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That's What She Said: An Evaluation of Whether Hearsay Exceptions Should Be Permitted in Accusatory Instruments

Andrea Laterza

"THAT'S WHAT SHE SAID": AN EVALUATION OF WHETHER HEARSAY EXCEPTIONS SHOULD BE PERMITTED IN ACCUSATORY INSTRUMENTS

Andrea Laterza[*]

I. INTRODUCTION

An accusatory instrument is a criminal complaint that charges a defendant with a crime.[1] The complaining witness usually attests to the incident by signing a supporting deposition, a firsthand narrative of the crime, which is attached to the accusatory instrument.[2] In some instances where the complainant chooses not to sign a supporting deposition, Assistant District Attorneys (hereinafter "ADA") and police officers, who were not present during the incident, sign supporting depositions in lieu of the complainant's supporting deposition.[3] The ADA and officer's supporting depositions in those cases, however, are hearsay because they are not based on personal knowledge, but are instead based on information relayed to them

[*]Juris Doctor Candidate 2018, Touro College Jacob D. Fuchsberg Law Center; Hofstra University, B.A., *cum laude*, Psychology. I would like to thank the Nassau County Legal Aid Society for bringing this topic to my attention. I would also like to thank Rhona Amorado and Professor Michelle Zakarin, Esq. for their advice and hard work throughout the editing process.

[1] N.Y. CRIM. PROC. LAW § 100.15 (McKinney 1978) ("The accusatory part of each such instrument must designate the offense or offenses charged.").

[2] N.Y. CRIM. PROC. LAW § 100.20 (McKinney 1972) ("A supporting deposition is a written instrument accompanying or filed in connection with an information, a simplified information, a misdemeanor complaint or a felony complaint, subscribed and verified by a person other than the complainant of such accusatory instrument, and containing factual allegations of an evidentiary character, based either upon personal knowledge or upon information and belief, which supplement those of the accusatory instrument and support or tend to support the charge or charges contained therein.").

[3] *See* People v. Solomon, 2002 WL 32157170 at *3 (Crim. Ct. Kings Cnty. 2002); People v. Foster, 740 N.Y.S.2d 567, 572 (Crim. Ct. Kings Cty. 2002); People v. Swinger, 689 N.Y.S.2d 336, 341 (Crim. Ct. N.Y. Cnty. 1998).

through the complainant.[4] New York's Criminal Procedure Law (hereinafter "CPL") states that accusatory instruments must not contain any hearsay allegations,[5] or the claims they allege will be dismissed for facial insufficiency.[6] Despite the obvious violation of the hearsay rule, New York trial courts have found these accusatory instruments to be facially sufficient based on hearsay exceptions, such as excited utterances and present sense impressions.[7]

In *People v. Solomon*,[8] a police officer and an ADA each filed supporting depositions stating the complaining witness told the officer, "while speaking loudly and talking fast," that the defendant hit her.[9] The Kings County Criminal Court held that this behavior constituted an excited utterance[10] because the statement was made shortly after the incident while the complainant was still visibly upset.[11] The court permitted the use of the accusatory instrument, holding that the excited utterance hearsay exception is applicable to the affidavits.[12] Thus, the court found that the accusatory instrument, which did not contain a deposition from the actual victim, was facially sufficient even though it contained only hearsay allegations.[13] In order to justify its position,

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[4] *See* People v. Giarraputo, 949 N.Y.S.2d 852, 853 (Crim. Ct. Richmond Cnty. 2012) (defining hearsay as "testimony that is given by a witness who relates not what he or she knows personally, but what others have said and is therefore dependent on the credibility of someone other than the witness.") (citing BLACK'S LAW DICTIONARY (7th ed. 1999)).

[5] N.Y. CRIM. PROC. LAW § 100.40(1)(c) (McKinney 1972) ("An information, or a count thereof, is sufficient on its face when . . . [n]on-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.").

[6] N.Y. CRIM. PROC. LAW § 170.35(1)(a) (McKinney 1972) ("An information, a simplified information, a prosecutor's information or a misdemeanor complaint, or a count thereof, is defective within the meaning of paragraph (a) of subdivision one of section 170.30 when: (a) It is not sufficient on its face pursuant to the requirements of section 100.40.").

[7] *See* People v. Valentine, 2011 WL 5007959 at *4 (Crim. Ct. Kings Cnty. 2011) ("[A]n excited utterance made by a complaint to a police officer/deponent, may serve in lieu of a supporting deposition, as the vehicle by which to convert a complaint into an information.").

[8] 2002 WL 32157170 (Crim. Ct. Kings Cnty. 2002).

[9] *Id.* at *1.

[10] *Id.* at *3 ("[A]n excited utterance is a spontaneous declaration, made contemporaneously or immediately after a startling event, which asserts the circumstances of that occasion as observed by the declarant."); *see* discussion *infra* Section III.

[11] *Solomon*, 2002 WL 32157170 at *4.

[12] *Id.* at *3; *see also* People v. Vickers, 2007 WL 2982004, at *4 (Crim. Ct. Kings Cnty. 2007) ("[T]he complainant's statements to Officer Beierle constitute excited utterances. As such, they can be used in lieu of a supporting deposition to convert the docket to an information.").

[13] *Solomon*, 2002 WL 32157170 at *3.

the court cited to *People v. Foster*[14] and *People v. Swinger*.[15] In both of those cases, the trial court held that the accusatory instrument was facially sufficient based on excited utterances.[16] The court reasoned, where hearsay exceptions would be permitted at trial, they should also be permitted in the accusatory instrument because there is a lower standard of proof in determining the viability of an accusatory instrument, as opposed to the state's trial burden.[17] The *Solomon* court's holding, as well as the other courts' holdings, disregards the statutory requirements of the CPL.[18]

A recent decision in Nassau County, *People v. Rasoully*,[19] addressed the issue of whether a supporting deposition, containing only hearsay exceptions, may serve as a basis to corroborate the complaint.[20] In this case, an ADA and the responding officer each signed a supporting deposition because the alleged victim refused to sign one.[21] The ADA's deposition recounted the 911 call allegedly made by the victim.[22] The prosecution argued that the contents of the call constituted an excited utterance and a present sense impression, which should be permitted in the accusatory instrument based on the holding in *Solomon*.[23] The court, however, rejected the prosecution's argument, and recognized that the ADA's deposition, which contained a third-party's description of recording, lacked authentication and was based entirely on inadmissible hearsay.[24] While the court did not permit the ADA's supporting deposition, it found that the officer's deposition was based not upon hearsay, but upon factual, personal knowledge.[25] The court found that the accusatory instrument was facially sufficient because the officer stated in his deposition that he

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[14] 740 N.Y.S.2d 567 (Crim. Ct. Kings Cnty. 2002); *see* discussion *infra* Section III.

