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Statements of Victim in Response to Inquiries Deemed Spontaneous Declarations

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its holding in *La Carrubba*, the anomaly exists that indictments alleging violations of clearly inherent duties may survive, provided no reference is made to a violation of canonical provisions.\(^5\)

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**Statements of victim in response to inquiries deemed spontaneous declarations**

The spontaneous declaration exception\(^3\) to the rule against hearsay evidence,\(^3\) often imprecisely viewed as falling within the *res gestae* doctrine,\(^4\) renders statements spontaneously uttered and the other enables the evident purposes of the Legislature to be effectuated, the latter is preferred.

*Id.*

An evidently broad legislative purpose seems to have been enunciated in this regard.

\(^5\) Consequently, under the *La Carrubba* holding, an indictment not specifically referring to the Code of Judicial Conduct, but describing conduct or omissions in violation of one of its provisions, may survive a challenge of insufficiency under § 195.00(2). Notwithstanding *La Carrubba*'s potential for creating such technical distinctions, where an indictment does not incorporate by reference the Code of Judicial Conduct, the availability of § 195.00(2) in cases of judicial nonfeasance should not be precluded. Clarification of the scope of this provision by the legislature ultimately may be essential for its proper interpretation.

\(^3\) See note 361 and accompanying text infra.

\(^3\) The hearsay rule excludes out-of-court statements from evidence only when they are used to establish the truth of their content. E. Fisch, New York Evidence § 756, at 446 (2d ed. 1977); W. Richardson, Evidence § 200, at 176 (10th ed. J. Prince 1973). See generally Morgan, *Hearsay and Non-Hearsay*, 48 Harv. L. Rev. 1138, 1139-45 (1935). Thus, extra-judicial declarations that are not offered to prove the truth of the matter asserted are not subject to the prohibition of the hearsay rule. See Keefe v. State, 50 Ariz. 293, 72 P.2d 425 (1937); W. Richardson, supra, § 203, at 180; 6 J. Wigmore, Evidence § 1745 (3d ed. 1940); 32 Cornell L.Q. 115, 115-16 (1946). The primary justification for the exclusion of hearsay testimony is the unavailability of cross-examination to test its strength and accuracy. See W. Richardson, supra, § 201; 5 J. Wigmore, supra, §§ 1361-62.

\(^3\) See note 361 and accompanying text infra.

\(^3\) People v. Caviness, 38 N.Y.2d 227, 230, 342 N.E.2d 496, 499, 379 N.Y.S.2d 695, 698 (1975); see E. Fisch, supra note 359, § 1001, at 579-80; W. Richardson, supra note 359, § 281, at 246-48. *Res gestae* literally means "the thing done." *Id.* at § 279. Unfortunately, a precise definition of the term, as it is applied in the law of evidence, has not been formulated because it has been used by the courts in a variety of factual circumstances. *Id.* One of the situations in which the *res gestae* principle is invoked involves ambiguous conduct that requires an explanation in order to be given a specific legal effect. Commonly referred to as the "verbal act" doctrine, this rule of evidence authorizes the admission of a statement that accompanies and characterizes a particular transaction. See E. Fisch, supra note 359, § 762, at 452; W. Richardson, supra note 359, § 280, at 244-45; 6 J. Wigmore, supra note 359, § 1772, at 190-91. For example, a transfer of money can be effected for several reasons and therefore is, by itself, equivocal conduct. If at the same time, however, the transferor says, "Here is the money I borrowed from you," the transaction can be construed as constituting the repayment of a loan. See E. Fisch, supra note 359, § 762, at 452. To be admissible under the verbal act
under the influence of a shocking event admissible as evidence of the truth of their contents.\textsuperscript{301} The foundation for the exception lies in the assumption that the declarant, startled by the excitement of the moment, is unable to reflect or deliberate and therefore to fabricate.\textsuperscript{302} Notwithstanding the inherent trustworthiness of spontaneous declarations, it was unclear whether statements made in response to a question were covered by the exception.\textsuperscript{303} In \textit{People v. Edwards},\textsuperscript{304} the Court of Appeals recently resolved a 66-year-old conflict in precedent,\textsuperscript{305} holding that a statement elicited by an inquiry is admissible if the "surrounding circumstances demonstrate that the utterance was instinctive."\textsuperscript{306}

