States v. Obayagbona*, 627 F. Supp. 329 (E.D.N.Y. 1985) (same). See generally *Passannante*, *supra* note 1, at 100-06 (stating split authority regarding corroboration causes judicial confusion). One commentator has suggested that the use of *Houston Oxygen* in the committee advisory notes to Federal Rule of Evidence 803(1) suggests that the drafters intended a strict corroboration requirement. *Waltz*, *supra* note 4, at 883-89.

For state decision requiring corroboration, see *Commonwealth v. Blackwell*, 494 A.2d 426, 434-35 (Pa. Super. Ct. 1985); *Hewitt v. Grand Trunk W. R.R.* 333 N.W.2d 264, 267 (Mich. Ct. App. 1983).

For state decisions not requiring corroboration, see *State v. Flesher*, 286 N.W.2d 215, 216-18 (Iowa 1979); *State v. Jones*, 532 A.2d 169, 173 (Md. 1987); *Duke v. American Olean Tile Co.*, 400 N.W.2d 677, 684 (Mich. Ct. App. 1986).

Until the Court of Appeals decided *Brown*, New York courts were divided on the issue of whether corroboration was necessary. See *People v. Jardin*, 154 Misc. 2d 172, 175, 584 N.Y.S.2d 732, 735 (Sup. Ct. Bronx County 1992) (requiring corroboration); *People v. Graham*, 181 A.D.2d 504, 505, 580 N.Y.S.2d 772, 773 (1st Dep't 1992) (same); *People v. Watson*, 100 A.D.2d 452, 464-69, 474 N.Y.S.2d 978, 987-89 (2d Dep't 1984) (requiring corroboration); *Brown*, 579 N.Y.S.2d 15, 16, 179 A.D.2d 485, 486 (1st Dep't 1992) (no corroboration required); *People v. Luke*, 136 Misc. 2d 733, 519 N.Y.S.2d 316, 318-19 (Sup. Ct. Bronx County 1987) (no corroboration required), *aff'd*, 147 A.D.2d 990, 538 N.Y.S.2d 886 (1st Dep't 1989); see *supra* note 3 (discussing corroboration requirement); see, e.g., McCORMICK, *supra* note 1, § 271, at 211-15 (underlying rationale of present sense impression exception offers sufficient assurances of trustworthiness without added requirement of corroboration).

²⁶ *Brown*, 80 N.Y.2d at 729, 610 N.E.2d at 369, 594 N.Y.S.2d at 696. An equally percipient witness is a "witness at the scene who had an equal opportunity to perceive the event and who will be subject to cross-examination as to the accuracy of the declarant's statement." *Id.* at 735, 610 N.E.2d at 373, 594 N.Y.S.2d at 700. The *Brown*

of the statement,²⁷ and no corroboration at all.²⁸ The *Brown* court adopted the middle ground, holding that sufficient corroboration would be required before a present sense impression would be admitted.²⁹

Although it is conceded that the court's corroboration requirement³⁰ helps to enhance reliability, it is nevertheless submitted that corroboration alone may not be an adequate substitute for cross-examination when the present sense impression admitted against a criminal defendant originates from an unidentified declarant. The *Brown* court appeared to reason that as long as sufficient corroboration existed, an unidentified declarant presented no additional risk.³¹ Corroboration, however, does not protect a defendant from the prejudice inherent in being deprived of the ability to impeach the declarant.³² In a criminal trial, this takes

court recognized that this was the theory as Thayer advocated it. *Id.* Although it has been generally accepted that both Thayer and Morgan required an equally percipient witness, their writings may merely have been recognizing that an equally percipient witness would usually exist, rather than establishing it as an element of the exception. See Beck, *supra* note 3, at 1069 n.83; Hearsay, *supra* note 3, at 672-73 n.29.

The *Brown* court concluded, however, that such strict corroboration would "deprive the exception of most, if not all, of its usefulness." *Brown*, 80 N.Y.2d at 735, 610 N.E.2d at 373, 594 N.Y.S.2d at 700. The court stated that there would be no need for the hearsay evidence if such an eyewitness were available to testify. *Id.*

²⁷ See *supra* note 25 and accompanying text (citing courts which require some level of corroboration).

²⁸ See *supra* note 25 and accompanying text (citing courts which do not require corroboration).