[15] 689 N.Y.S.2d 336 (Crim. Ct. N.Y. Cnty. 1998); *see* discussion *infra* Section III.

[16] *Solomon*, 2002 WL 32157170 at *3.

[17] *Id.* at *2.

[18] *See* N.Y. CRIM. PROC. LAW § 100.40(1)(c) (McKinney 1972) ("An information, or a count thereof, is sufficient on its face when . . . [n]on-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.").

[19] People v. Rasoully, 2016 WL 4767430 (Nassau Cnty. Dist. Ct. 2016).

[20] *Id.* at *1.

[21] *Id.*

[22] *Id.* at *2.

[23] *Id.*

[24] *Rasoully*, 2016 WL 4767430 at *2.

[25] *Id.* at *3.

observed an upset woman with an injury on her face and the defendant admitted to him that he hit her.[26]

In contrast to *Rasoully*, another Nassau County decision, *People v. Rizzo*,[27] not only rejected hearsay in the accusatory instrument but also held that "details relayed through [an] [o]fficer [] are not properly considered in ruling on the sufficiency of the accusatory instrument."[28] The court reasoned that hearsay exceptions, alone, could never make an accusatory instrument facially sufficient because, besides the hearsay, the accusatory instrument lacks "*any* meaningful facts."[29]

The issue of whether hearsay exceptions in an accusatory instrument may serve as a valid replacement for a complainant's supporting deposition has not yet gone to an appellate court in New York.[30] This Note argues that hearsay exceptions, specifically excited utterances and present sense impressions, should not be permitted to corroborate a complaint in lieu of a complaining witness's supporting deposition because it is a clear violation of the CPL,[31] and constitutes unfair prosecution, in that a defendant may be charged based solely on hearsay exceptions, instead of concrete facts.[32]

This Note will be divided into six sections. Section II will examine accusatory instruments and their function. Section III will discuss hearsay, the hearsay exceptions used by the District Attorney's Office in accusatory instruments, and the reliability[33] of these hearsay

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[26] *Id.* at *2-3 ("[T]he allegations of Officer Re, which are based upon his first-hand observations and personal knowledge, contain sufficient non-hearsay allegations which 'establish, if true, every element of the offense charged and the defendant's commission thereof.'") (quoting N.Y. CRIM. PROC. LAW § 100.40(1) (McKinney 1972)).

[27] 735 N.Y.S.2d 916 (Nassau Cnty. Dist. Ct. 2001).

[28] *Id.* at 919.

[29] *Id.* (emphasis added).

[30] *Solomon*, 2002 WL 32157170 at *3.

[31] *See* N.Y. CRIM. PROC. LAW § 100.15(3) (McKinney 1978) ("The factual part of [an accusatory] instrument must contain a statement of the complainant alleging facts of an evidentiary character . . . supported by non-hearsay allegations.").

[32] *See infra* notes 48, 68, 71 and accompanying text.

[33] *See generally* Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL'Y & L. 485 (1999); Aviva Orenstein, *"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, (1997); Stanley A. Goldman, *Distorted Vision: Spontaneous Exclamations as a "Firmly Rooted"' Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453 (1990). *See also* Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 95 (1987) (arguing that evidence stemming from an officer is inherently unreliable due to the police's natural animosity toward criminal defendants).

exceptions. Section IV will analyze the Confrontation Clause and will address whether hearsay in an accusatory instrument violates a criminal defendant's Sixth Amendment right to confront "the witnesses against him."[34] Specifically, this section argues that the Confrontation Clause of the Sixth Amendment should extend to the pleading stage because there is a strong probability that these cases may never go to trial.[35] In addition, this section will address whether the accused can confront his or her accuser if the complaining witness never comes forward and he or she is prosecuted based entirely on hearsay. Section V will discuss how defense attorneys should handle these types of cases, specifically that they need to address the pleading defect in a motion or on the record. This section will also propose a solution to the court, mainly that hearsay exceptions should only be permitted in accusatory instruments if there is sufficient corroborating evidence and if the witness is unavailable. Also, this section will suggest that non-testifying hearsay declarants should be able to be impeached by prior inconsistent statements. Lastly, Section VI will summarize why permitting hearsay in accusatory instruments should not be permitted.

II. ACCUSATORY INSTRUMENTS

The purpose of an accusatory instrument is to "provide a defendant with fair notice of the charges against him or her, and of the manner, time, and place of the conduct underlying the accusations . . . ."[36] This notice gives the defendant the opportunity to prepare his or her defense.[37]

There are two parts to an accusatory instrument, the accusatory part and the factual part.[38] The accusatory part must state the crime with which the defendant is being charged.[39] The factual part must allege "facts of an evidentiary character supporting or tending to support the charges."[40]

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

[35] *See* Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (March 22, 2012), http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html ("94 percent of state cases end in plea bargains.").

[36] People v. Atta, 5 N.Y.S.3d 455, 457 (App. Div. 2d Dep't 2015).

[37] *Id.*

[38] N.Y. CRIM. PROC. LAW § 100.15 (McKinney 1978).

[39] N.Y. CRIM. PROC. LAW § 100.15(2) (McKinney 1978).

[40] N.Y. CRIM. PROC. LAW § 100.15(3) (McKinney 1978).

A. Requirements for Facial Sufficiency

An accusatory instrument is insufficient if it contains only hearsay allegations in establishing any and all elements of the offense charged.[41] The accusatory instrument must be dismissed if it is uncertain whether it is based upon hearsay or direct knowledge.[42] The "required non-hearsay evidentiary allegations [must be] within 'the four corners of the instrument itself.'"[43] When a witness's deposition is based on what someone else told him instead of being based on what he or she witnessed, the information stems entirely from hearsay, which renders it defective.[44] The New York Court of Appeals has repeatedly held that conclusory allegations, such as drawing inferences from hearsay, will not suffice as a substitute for evidentiary facts.[45] Hearsay is explicitly prohibited in accusatory instruments;[46] therefore, it is inexcusable for any court to permit hearsay allegations in place of "facts of an evidentiary character."[47]

B. Legislative Intent

The CPL requires factual evidence and forbids hearsay in the accusatory instrument because, without those safeguards, the People could prosecute anyone based on unfounded and groundless allegations.[48] The requirements for the factual portion of the accusatory instrument are strict and straightforward.[49] The reason for requiring factual proof is evident when understanding the function of an accusatory instrument as laid out in the CPL.[50] The prosecution must make out a *prima facie* case in the information, the formal written

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[41] N.Y. CRIM. PROC. LAW § 100.40(1)(c) (McKinney 1972); N.Y. CRIM. PROC. LAW § 100.15(3) (McKinney 1978); People v. Alejandro, 511 N.E.2d 71, 72 (N.Y. 1987).