Defendant Edwards, who previously had resided with the vic-
tim and her husband, supported himself as a sidewalk vendor in front of their apartment building. On the day of the murder, Charles Simpson, the brother and neighbor of the 72-year-old victim, heard muffled screams from his sister’s apartment and inquired through the closed door, “What is the matter, Edna?” The victim replied, “Please help me get out . . . . Mr. Eddie is trying to kill me.” Further inquiry of the victim by her brother led to the identification of the assailant as “Eddie, Rudy’s brother downstairs.” After considerable effort, Simpson forced the door open and, while dragging his sister to the hallway, she warned, “Don’t go in there.” Again he asked, “What is the matter?” and the victim responded, “Eddie will kill you.” At the defendant’s trial, his objection that the victim’s statements were “distinctly narrative” and, therefore, inadmissible hearsay, was overruled, and he was convicted of murder in the second degree. The Appellate Division, First Department, affirmed without opinion.

In affirming, a unanimous Court of Appeals held that the statements of the victim were admitted properly as spontaneous declarations or, more accurately, excited utterances, even though they were made in response to questions. Writing for the Court, Chief Judge Cooke emphasized that the essential feature of the exception is the trustworthiness of declarations made while the deliberative capacities of the declarant have been overcome by a startling occurrence. Finding that it “would serve no useful purpose” to bar

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357 Id. at 495, 392 N.E.2d at 1230, 419 N.Y.S.2d at 46. In his business of selling watermelon slices, the defendant used a knife and an ice pick. Id.
358 Id. at 495-96, 392 N.E.2d at 1230, 419 N.Y.S.2d at 46.
359 Id. Mr. Simpson’s initial efforts caused the door to open slightly, but it was immediately slammed closed and locked. Id.
360 Id. Immediately after the crime, the defendant was seen running down the fire escape. A knife and an ice pick handle were found in a flower pot on the fire escape. Id.
361 Id. at 498, 392 N.E.2d at 1232, 419 N.Y.S.2d at 48. See generally note 383 and accompanying text infra.
362 Id. at 495, 392 N.E.2d at 1230, 419 N.Y.S.2d at 46; see N.Y. PENAL LAW § 125.25 (McKinney 1974).
363 People v. Edwards, 63 App. Div. 2d 866, 405 N.Y.S.2d 622 (1st Dep’t 1978) (mem.).
364 Noting the “constantly changing nomenclature” of the exception, the Court observed that the original term res gestae had been supplanted in favor of “a spontaneous declaration uttered in response to a startling event.” 47 N.Y.2d at 496-97 n.1, 392 N.E.2d at 1231 n.1, 419 N.Y.S.2d at 47 n.1 (citations omitted). The Court suggested that the term “excited utterance,” as used in the Federal Rules of Evidence, Fed. R. Evid. 803(2), and the Model Code of Evidence, Model Code of Evidence Rule 512, might be “more appropriate.” 47 N.Y.2d at 496-97 n.1, 392 N.E.2d at 1231 n.1, 419 N.Y.S.2d at 47 n.1.
366 See id. at 497, 392 N.E.2d at 1231, 419 N.Y.S.2d at 47; note 362 and accompanying text supra.
the admission of an excited utterance merely because it was elicited by an inquiry, the Edwards Court ruled that the fact that the declaration was prompted by a question is only one element to be considered in the ultimate determination of spontaneity. Any interpretation of precedent to the contrary was disapproved by the Court.