²⁹ *Brown*, 80 N.Y.2d at 736, 610 N.E.2d at 374, 594 N.Y.S.2d 700. The court reasoned that because the defendant cannot cross-examine the declarant, the defendant's only protection against contrived or misrepresented testimony admitted as a present sense impression is to require additional indicia of reliability. *Id.* The court explained that the degree of corroboration necessary should be assessed on a case-by-case basis and left to the trial judge's discretion. *Id.* at 737, 610 N.E.2d at 374, 594 N.Y.S.2d 701. The court was clear, however, that the declaration itself would be insufficient to assure that it was made spontaneously and contemporaneously with the event. *Id.*

³⁰ See *supra* note 25.

³¹ *Brown*, 80 N.Y.2d at 736-37, 610 N.E.2d at 374, 594 N.Y.S.2d at 700-01. The court reasoned that, since the defendant was deprived of the assurances that cross-examination provides, it was reasonable to require additional indicia of reliability. *Id.* at 736, 610 N.E.2d at 374, 594 N.Y.S.2d at 701. The court stated that the police officers' testimony supplied sufficient corroboration to render the caller's statement reliable. *Id.* at 736-37, 610 N.E.2d at 374, 594 N.Y.S.2d at 701.

³² See Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 U.C.L.A. L. Rev. 557, 586 (1988). Corroboration does not replace the testing of evidence provided by cross-examination. *Id.* Cross-examination allows the opponent to test and challenge a witness's testimony. *Id.* The opportunity to impeach a witness is critical since the fact-finder is unlikely to rely on the words of a witness

on constitutional implications by denying defendants the right to confront their accusers.³³

who has been shown to lack credibility, possesses a bias, or has a criminal record. *Id.*; see *infra* note 37.

³³ The Sixth Amendment, and its counterpart in the New York State constitution, provide the accused with the opportunity to confront his accuser. See U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6. The rule against hearsay testimony protects similar interests and "operates to preserve the ability of a party to confront the witnesses against him in open court." McCORMICK, *supra* note 1, § 252, at 126.

The assurances provided by the Confrontation Clause and the rule against hearsay include: cross-examination of witnesses, testimony taken under oath, ability of jury to observe witnesses' demeanor, and the right to confront the witness face to face. McCORMICK, *supra* note 1, § 245, at 93-96; see *California v. Green*, 399 U.S. 149 (1970) (stating Confrontation Clause ensures accused has opportunity to cross-examine accuser, and protects against perjury by taking testimony under oath); *Mattox v. United States*, 156 U.S. 237 (1895) (stating that accused should be given opportunity to face accuser and jury should be able to observe accuser's demeanor). "These means of testing accuracy are so important that the absence of proper confrontation at trial calls into question the ultimate integrity of the fact finding process." *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (citations omitted).

The Supreme Court has recognized that although the Confrontation Clause and the hearsay rule are designed to protect similar interests, *Green*, 399 U.S. at 155, the Confrontation Clause bars the admission of some hearsay that would otherwise be admissible as a hearsay exception. *Idaho v. Wright*, 497 U.S. 805, 814 (1990). Similarly, the rule against hearsay may bar admission of some testimony that would otherwise not violate the Confrontation Clause. *Id.*; *Green*, 399 U.S. at 155-66.

To justify admitting hearsay, sufficient reliability must be present to offset the absence of the Sixth Amendment assurances. See 5 WIGMORE, *supra* note 23, § 1422, at 253. Wigmore reasoned that:

The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.

Id. § 1420, at 251.

The reliability of the present sense impression exception lies in its contemporaneity. See *supra* note 23. When however does such reliability fall short of satisfying the Confrontation Clause?

The Supreme Court has held that a hearsay statement must possess sufficient indicia of reliability to be admitted before a jury. *Dutton v. Evans*, 400 U.S. 74, 89 (1970). For those hearsay exceptions that are "firmly rooted" in our jurisprudence, sufficient reliability is deemed to exist. *Roberts*, 448 U.S. at 66. Whether the present sense impression exception violates the Confrontation Clause when the declarant is unidentified, therefore, requires a determination: is the present sense impression a firmly rooted hearsay exception? The Court has not yet answered this question. See McCORMICK, *supra* note 1, § 252, at 124; see also *supra* note 5 (discussing Sixth Amendment implications generally); *infra* note 39 (discussing firmly rooted hearsay exceptions).