[42] People v. Casey, 740 N.E.2d 233, 237 (N.Y. 2000) ("[B]ecause it cannot be determined upon the face of the information whether the pleading is in compliance with [the non-hearsay requirement of the CPL], the information is subject to a motion to dismiss.").

[43] People v. Thomas, 824 N.E.2d 499, 501 (N.Y. 2005) (quoting Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A).

[44] People v. Krimitsos, 831 N.Y.S.2d 349 (Dist. Ct. Nassau Cnty. 2006).

[45] People v. Dreyden, 931 N.E.2d 526, 527 (N.Y. 2010), People v. Dumas, 497 N.E.2d 686, 686-87 (N.Y. 1986).

[46] N.Y. CRIM. PROC. LAW § 100.40(1)(c) (McKinney 1972).

[47] N.Y. CRIM. PROC. LAW § 100.15(3) (McKinney 1978).

[48] People v. Monero, 712 N.Y.S.2d 763, 764 (Crim. Ct. N.Y. Cnty. 2000).

[49] *See* N.Y. CRIM. PROC. LAW § 100.15 (McKinney 1978) (stating the requirements for the factual portion of the accusatory instrument).

[50] *Alejandro*, 511 N.E.2d at 73.

accusation charging a defendant with a crime, because it is the sole instrument needed to prosecute someone for a misdemeanor.[51] Thus, aside from the misdemeanor complaint, the prosecution does not need to present any other factual evidence before trial, if the case even goes to trial.[52]

The non-hearsay "requirement is not merely a formalistic technicality," but is rooted in "fairness and due process."[53] Every defendant has the right to be prosecuted by a valid information regardless of how heinous the charges against him or her are.[54] It is vital for the actual victim to sign a supporting deposition because it shows "that a real person actually complained to the police and had an opportunity to review the accuracy of the factual allegations drafted by the prosecutor."[55] The legislators foresaw this potential abuse of prosecutorial power, which is why they created the non-hearsay requirement.[56] In order to avoid the slippery slope of baseless prosecutions, it is crucial to forbid hearsay allegations in accusatory instruments.[57]

In *In re Neftali D.*,[58] the New York Court of Appeals compared the requirements for an accusatory instrument to the requirements for a juvenile delinquency petition under the Family Court Act.[59] The court stated, "The sufficiency requirements . . . are not simply technical pleading requirements but are designed to ensure substantive due process protection."[60] The court reasoned that a juvenile delinquency petition, like an accusatory instrument, is the sole instrument for which someone could be "arrested and deprived of liberty."[61] Thus, it is of utmost importance that both documents

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[51] *Alejandro*, 511 N.E.2d at 73 (stating that a misdemeanor complaint differs from a felony complaint in that the felony complaint would be "followed by preliminary hearing and a Grand Jury proceeding").

[52] *Id.* at 73-74; *see* Goode, *supra* note 35 (stating that only approximately 6% of state criminal cases actually go to trial because the majority of criminal defendants will take a plea deal).

[53] People v. Phillipe, 538 N.Y.S.2d 400, 403-04 (Crim. Ct. Kings Cnty. 1989).

[54] *Rizzo*, 725 N.Y.S.2d at 918.

[55] *Phillipe*, 538 N.Y.S.2d at 404.

[56] *See Monero*, 712 N.Y.S.2d at 764 ("CPL [§] 100.15 and [§] 100.40 require the People to file an accusatory instrument based on nonhearsay evidence. The purpose of this requirement is to prevent the People from bringing baseless prosecutions.").

[57] *Id.*

[58] 651 N.E.2d 869 (N.Y. 1995).

[59] *Id.* at 871.

[60] *Id.*

[61] *Id.*

comply with statutory requirements.[62] The New York Court of Appeals recognized the dangers of statutory non-compliance.[63] If prosecutors neglect to follow the CPL, there could be chaos in the number of people arrested and prosecuted based on unreliable hearsay rather than solid factual allegations.[64] Thus, hearsay exceptions should never be permitted in accusatory instruments.

III. HEARSAY

Hearsay is "an out-of-court[65] statement[66] offered to prove the truth of the matter asserted[67] therein."[68] The rule against hearsay was created out of "[d]istrust of jurors and their ability to appropriately weigh the credibility of a witness's trial testimony recounting someone else's statement."[69]

The United States Supreme Court recognized three reasons for excluding hearsay.[70] First, the Court reasoned that the witness must physically take the stand under oath in order to understand the seriousness of his statements.[71] If a witness falsely testified as to someone else's knowledge, it would be difficult for the prosecution to bring forth perjury charges.[72] Second, the witness has to be present in order to be cross-examined, which is the most effective method for assessing truth.[73] Cross-examination measures credibility by "explor[ing] weaknesses in a declarant's memory, perception,

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[62] *Id.*

[63] *In re Neftali D.*, 651 N.E.2d at 871-72.

[64] *See id.* (holding that a juvenile delinquency petition, like an accusatory instrument, must comport with statutory requirements because it is the sole instrument needed to arrest someone and deprive him of his liberty); *See also* People v. Zambounis, 167 N.E. 183, 184 (N.Y. 1929) ("Forms and procedure still have their place and purpose in the administration of the law; without them we would have chaos.").

[65] An out-of-court statement is one that "the declarant does not make while testifying at the current trial or hearing." FED. R. EVID. 801(c)(1).

[66] A statement is "a person's oral assertion, written assertion, or nonverbal conduct" so long as the person intended to communicate something. FED. R. EVID. 801(a).

[67] An out-of-court statement will only be hearsay if it is offered "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c)(2).

[68] Stern v. Waldbaum, 651 N.Y.S.2d 187, 188 (App. Div. 2d Dep't 1996).

[69] Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. KAN. L. REV. 717, 718 (2015).

[70] California v. Green, 399 U.S. 149, 158 (1970).

[71] *Id.*

[72] Donnelly v. United States, 228 U.S. 243, 273 (1913).