In focusing on the unique reliability of statements made under the stress of an alarming experience, the Edwards Court has succeeded in clarifying the inconsistent and often erroneous approaches to spontaneous declarations. Apparently the result of an inclina-

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371 47 N.Y.2d at 499, 392 N.E.2d at 1232, 419 N.Y.S.2d at 48.
372 Id.; see note 384 infra. The Court pointed out that, if the question or the person asking it influences the response or if the inquiry is made a considerable length of time after the exciting occurrence, “the declarations might very well lack the inherent reliability basic to the rule.” 47 N.Y.2d at 499, 392 N.E.2d at 1232, 419 N.Y.S.2d at 48.
373 47 N.Y.2d at 499, 392 N.E.2d at 1232, 419 N.Y.S.2d at 48 (citing People v. Sprague, 217 N.Y. 373, 111 N.E. 1077 (1916); Greener v. General Elec. Co., 209 N.Y. 135, 102 N.E. 527 (1913)).
374 See 47 N.Y.2d at 497, 392 N.E.2d at 1231, 419 N.Y.S.2d at 47. Compare People v. Del Vermo, 192 N.Y. 470, 85 N.E. 690 (1908) with Greener v. General Elec. Co., 209 N.Y. 135, 102 N.E. 527 (1913) and Handel v. New York Rapid Transit Corp., 252 App. Div. 142, 297 N.Y.S. 216 (2d Dep’t 1937), aff’d per curiam, 277 N.Y. 548, 13 N.E.2d 468 (1938). In Del Vermo, the declarant had been walking with a friend and the defendant late at night. Suddenly, the defendant ran off and, after taking a few steps, the declarant slumped to the pavement. When his friend asked him, “What was the matter?,” the declarant responded, “Del Vermo stabbed me with a knife.” 192 N.Y. at 476, 85 N.E. at 692. The Court admitted the statement into evidence as a spontaneous declaration without mentioning that it was made in answer to the inquiry of a witness. Id. at 483, 85 N.E. at 695. Del Vermo was the first Court of Appeals decision to recognize the distinction between the spontaneous declaration exception and the vague res gestae doctrine. See People v. Marks, 6 N.Y.2d 67, 72, 160 N.E. 2d 26, 28, 188 N.Y.S.2d 465, 468-69 (1959), cert. denied, 362 U.S. 912 (1960); 6 J. Wigmore, supra note 359, § 1745. See generally notes 358-362 and accompanying text supra. The Del Vermo Court “observed that this exception contemplates and permits proof of declarations by an injured person made after the event, so that it cannot fairly be said that the words spoken really constituted a part of the thing done.” 192 N.Y. at 483, 85 N.E. at 695.

The Greener Court, on the other hand, refused to admit an excited utterance elicited by a question on the ground that it merely was an explanation of a past occurrence. 209 N.Y. at 138, 102 N.E. at 528. Greener was a wrongful death action brought on behalf of an employee who had died from injuries suffered when he fell from a ladder in the defendant’s plant. Id. at 136-37, 102 N.E. at 527-28. Immediately after the fall, another employee who had witnessed the accident asked the injured person what had happened. Id. at 137, 102 N.E. at 528. The Court refused to allow the response to the effect that the ladder had broken to be admitted as a spontaneous declaration. Id. at 138, 102 N.E. at 528. Stating that in Del Vermo the declaration was admitted “‘as part of the res gestae, in the broadest sense of the term’” the Greener Court reasoned:

The distinction to be made is in the character of the declaration; whether it be so spontaneous, or natural, an utterance as to exclude the idea of fabrication; or whether it be in the nature of a narrative of what had occurred. In the present case, the declaration of the deceased was not spontaneous; it was called forth by
tion to impose the contemporaneity requirement of the res gestae doctrine on the spontaneous declaration exception, several courts had refused to admit excited utterances elicited by a question

the inquiry as to "what had happened" and was, distinctly, narrative. As it was observed in the dissenting opinion below, "it was, in effect, a statement that the falling was not accidental, nor due to the negligence of the plaintiff's intestate, but was due to an occurrence upon which might be predicated negligence upon the part of the defendant."