In *Ohio v. Roberts*,³⁴ the United States Supreme Court established a two-part test for determining when hearsay evidence could be admitted against a criminal defendant without violating his constitutional right to confront his accusers.³⁵ First, the prosecutor must either produce the declarant or prove he is unavailable.³⁶ This first element, however, has been eroded by subsequent decisions holding that unavailability is not universally required.³⁷ Second, the statements must be supported by sufficient indicia of reliability.³⁸ The Court noted that sufficient indicia of reliability can be inferred when the exception is a firmly rooted one;³⁹ all

³⁴ 448 U.S. 56 (1980).

³⁵ *Id.* at 66; see *People v. Sanders* 56 N.Y.2d 51, 436 N.E.2d 480, 451 N.Y.S.2d 30 (1982) (applying *Roberts* test); *People v. Bridges*, 184 A.D.2d 1042, 584 N.Y.S.2d 360 (4th Dep't 1992) (same).

³⁶ *Roberts*, 448 U.S. at 66.

³⁷ *Id.* In several cases subsequent to *Roberts*, the Court stated that the unavailability requirement applied only to prior statements made during a judicial proceeding (former testimony hearsay exception). *White v. Illinois*, 112 S. Ct. 736, 741 (1992) (holding unavailability requirement inapplicable to excited utterances and statements made in pursuit of medical diagnosis); *United States v. Inadi*, 475 U.S. 387, 400 (1986) (holding unavailability requirement inapplicable to co-conspirators statements). *White* and *Inadi* have eroded the unavailability requirement for firmly rooted exceptions, and it remains to be seen whether the Court will require unavailability for other firmly rooted exceptions. Similarly, whether unavailability will still be required for exceptions which are not firmly rooted remains an open issue. See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 559 (1992).

The unavailability requirement for prior testimony merely recognizes that a current version of courtroom testimony is preferable to a former version. See *People v. Persico*, 157 A.D.2d 339, 344, 556 N.Y.S.2d 262, 266 (1st Dep't 1990). Unavailability forms no part of the confrontation analysis when the value of the hearsay in question flows from the fact that it was uttered in or about the time of the events described. See, e.g., *White*, 112 S. Ct. 736 (excited utterances); *Inadi*, 475 U.S. 387 (co-conspirators).

Until the court of appeals addresses the issue, it is uncertain whether unavailability still applies as a requirement under the New York State Constitution. See *Sanders*, 56 N.Y.2d at 64, 436 N.E.2d at 486, 451 N.Y.S.2d at 36 (declining to decide whether New York constitution affords broader protection to defendant than U.S. Constitution). New York lower courts, however, have required unavailability for hearsay exceptions when the federal courts have not; thus providing broader protection to the criminal defendant under the New York constitution than the United States Constitution. See *Persico*, 157 A.D.2d at 344, 349, 556 N.Y.S.2d at 266, 269 (holding unavailability required under co-conspirator hearsay exception); see also *People v. Cook*, 603 N.Y.S.2d 979, 985 (Sup. Ct. Kings County 1993) (requiring that declarant be unavailable to admit hearsay under present sense impression).

³⁸ *Roberts*, 448 U.S. at 66.

³⁹ *Id.* The Supreme Court has not delineated which hearsay exceptions are firmly rooted and which are not. See McCORMICK, *supra* note 1, § 252, at 443. Instead, the Court has approached the issue on a case-by-case basis. See *White*, 112 S. Ct. at 742-

other hearsay exceptions should be excluded under the Sixth Amendment unless the prosecution can demonstrate "particularized guarantees of trustworthiness."⁴⁰

It is submitted that the present sense impression exception is not firmly rooted in New York.⁴¹ Therefore, in order to be admis-

43 (holding spontaneous declaration and statements made in pursuit of medical diagnosis were firmly rooted exceptions); *Idaho v. Wright*, 497 U.S. 805, 816 (1990) (holding residual hearsay exception was not firmly rooted); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (holding co-conspirators statements are firmly rooted exception); *Lee v. Illinois*, 476 U.S. 530, 543 (1986) (holding admission of co-defendant's confession is not firmly rooted exception); *Roberts*, 448 U.S. at 66 (holding prior statements made during judicial proceeding are firmly rooted).

The Court has defined a firmly rooted exception as one which possesses sufficient reliability acquired from the "weight [of] longstanding judicial and legislative experience in assessing [its] trustworthiness . . ." *Wright*, 497 U.S. at 817 (citations omitted). A hearsay exception which is not firmly rooted does not possess the same "tradition of reliability" that renders firmly rooted exceptions admissible. *Id.*

⁴⁰ *Roberts*, 448 U.S. at 66.