[73] *California*, 399 U.S. at 158.

narrative ability, and sincerity."[74] The Court, lastly, recognized that hearsay must be excluded because it is crucial for the jury to observe the witness's demeanor on the stand in order to evaluate his or her credibility.[75] Thus, for the reasons outlined by the Supreme Court, hearsay is impermissible as evidence.[76]

A. Hearsay Exceptions

Although hearsay is impermissible as evidence, several hearsay exceptions were developed because "some out-of-court statements were thought to contain sufficient indicia of reliability to deem them worthy of admission into evidence."[77] In order for an out-of-court statement to be admitted into evidence, it must not only fall within a hearsay exception but also be proven to be reliable by the prosecution.[78] The Federal Rules of Evidence outlines thirty-two exceptions and exclusions to the hearsay rule.[79] These exceptions stem from necessity[80] and were created for jury trials.[81] The two relevant hearsay exceptions that will be addressed in this Note are the present sense impression and the excited utterance.[82]

1. Present Sense Impression

The present sense impression allows the trier of fact to hear hearsay testimony of "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."[83] A statement made while or immediately after an event occurred is theoretically reliable because the statement and the event take place

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[74] Park, *supra* note 33, at 55.

[75] *California*, 399 U.S. at 158.

[76] *Id.*

[77] Williams, *supra* note 69, at 720.

[78] People v. Brensic, 509 N.E.2d 1226, 1228 (N.Y. 1987).

[79] FED. R. EVID. 801-804. New York has not codified its own rules of evidence, but acknowledges both the excited utterance and the present sense impression as exceptions to the hearsay rule. *See* People v. Brown, 610 N.E.2d 369, 370 (N.Y. 1993) (recognizing the present sense impression as a New York hearsay exception); *see* People v. Edwards, 392 N.E.2d 1229, 1231 (N.Y. 1979) (recognizing the excited utterance hearsay exception).

[80] Barber v. Page, 390 U.S. 719, 722 (1968).

[81] *See* Williams, *supra* note 69, at 728.

[82] FED. R. EVID. 803.

[83] FED. R. EVID. 803(1).

at practically the same time, leaving no time for reflection.[84] An example of a present sense impression would be a neighbor calling the police to report a break-in across the street while describing the burglar's appearance and actions.[85] In *People v. Brown*,[86] the New York Court of Appeals held that present sense impressions may be admissible as long as the declarant's statements were sufficiently corroborated.[87] However, the court did not definitively state how much corroboration would be required.[88] In this particular case, the court decided the police's arrival at the scene shortly thereafter was sufficient corroboration because the officers observed the people and the atmosphere described by the neighbor.[89]

2. Excited Utterance

An excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[90] The exception may be admissible if: "(1) the statement was made contemporaneously or immediately after a startling or upsetting event; [and] (2) the declarant was under the stress of excitement, or shock, or trauma at the time the utterance was made, and before the declarant had the opportunity to reflect and fabricate."[91] Excited utterances are admissible under the theory that "the excitement flows from the event," thereby making the utterance part of the event itself.[92]

In assessing whether a statement should be admitted as an excited utterance, the court factors "the nature of the event, the amount of time which elapsed between the occurrence and the statement, and

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[84] People v. Brown, 610 N.E.2d 369, 371-72 (N.Y. 1993).

[85] *See id.* at 371.

[86] 610 N.E.2d 369 (N.Y. 1993) (holding that a 911 call describing a burglary, including the perpetrators' descriptions and actions was admitted into evidence as present sense impression).

[87] *Id.* at 374.

[88] *Id.*

[89] *Id.*

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

[91] *Swinger*, 689 N.Y.S.2d at 341 (Crim. Ct. N.Y. Cnty. 1998) (citing People v. Vasquez, 670 N.E.2d 1328 (N.Y. 1996), People v. Brown, 517 N.E.2d 515 (N.Y. 1987), People v. Nieves, 492 N.E.2d 109 (N.Y. 1986), People v. Edwards, 392 N.E.2d 1229 (N.Y. 1979), People v. Simms, 665 N.Y.S.2d 185 (App. Div. 4th Dep't 1997), People v. Van Patten, 509 N.Y.S.2d 926 (App. Div. 3d Dep't 1986), People v. Egan, 434 N.Y.S.2d 55 (App. Div. 4th Dep't 1980)).

[92] Orenstein, *supra* note 33, at 168–69.

the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth."[93]

In *Swinger*, the responding officer arrived within one minute of receiving the 911 call while "the dispute was still in progress."[94] The officer heard a verbal altercation and witnessed the complainant crying while hiding on the floor behind the couch.[95] She had bruises on her face and told the officer in a distressed tone that her husband beat her.[96] The woman later recanted her statement and refused to press charges against her husband.[97] Nevertheless, the court held that the woman's statement to the officer was an excited utterance and permitted it in the accusatory instrument as an exception to the hearsay rule.[98] The court reasoned that the victim in this case was a battered woman who was traumatically beaten by her husband.[99] The officer arrived in the middle of the event while the woman was "cowering in fear."[100] The court concluded that the statement qualified as an excited utterance because "the statement was made spontaneously, under the stress of a startling event," thereby leaving no time for reflection or fabrication.[101]

Similarly, in *Foster*, the officer arrived at the scene within five minutes of receiving the 911 call.[102] The complainant, while "sweating and in an excited state," asserted that he was stabbed in the head with a screwdriver by the defendant.[103] The court reasoned that the complainant's statement to the officer constituted an excited utterance because "[a] gash to the head caused by being stabbed in the head by a hard sharp metal object such as a screwdriver is an injury that would be startling and upsetting to any reasonable person."[104]

On the contrary, in *People v. Heinitz*,[105] the officer arrived within five minutes of receiving the 911 call and observed the victim

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[93] People v. Simpson, 656 N.Y.S.2d 765, 767 (App. Div. 2d Dep't 1997) (citing People v. Edwards, 392 N.E.2d 1229 (N.Y. 1979); People v. Brown, 517 N.E.2d 515 (N.Y. 1987); People v. Nieves, 492 N.E.2d 109 (N.Y. 1986)).

[94] *Swinger*, 689 N.Y.S.2d at 338.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 341.

[99] *Swinger*, 689 N.Y.S.2d at 341.

[100] *Id.*

[101] *Id.*

[102] *Foster*, 740 N.Y.S.2d at 571.