Id. at 138, 102 N.E. at 528; see People v. Del Vermo, 192 N.Y. 470, 483, 85 N.E. 690, 695 (1903); Waldele v. New York Cent. & Hudson River R.R., 95 N.Y. 274 (1884). Although the Greener Court was somewhat enigmatic in its reference to the exculpatory form of the declarant's statement, it appears the fact that it was prompted by a question was the dispositive circumstance of the case. See People v. Sprague, 217 N.Y. 373, 378-79, 111 N.E. 1077, 1079 (1916); People v. Chapman, 191 App. Div. 660, 666, 181 N.Y.S. 750, 754 (3d Dep't 1920). See also 32 CORNELL L.Q. 115, 120 (1946); 54 MICH. L. REV. 133, 136 n.15 (1955); 31 N.Y.U.L. Rev. 1100, 1108-10 (1956).

The disposition of Svendsen v. Frank McWilliams, Inc., 157 App. Div. 474, 142 N.Y.S. 606 (2d Dep't 1913), aff'd per curiam, 214 N.Y. 621, 108 N.E. 1109 (1915), supports the inference that Greener turned on the inquiry by a witness. In Svendsen, the plaintiff brought a personal injury action alleging negligence of the defendant's agent. The plaintiff, who had fallen while working on a ship in drydock, demanded of defendant's agent "how he could be so foolish" as to turn the rudder while plaintiff "was hanging on to it." 157 App. Div. at 476, 142 N.Y.S. at 607. The statement was made while the plaintiff, who was caught by the agent, was still in the agent's arms. Id. The only apparent difference between this exclamation and the exclamation in Greener was the absence of an inquiry. Nevertheless, the out-of-court statement was held to be admissible as a spontaneous declaration and part of the res gestae, id. at 479, 142 N.Y.S. at 609, and the Court of Appeals affirmed without further comment. 214 N.Y. 621, 108 N.E. 1109 (1915).

The res gestae principle, which generally is not a true exception to the hearsay rule, authorizes the admission of statements that form part of a transaction in order to explain the nature of the act. See note 360 supra. To come within the doctrine, the declaration must be made contemporaneously with the transaction. Id. In contrast with the res gestae concept, spontaneous declarations are admissible because, constituting uncalculated responses to an exciting event, they are considered highly trustworthy. See notes 361 & 362 and accompanying text supra.

Indeed, in People v. Caviness, 138 N.Y. 266, 269, 35 N.Y.S. 797 (1899), cert. denied, 173 U.S. 681 (1900), the Court recognized that a startling event can produce an excited utterance in anyone who witnesses it and held, therefore, that the spontaneous statements of a nonparticipant are also admissible. Id. at 269-70. The Court stated:

"Assuming that the non-participant is shown to have had adequate opportunity to observe the event, there is no sound reason why his spontaneous exclamation should not be admitted, for the unexpected exciting event may just as effectively produce a natural and spontaneous declaration by a bystander as by a participant."

Id. (quoting W. RICHARDSON, supra note 359, § 284, at 260-51).
on the ground that they merely were narrative explanations of past occurrences. Since the Edwards Court has made it clear that the time of the utterance is important only as one factor in determining its spontaneity, it is submitted that the Court impliedly has repudiated the use of a narrative standard when analyzing spontaneous declarations. Consequently, in evaluating the admissibility of spontaneous declarations, it would appear that the criteria set forth in Edwards should replace the conclusory narrative test.

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383 209 N.Y. at 138, 102 N.E. at 528. The narrative standard was enunciated in Waldele v. New York Cent. & Hudson River R.R., 95 N.Y. 274 (1884). In Waldele, the statements of a deaf mute using sign language made 30 minutes after he had been run down by a train were held inadmissible as not part of the res gestae. Id. at 276-77. The Court stated: The claim that the declarations can be treated as part of the res gestae is not supported by authority in this State. The res gestae, speaking generally, was the accident. These declarations were no part of that — were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Id. at 277; see Greener v. General Elec. Co., 209 N.Y. 135, 102 N.E. 527 (1913), discussed at note 380; Handel v. New York Rapid Transit Corp., 252 App. Div. 142, 297 N.Y.S. 216 (2d Dep't 1937), aff'd per curiam, 277 N.Y. 548, 13 N.E.2d 468 (1938), discussed at note 386 infra.