Although the Court has refused to lay out a mechanical test for when "particularized guarantees of trustworthiness" are present, it stated that the principal issue is whether the circumstances tend to prove that the declarant was telling the truth. *Wright*, 497 U.S. at 822. The guarantees are drawn from the "totality of the circumstances." *Id.* at 820. However, the only circumstances relevant in determining if such guarantees exist are those surrounding the making of the statement and that render the declarant particularly trustworthy. *Id.* at 820. The corroboration must refer to the making of the declaration itself, not to the occurrence of the criminal act. *Id.* at 821 (quoting *State v. Ryan*, 691 P.2d 197, 204 (Wash. 1984)); see *United States v. Esquivel*, 755 F. Supp. 434 (D.D.C. 1990).

⁴¹ See *People v. Cook*, 159 Misc. 2d 430, 435, 603 N.Y.S.2d 979, 984 (Sup. Ct. Kings County 1993) (holding present sense impression not firmly rooted, but admitting 911 tape of unidentified declarant). The court applied two different tests to determine whether the present sense impression was firmly rooted. *Id.* First, the court asked whether there was "long-standing judicial and legislative experience" with the exception. *Id.* (quoting *Idaho v. Wright*, 497 U.S. 805, 817 (1990)). The court responded in the negative, noting that the court of appeals had not accepted the present sense impression exception until the 1993 *Brown* decision. *Id.* Second, the court asked whether the exception was "inherently reliable." *Id.* (quoting *Persico*, 157 A.D.2d at 348, 556 N.Y.S.2d at 268. Again the court answered no, especially under the facts of the case—one declarant was unidentified and another was a possible participant in the incident. *Id.* Despite these uncertainties the court determined, without discussion, that there existed sufficient indicia of reliability to admit the 911 tape of an unidentified declarant under the present sense impression exception. *Id.* at 980, 984; see *supra* note 37 and accompanying text (discussing firmly rooted hearsay exceptions).

The present sense impression suffers from an uncertain evolution. See *McCORMICK*, *supra* note 1, § 271, at 474; *supra* note 23 and accompanying text. From its inception the exception was not readily accepted, as scholars disagreed over its basis of reliability. See *McCORMICK*, *supra* note 1, § 271, at 474; *supra* note 23 and accompanying text. While some followed Wigmore's rationale that a state of excitement was required to assure reliability, others adopted the Thayer/Morgan rationale that contemporaneity provided reliability. See *supra* note 23. Additionally, judicial use of the

sible against a criminal defendant who objects on constitutional grounds, the statement itself must possess particularized guarantees of trustworthiness.⁴² It is suggested that such guarantees can rarely be established when the declarant is unidentified.⁴³ If

exception did not emerge until the 1940s. McCORMICK, *supra* note 1, § 271, at 474; see *Houston Oxygen Co. v. Davis*, 161 S.W.2d 474 (Tex. 1942); *Tampa Elec. Co. v. Getrost*, 10 So. 2d 83 (Fla. 1942). Prior to these cases, courts generally admitted contemporaneous statements under the murky concept of *res gestae*. McCORMICK, *supra* note 1, § 271, at 474.

Res Gestae is a generic term which has been criticized throughout history because of its apparent vagueness. *Id.* § 268, at 472. The term encompasses four separate hearsay exceptions: declarations as to present bodily conditions; declarations of present mental states and emotions; excited utterances; and declarations of present sense impressions. *Id.* Thayer believed the term *res gestae* "did for [lawyers and judges] what the 'limbo' of the theologians did for them . . ." Thayer II, *supra* note 1, at 817. Morgan called the term a substitute for reasoning. Morgan, *supra* note 3, at 229.

Moreover, since most contemporaneous statements were made under the influence of an exciting event, the excited utterance exception was applicable. McCORMICK, *supra* note 1, § 271, at 474. Unexciting events infrequently give rise to declarations which later have bearing upon litigation. *Id.* at 475. In New York, however, the present sense impression developed independently of the *res gestae*. *Cook*, 603 N.Y.S.2d at 984 n.4.