[103] *Id.*

[104] *Id.*

[105] People v. Heinitz, 859 N.Y.S.2d 905 (Crim. Ct. Kings Cnty. 2008).

crying while touching her crooked nose, which had a dark mark on it.[106] The victim stated that the defendant head-butted her.[107] The court held this statement did not qualify as an excited utterance because, although the victim was crying and sniffling, she was "not yelling, screaming, or visibly disturbed in any other way."[108] The court reasoned, "[w]hen the injuries suffered by a complainant are considerably less severe, as is the case here, the complainant's reaction and emotional and physical states must be proportionately higher in order to meet the threshold of an excited utterance standard."[109] The complainant in this case kept touching her nose and asking the officer if it was broken.[110] The court reasoned that "the fact that the complainant was 'aware of her injury' . . . belies the reasoning behind, and the need for, the excited utterance doctrine."[111] The court concluded that if a declarant is having rational thoughts she could not possibly be in a traumatic enough state to declare an excited utterance.[112]

Courts have differed on the standard for what should constitute an excited utterance.[113] Some courts focus on the amount of time elapsed between receiving the 911 call and an officer arriving on the scene.[114] Other courts focus on the state of mind of the victim and the severity of his or her injuries.[115] Overall, the test for whether a statement qualifies as an excited utterance is subjective.[116] A judge does not have the medical training to understand whether an injury or

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[106] *Id.* at 2.

[107] *Id.*

[108] *Id.* at 3; *Cf.* People v. Mitchell, 849 N.Y.S.2d 209, 210 (App. Div. 1st Dep't 2007) (holding that the complainant's statements were excited utterances because she was "screaming," "hysterical," and "gasping for air").

[109] *Heinitz*, 2008 WL 756131 at *3.

[110] *Id.* at *2.

[111] *Id.* at *3.

[112] *Id.*

[113] *Compare Heinitz*, 859 N.Y.S.2d 905 (considering "the surrounding facts and circumstances, the additional information in the second superseding instrument, the complainant's appearance, the severity of her injuries, the amount of time elapsed since the incident, and the content of the statement itself"), *with Foster*, 740 N.Y.S.2d 567, 571 (considering only whether the declarant was under the stress of the startling event when she spoke).

[114] *See Swinger*, 689 N.Y.S.2d at 338 (holding that the exception should apply if there is a one-minute elapse of time); *see Foster*, 740 N.Y.S.2d at 568 (holding that the exception should only apply if the elapse of time is within five minutes).

[115] *See Heinitz*, 859 N.Y.S.2d 905; *see Foster*, 740 N.Y.S.2d at 571.

[116] *See supra* notes 110-12 and accompanying text.

situation is traumatic enough to bring about an excited utterance or whether a victim's reaction to being injured is an appropriate response. The judge's perception of the incident may not be accurate, yet he or she has broad discretion in choosing whether to admit the statement.[117] Thus, excited utterances should never be permitted in accusatory instruments as the sole form of evidence against someone.

B. DA's Rationale for Using Hearsay Exceptions in Accusatory Instruments

Although hearsay is not permitted in accusatory instruments, prosecutors have offered several justifications for using hearsay exceptions.[118] First, prosecutors have argued that hearsay exceptions are permitted at trial, where the standard of proof is higher than at the pleading stage.[119] Thus, the exceptions should be permitted in the accusatory instrument because there is a lower threshold of proof.[120] The problem with the DA's reasoning is there is a ninety percent chance the case will not go to trial.[121] If the case never goes to trial, then the defendant would be prosecuted based on a statement that may not be accurate and cannot be challenged through trial proceedings, such as cross-examination.[122] Second, prosecutors have argued that they should be able to use hearsay exceptions in accusatory instruments because other courts have permitted them.[123] Other states also permit hearsay exceptions at trial regardless of the availability of

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[117] *See supra* notes 105-12 and accompanying text.

[118] N.Y. CRIM. PROC. LAW § 100.40(1)(c) (McKinney 1972).

[119] People v. Fields, 344 N.Y.S.2d 413, 416 (Dist. Ct. Nassau Cnty. 1973) ("[Hearsay] exceptions must be authorized implicitly in the Criminal Procedure Law or we have the absurd result that the rules for making an information are more stringent than those applicable to criminal trials and hearings. In the light of the historical case background and the absurdity of any other construction, we must construe Hearsay as used in the Criminal Procedure Law to mean hearsay which is not admissible on the trial.").

[120] *Solomon*, 2002 WL 32157170 at *2.

[121] Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 116-17 (1997).

[122] *See* Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?*, 8 CARDOZO WOMEN'S L.J. 171, 179 (2002) (stating that in cases where hearsay is admitted as the sole form of evidence, defendants have "little or no opportunity to cross-examine the complainant, the heart of the prosecution's case. The majority of domestic violence trials involve 'what happened' defenses, which may depend largely on the strength of the complainant's credibility against assertions of grudges, self-interests, jealousies, and other biases or motives for fabrication.").

[123] *See Solomon*, 2002 WL 32157170 at *3; *Foster*, 740 N.Y.S.2d at 572; *Swinger*, 689 N.Y.S.2d at 341.

the declarant.[124] Lastly, prosecutors have justified the use of hearsay exceptions because sometimes hearsay is the only evidence in a case.[125]

C. Reliability of Excited Utterances and Present Sense Impressions

Hearsay exceptions will only be admitted if they are proven to be reliable.[126] Reliability is the sum of the circumstances surrounding the making of the statement that render the declarant worthy of belief.[127] After taking all of the surrounding circumstances into consideration, the statement, made under those surrounding conditions, should appear to be highly truthful.[128] The time frame as to when the statement was made is an important factor in a court's analysis.[129] Most courts have deemed statements made only a few minutes after the incident as reliable.[130] Their reasoning is that if the statement was made quickly, it was spontaneous and leaves little time for fabrication.[131] However, some courts have permitted excited utterances that were made up to two and a half hours after the

[124] King v. State, 953 S.W.2d 266, 267 (Tex. Crim. App. 1997) (statements to girlfriend confessing to murder were admitted as an excited utterance); People v. Hughey, 194 Cal. App. 3d 1383, 1387 (Cal. Ct. App. 1987) (declarant present at trial but did not testify); People v. Jones, 155 Cal. App. 3d 653, 656 (Cal. Ct. App. 1984) (statements by murder victim were admitted as hearsay exceptions).

[125] Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge Of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 692 (1993) (discussing how hearsay exceptions may be the only form of evidence in a child abuse case where the child may not take the stand because it is too traumatic).

[126] *Brensic*, 509 N.E.2d at 1228.