384 47 N.Y.2d at 499, 392 N.E.2d at 1232, 419 N.Y.S.2d at 48. In addition to the fact that the declaration was prompted by a question, other criteria to be considered in determining whether the statement was uttered impulsively and without reasoned thought are the nature of the exciting event, the time span between the event and the statement and the interim activities of the declarant. Id. at 497, 392 N.E.2d at 1231, 419 N.Y.S.2d at 47.

385 Unfortunately, however, the Court failed to take the opportunity to expressly repudiate the highly criticized narrative standard employed by Greener. See E. Fisch, supra note 359, § 1001, at 579; 6 J. Wigmore, supra note 359, § 1756, at 163. Nonetheless, the Court never used the term “narrative” but merely confined itself to the factors that are relevant to spontaneity, see note 384 and accompanying text infra, and appears to have been concerned only with excluding the possibility of reflective declarations. 47 N.Y.2d at 497, 392 N.E.2d at 1231, 419 N.Y.S.2d at 47. This has been the approach of the Court in recent cases. See People v. Caviness, 38 N.Y.2d 227, 231, 342 N.E.2d 496, 499, 379 N.Y.S.2d 695, 699 (1975); People v. Marks, 6 N.Y.2d 67, 72, 160 N.E.2d 26, 28, 188 N.Y.S.2d 465, 468-69 (1959), cert. denied, 362 U.S. 912 (1960); note 382 supra.

386 It is submitted that the use of a narrative standard to review spontaneity would bar the majority of spontaneous statements since they typically are uttered after the fact. See People v. Marks, 6 N.Y.2d 67, 71, 160 N.E.2d 26, 28, 188 N.Y.S.2d 465, 467-68 (1959), cert. denied, 362 U.S. 912 (1960); 6 J. Wigmore, supra note 359, § 1756, at 163; 32 Cornell L. Q. 115, 120 (1946); 54 Mich. L. Rev. 133, 136 n.15 (1955); 31 N.Y.U.L. Rev. 1100, 1108-10 (1956). Indeed, the narrative standard has generated much confusion among the courts in cases involving spontaneous declarations. An example of a decision that apparently can be explained only as the product of this confusion is Handel v. New York Rapid Transit Corp., 252 App. Div. 142, 297 N.Y.S. 216 (2d Dep't 1937), aff'd per curiam, 277 N.Y. 548, 13 N.E.2d 468 (1938). There, the deceased was dragged for five blocks along an elevated trolley, suffered innumerable fractures and lacerations and finally was dropped to the street level in a state
Addressing the excited utterance as an exception separate and distinct from the *res gestae* doctrine, the Court has identified manageable and realistic guidelines for assessing the spontaneity of statements elicited in response to a question. Whether the responsive declarations of a bystander will be deemed admissible has not been addressed, but it is submitted that where the totality of the surrounding circumstances demonstrates the statements to have been uttered impulsively, the *Edwards* rationale should allow their admission. It is hoped that the criteria announced in *Edwards* will be followed in an area of the law most have "approached with a feeling akin to despair."  

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of shock. A witness who appeared on the scene in minutes testified to the declaration, "Save me. Help me — why did that conductor close the door on me?" 252 App. Div. at 143-44, 297 N.Y.S. at 218-19. The statement was excluded by the majority as narrative and not a part of the *res gestae*. *Id.* at 142-43, 297 N.Y.S. at 217. The dissent, however, found it "incredible that a man so broken in body and so profoundly shocked in mind could have spent the slight interval before aid arrived in manufacturing a false explanation of the extremity in which he was found." *Id.* at 148, 297 N.Y.S. at 224 (Close, J., dissenting).