Based upon this evaluation, the present sense impression exception does not share the history of reliability of the firmly rooted exceptions. See Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 27 (1987) (arguing that present sense impression is not firmly rooted). *But see* *Guam v. Ignacio*, No. 91-00107A, 1992 WL 245633, at *3 (D. Guam Sept. 11, 1992) (same), *aff'd*, 10 F.3d 608 (9th Cir. 1993) (finding particularized guarantees of trustworthiness and leaving unanswered whether present sense impression is firmly rooted); *United States v. Vega*, 883 F.2d 1025 (9th Cir. 1989) (holding present sense impression firmly rooted); *Williams v. Melton*, 733 F.2d 1492, 1495 (11th Cir. 1984) (same); *Brown v. Tard*, 552 F. Supp 1341 (D.N.J. 1982) (concluding present sense impression is firmly rooted exception); *State v. Brown*, 618 So. 2d 629 (La. 1993) (holding present sense impression firmly rooted).

⁴² See *supra* note 40 (discussing particularized guarantees of trustworthiness).

The critical issue to admissibility of hearsay is whether the cross-examination would have weakened the effect of the prosecutor's evidence in the fact-finder's mind and rendered the evidence more favorable to the defendant. See *Dutton v. Evans*, 400 U.S. 74 (1970). The defendant does not have the opportunity to determine this issue when the declarant is unidentified. See *Jonakait*, *supra* note 32, at 595. Therefore, an unidentified declarant's present sense impression is inherently untrustworthy and lacks particularized guarantees of trustworthiness. See S. Douglas Borisky, *Reconciling the Conflict between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1316 (1985).

⁴³ Assuming that the present sense impression exception is not firmly rooted, the admissibility of such hearsay would hinge upon a showing of "particularized guarantees of trustworthiness." See *Roberts*, 448 U.S. at 66; *Wright*, 497 U.S. at 816-17; *supra* note 37.

Applying the *Wright* analysis to the *Brown* facts, it is apparent that there were no particularized guarantees of trustworthiness because nothing was known about the

the defendant is deprived of cross-examination, some basis should be provided by which the fact-finder can assess the credibility of the declarant.⁴⁴ Furthermore, the defendant should have the opportunity to impeach the hearsay declarant, for example, by a showing of strong bias, bad reputation for truth or veracity, or prior convictions, none of which can be established when the declarant is unidentified.⁴⁵ The *Brown* court failed to address this issue.⁴⁶ Therefore, it is submitted that *Brown* does not preclude a defendant from challenging the admissibility of an unidentified declarant's present sense impression on constitutional grounds.

While the *Brown* court correctly recognized the need to bolster the element of contemporaneity with a corroboration requirement, the court stopped short of providing adequate safeguards of reliability by admitting hearsay evidence of an unidentified declarant against a criminal defendant.

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declarant at all. See *Brown*, 80 N.Y.2d 729, 610 N.E.2d 364, 564 N.Y.S.2d 596. Because the declarant is unidentified, there is no basis for his trustworthiness. The police officers' testimony corroborated the truth of the hearsay statement, not the trustworthiness of the declarant, as required under *Wright*. See *Wright*, 497 U.S. at 821. *Wright* emphasized the trustworthiness of the declarant. *Id.* When the declarant is unidentified it is virtually impossible to assess his trustworthiness. Therefore, since the declarant's trustworthiness cannot be established, the hearsay does not meet the strict standard of "particular guarantees of trustworthiness", even though corroboration of the event itself exists. *But see* *Miller v. Keating*, 754 F.2d 507, 510 (3d Cir. 1985) (admitting under present sense impression exception statement by unidentified declarant, but requiring proponent carry heavier burden than for identified declarant); *Booth v. State*, 508 A.2d 976, 981-82 (Md. 1986) (admitting under present sense impression exception statement by unidentified declarant); *People v. Buras*, 324 N.W.2d 589, 592 (Mich. 1982) (same).

⁴⁴ See *Wright*, 497 U.S. at 819-21. To possess particularized guarantees of trustworthiness hearsay evidence must be so trustworthy that "adversarial testing would add little to [its] reliability." *Id.* at 821. Particularized guarantees of trustworthiness depend upon the trustworthiness of the declarant, which is assessed by the circumstances that surround the making of the statement and the render the declarant trustworthy. *Id.* at 819. The circumstances include motive to fabricate the statement, bias, or lack of credibility in general. See *id.* at 824.

⁴⁵ See *supra* notes 32-33 and accompanying text (discussing impeachment).

⁴⁶ See *Brown*, 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696.