[127] Nucci v. Proper, 744 N.E.2d 128, 131 (N.Y. 2001) ("Relevant factors include 'spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, unlikelihood of faulty recollection and the degree to which the statement was against the declarant's . . . interest.' Courts have also 'considered the status or relationship to the declarant of the person to whom the statement was made . . ., whether there was a coercive atmosphere, whether it was made in response to questioning and whether the statements reflect an attempt to shift blame or curry favor.'") (quoting People v. James, 717 N.E.2d 1052, 1066 (N.Y. 1999)).

[128] *Solomon*, 2002 WL 32157170 at *2.

[129] *See Swinger*, 689 N.Y.S.2d at 338*; see Foster*, 740 N.Y.S.2d at 568.

[130] *See id.*

[131] *Swinger*, 689 N.Y.S.2d at 341; *Foster*, 740 N.Y.S.2d at 572.

incident.[132] This line of reasoning directly contradicts the "spontaneity" requirement.[133]

In *People v. Cotto*,[134] the victim, while in an ambulance after being shot, named Richie Cotto as his shooter.[135] Although there was a gap in time and the declaration was in response to probing questions, the New York Court of Appeals held that the statement was admissible as an excited utterance.[136] The court reasoned that "[w]hile it is critical that statements be made before a declarant had an opportunity to reflect, the relevant time period 'is not measured in minutes or seconds' but rather 'is measured by facts.'"[137] The court decided that the victim's "shock and trauma never subsided," which eliminated his ability to reflect, thereby rendering his statements reliable.[138] Contrary to the majority's reasoning, the victim was not in shock, but was "conscious and lucid."[139] The victim also clearly did not make any spontaneous declarations.[140] Instead, he intentionally declined to name his shooter and only mentioned Richie after continuous probing and prodding by both the officer and the emergency medical technician, who told him that he was probably going to die.[141] A statement that was "made in response to suggestive comments and questioning . . . lack[s] the inherent reliability of an excited utterance."[142] While a gunshot wound is certainly traumatic, "there is no presumption that a statement" made after such an event necessarily qualifies as an excited utterance.[143] The victim "reflected upon his answers, deliberated before responding, and weighed his responses accordingly," which demonstrates that he was not in an excited state.[144]

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[132] People v. Brooks, 522 N.E.2d 1051, 1051 (N.Y. 1988); *see also Brown*, 517 N.E.2d at 515 (holding that a statement made 30 minutes after the incident is sufficient in time to permit the hearsay exception).

[133] *Nucci*, 744 N.E.2d at 131.

[134] 699 N.E.2d 394 (N.Y. 1998).

[135] *Cotto*, 699 N.E.2d at 405 (Smith, J., dissenting).

[136] *Id.* at 400.

[137] *Id.* at 399 (quoting *Vasquez*, 670 N.E.2d at 1328).

[138] *Id.* at 400.

[139] *Id.* at 405 (Smith, J., dissenting).

[140] *Cotto*, 699 N.E.2d at 405 (Smith, J., dissenting).

[141] *Id.*

[142] People v. Fenner, 727 N.Y.S.2d 117, 118 (App. Div. 2d Dep't 2001); *see also* Elizabeth F. Lofus, *The Reality of Repressed Memories*, AMERICAN PSYCHOLOGIST 48, 518-37 (1993) (describing how "new, postevent information often becomes incorporated into memory, supplementing and altering a person's recollection.").

[143] *Cotto*, 699 N.E.2d at 406 (Smith, J., dissenting).

[144] *Id.* at 405 (Smith, J., dissenting).

Even if an excited utterance was made shortly after the incident, that still does not mean it was reliable.[145] A person could craft a lie in merely two seconds.[146] In addition, the accepted short time period does not necessarily comport with the psychology of a victim.[147] Many victims feel ashamed and tend to withdraw.[148] Thus, it is unlikely for a victim to immediately come forward with an accurate tale as to what happened.[149] Further, the short time frame is also unreliable because victims may initially suppress unwanted or unpleasant memories, which may not return to their consciousness until a later time.[150]

The excited utterance doctrine focuses on the sincerity of the statement, but does not factor into account any mistakes based on perception and memory.[151] The complex cognitive processes that occur in the brain play tricks on one's senses, especially vision and hearing.[152] Perception and memory are matters of "reconstruction" rather than a playback of what actually occurred.[153] Thus, it is incredibly plausible and common for people to make honest errors about what they saw or heard.[154] In addition, "entire events that never happened can be injected into memory."[155] Psychology experiments have shown that people can make up false memories of witnessing an

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145 Orenstein, *supra* note 33, at 179.

146 Orenstein, *supra* note 33, at 178 (citing Goldman, *supra* note 33, at 460 ("[T]he hearsay statement would have to be spoken virtually simultaneously with the described event for even the slightest assurance of increased reliability.")).

147 Orenstein, *supra* note 33, at 180.

148 Orenstein, *supra* note 33, at 204.

149 Orenstein, *supra* note 33, at 204; *see also* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1033-34 (2008) (discussing how New York does not have a statute of limitations for rape because the legislators understand that many victims take time to come forward).

150 Lofus, *supra* note 142, at 518-37.

151 Orenstein, *supra* note 33, at 179.

152 *See* Daniel J. Simons & Daniel T. Levin, *Failure to Detect Changes to People During a Real-World Interaction*, PSYCHONOMIC BULLETIN & REVIEW 5(4), 644 (1998) (describing "change blindness," a phenomenon in which observers fail to notice substantial changes happening right in front of their eyes).

153 Brady Wagoner, *Barlett's Concept of Schema in Reconstruction*, THEORY & PSYCHOLOGY 23(5), 562 (2013).

154 *Id.* at 562.

155 Lofus, *supra* note 142, at 518-37 (1993) (describing "the case of Paul Ingram," who was falsely accused of participating "in a Satan-worshipping cult alleged to have murdered 25 babies." Ingram, who was completely innocent, was pressed to remember what he had done and "developed detailed memories and wrote a three-page statement confessing in graphic detail" to a crime he never committed).

assault.[156] For this reason, hearsay exceptions should never be permitted in accusatory instruments because the witness could simply be mistaken about what he heard or saw.[157]

Furthermore, psychological scholars do not condone the concept that the stress of an event will produce an accurate account of the incident.[158] To be sure, the extreme stress and strong feelings evoked by such an event will heavily interfere with one's perception and memory.[159] Therefore, excited utterances and present sense impressions are inherently unreliable and should not be used in accusatory instruments.

D. Credibility of Hearsay Declarants

When choosing to admit a hearsay exception into evidence, courts do not consider the credibility of the hearsay declarant.[160] Instead, courts use a "trauma trumping approach" where the deciding factor in admitting a statement is whether the declarant was reacting to a stressful situation.[161] This approach to admitting hearsay is alarming because the declarant could despise the defendant and lie simply to have the defendant arrested and charged with a crime.[162] For example, a woman could call the police screaming and crying that her ex-husband hit her when she actually lied in hopes that she would get full custody of their children. Suppose the woman later recants her statement and refuses to sign a supporting deposition. A police officer or an ADA could still use the statement as an excited utterance[163] in order to prosecute the husband for assault. Nonetheless, courts do not

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[156] Lofus, *supra* note 142, at 518-37 (1993) (describing an experiment in which "children aged four to seven years were led to believe that they saw a man hit a girl, when he had not, after hearing the girl lie about the assault. Not only did they misrecall the nonexistent hitting, but they added their own details . . . .").

[157] *See* Wagoner, *supra* note 153, at 562.

[158] Orenstein, *supra* note 33, at 181.

[159] Orenstein, *supra* note 33, at 181.

[160] A declarant is "the person who made the statement." FED. R. EVID. 801(b); *see* People v. Fratello, 706 N.E.2d 1173, 1176 (N.Y. 1998).

[161] Steven Zeidman, *Who Needs an Evidence Code?: The New York Court of Appeals' Radical Reevaluation of Hearsay*, 21 CARDOZO L. REV. 211, 220 (1999).

[162] *See* Holland, *supra* note 122, at 182.

[163] The statement would qualify as an excited utterance because it was made after a startling event and the woman was under stress when she spoke. *See Swinger*, 689 N.Y.S.2d at 341.

take bias into consideration in choosing whether to admit the statement.[164]

In *People v. Lopez*,[165] a woman who was beaten in her apartment made statements to police, which were admitted into evidence at trial as hearsay exceptions.[166] The court chose to admit the statements because "[t]he surrounding circumstances establish that they were made 'under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection.'"[167] The problem with the court's "trauma-trumping approach" is that it weighs the essence of the terrible ordeal more heavily than any other factor, if it even considers any other factors.[168] Therefore, through the court's eyes, as long as the declarant was reacting to a stressful circumstance, other factors, such as a motive to lie, may not even be taken into consideration.[169] In *People v. Simpson*,[170] a woman was accosted by the defendant, who stole her engagement ring and allegedly sexually assaulted her in an alley.[171] The woman told the defendant that she would give him money to stop bothering her.[172] As the two were walking back to her apartment to get the money, she yelled out to two friends for help and the defendant began to flee.[173] She and her friends started to chase the man, but then she went back to her apartment to call 911.[174] She told the police that the man had a gun even though he actually only had a box cutter.[175] She admitted that she lied because she thought it would make the police come faster.[176] Nevertheless, the court admitted the recording of the 911 call into evidence as an excited utterance.[177]

The court reasoned that the content of the call showed that the woman was still under the stress of the event, which made the tape

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164 *See Fratello*, 706 N.E.2d at 1176.
165 728 N.Y.S.2d 145 (App. Div. 1st Dep't 2001).
166 *Id.* at 146.
167 *Id.* (quoting *Brown*, 517 N.E.2d at 515).
168 Zeidman, *supra* note 161, at 220.
169 Holland, *supra* note 122, at 177.
170 656 N.Y.S.2d 765 (App. Div. 2d Dep't 1997).
171 *Id.* at 766.
172 *Id.*
173 *Id.*
174 *Simpson*, 656 N.Y.S.2d at 766.
175 *Id.* at 766-67.
176 *Id.* at 767.
177 *Id.*

admissible despite the self-confessed lie.[178] The majority acknowledged, but disregarded the fact that "an excited utterance must lack the reflective capacity essential for fabrication."[179] The entire theory behind the excited utterance doctrine is that the statement was made spontaneously without "studied reflection," which could motivate the declarant to lie.[180] The court clearly erred in admitting the tape as an excited utterance because the declarant, by confessing her lie, demonstrated that she had enough time to reflect upon the incident to craft a lie.[181] The majority simply ignored the lie, which undermines the definition of an excited utterance.[182] This reasoning clearly demonstrates why excited utterances should never be used in accusatory instruments; someone could blatantly lie about an incident, yet a defendant could and would likely be prosecuted based solely on that false statement.

In *People v. Fratello*,[183] Guy Peduto was shot during a 2:00 a.m. high-speed car chase in the Bronx.[184] Peduto told a passerby and an officer that the defendant was the person who shot him.[185] Those statements were admitted into evidence as excited utterances.[186] Peduto later recanted those statements in an affidavit and was called as a witness for the defense at trial.[187] On the stand, Peduto explained his long-standing friendship with the defendant.[188] He also described in detail the man who actually shot him.[189] Peduto originally lied because he was biased against the defendant and feared retaliation for an unrelated incident.[190] The court admitted the statements despite the bias because it concluded that the bias merely serves "as a basis for impeachment of the declaration."[191] The problem with the court's reasoning is that, unlike in this case, a hearsay declarant might not

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178 *Id.*

179 *Simpson*, 656 N.Y.S.2d at 768 (Joy, J., dissenting).

180 *Edwards*, 392 N.E.2d at 1231.

181 *See Swinger*, 689 N.Y.S.2d at 341 (concluding that a key factor in admitting an excited utterance is that there must not have been time for reflection or fabrication).

182 *Simpson*, 656 N.Y.S.2d at 767.

183 706 N.E.2d 1173 (N.Y. 1998).

184 *Id.* at 1174.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Fratello*, 706 N.E.2d at 1175.

189 *Id.*

190 *Id.* at 1176.

191 *Id.*

testify.[192] In order to impeach a witness, a lawyer must ask the witness a series of questions to lay the foundation for the contradiction.[193] If the declarant does not take the stand, it would be impossible to lay the foundation for impeachment.[194] Thus, it is irrelevant to the court whether the declarant had a motive to lie to frame someone for a crime he did not commit.[195]

The defense argued that the excited utterances should not have been admitted into evidence for two reasons.[196] First, in order for an excited utterance to be admitted, the declarant must have been able to observe what he claimed happened.[197] The defense argued that Peduto could not have possibly recognized the defendant as his attacker during the nighttime high-speed chase, and the court erred in refusing to allow expert testimony on the issue.[198] Second, the defense argued, "the prosecution's entire case was based upon Peduto's spontaneous declarations," even though his testimony at trial completely contradicted those statements.[199] If all the evidence in a case comes from one witness whose testimony is both inculpating and exculpating, the jury can only decide the case based on impermissible speculation, which would require the court to dismiss the charges.[200] The court, however, rejected the *per se* dismissal rule and decided that a jury should be allowed to draw whatever permissible inferences it so chooses, as the jurors have a rational basis for resolving the conflicting testimony.[201] The dissent opined that a repudiated statement should not be "used as the sole basis for a conviction."[202] In this case, there needed to be some corroborating evidence in order "to find the

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[192] *See Lopez*, 728 N.Y.S.2d at 145.

[193] People v. Wise, 385 N.E.2d 1262, 1265 (N.Y. 1978) ("To set the stage for the prior inconsistency, the questioner must first inform the witness of the circumstances surrounding the making of the statement, and inquire of him whether he in fact made it.").

[194] Sloan v. N. Y. Cen. R. R. Co., 45 N.Y. 125, 127 (1871) ("To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he has made such statements.").

[195] *Contra* People v. Norton, 563 N.Y.S.2d 802, 808 (App. Div. 1st Dep't 1990) ("[I]t is vitally important to consider whether [declarant] had, in addition to an opportunity to reflect, a reason to fabricate a story implicating defendant.").

[196] *Fratello*, 706 N.E.2d at 1176.

[197] *Id.* at 1175.

[198] *Id.*

[199] *Id.* at 1176.

[200] *Id.* at 1177.

[201] *Fratello*, 706 N.E.2d at 1177.

[202] *Id.* at 1179 (Smith, J., dissenting).

defendant guilty beyond a reasonable doubt."[203] The judge had no basis to conclude that the defendant was guilty based on the contradictory testimony of only one witness.[204]

Fratello exemplifies how dangerous admitting an excited utterance can be. In this case, the excited utterance was the only evidence against the defendant even though the hearsay declarant's testimony lacked any credibility.[205] This case shows that one can lie, admit to lying, and even explain his motive for lying, but the court would still admit the original fabricated statement simply because the declarant was under stress when he spoke.[206] This case should have been dismissed;[207] it would be impossible to find someone guilty beyond a reasonable doubt if the sole form of evidence stems from an undependable and contradictory hearsay declarant.[208]

Simpson and *Fratello* have proven that the credibility of the declarant is not taken into consideration when admitting a hearsay exception into evidence.[209] Sometimes these statements are the only form of evidence in the prosecution's case.[210] Prosecutors weigh the strengths and weaknesses of their cases and offer plea deals accordingly.[211] However, prosecutors may be less inclined to enter into plea discussions or dismiss a case because they know that the

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[203] *Id.* (Smith, J., dissenting); *see also* Holland, *supra* note 122, at 182 (warning that without any other corroborating evidence, such as physical injury, a statement may be admitted "simply because the complainant said it," and that statement could serve as the only form of evidence against the defendant).

[204] *Fratello*, 706 N.E.2d at 1179 (Smith, J., dissenting) (quoting People v. Jackson, 480 N.E.2d 727, 732 (N.Y. 1985)); *see also* People v. Stewart, 358 N.E.2d 487, 492-93 (N.Y. 1976) ("Here all the evidence on this point came from a single prosecution witness who offered irreconcilable testimony pointing in both directions to guilt and innocence on the homicide charge. There was then no basis for the jury to find that the injury inflicted by the defendant caused the death of Daniel Smith, beyond a reasonable doubt.").

[205] *Fratello*, 706 N.E.2d at 1176.

[206] *Id.* at 1174-76.

[207] *See Norton*, 563 N.Y.S.2d at 810 (App. Div. 1st Dep't 1990) (holding excited utterances cannot be admitted where a declarant "clearly had a motive—revenge—to fabricate his initial statements").

[208] *See Jackson*, 480 N.E.2d at 732 ("When all of the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence, the jury is left without basis, other than impermissible speculation, for its determination of either."); *see also Norton*, 563 N.Y.S.2d at 810 ("There is a significant probability that the jury would have made a different finding but for the erroneous admission of the hearsay testimony.").

[209] *Fratello*, 706 N.E.2d at 1176; *Simpson*, 656 N.Y.S.2d at 767.

[210] *See Fratello*, 706 N.E.2d at 1176.

[211] Hollander-Blumoff, *supra* note 121, at 124.

witness's credibility will not affect their case.[212] Because the District Attorney's office does not have to factor the witness's credibility into account, ADAs do not have to screen out these weaker cases.[213] This could result in a heavy court calendar full of baseless prosecutions.[214] Thus, hearsay statements should have to be proven as reliable and credible because once they are admitted, they will not only burden the court's time, but could also deprive a defendant of his or her freedom.[215]

IV. CONFRONTATION CLAUSE

Hearsay evidence arguably violates an accused's right "to be confronted with the witnesses against him"[216] because the hearsay declarant will never be subject to cross-examination.[217] In *Crawford v. Washington*,[218] the Supreme Court held that extrajudicial statements, which are testimonial in nature, are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[219] The Court relied on long-standing precedent, which held that *ex parte* depositions and affidavits presented at trial deprive the accused of his constitutional right to confront his accuser face-to-face.[220]

Federal Rule of Evidence 803,[221] however, disregards the unavailability requirement that has been outlined by the Supreme

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[212] *See* Hollander-Blumoff, *supra* note 121, at 124.

[213] *See* Holland, *supra* note 122, at 179-80.

[214] *See* discussion *supra* Section III.

[215] *See* discussion *supra* Section III.

[216] U.S. CONST. amend. VI. New York's Constitution has an identical provision stating "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her." N.Y. CONST. art. 1, § 6. *See also* Crawford v. Washington, 541 U.S. 36, 43 (2004) ("The right to confront one's accusers is a concept that dates back to Roman times.").

[217] *See* Davis v. Alaska, 415 U.S. 308, 315-16 (1974) ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.").

[218] 541 U.S. 36 (2004).

[219] *Id.* at 53-54, 68 (reasoning that the Framers must have based the Sixth Amendment on English common law, which "conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine").

[220] *Id.* at 57 (citing Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Motes v. United States, 178 U.S. 458 (1900); Kirby v. United States, 174 U.S. 47 (1899); Mattox v. United States, 156 U.S. 237 (1895)).

[221] FED. R. EVID. 803.

Court for hearsay declarants.[222] As previously stated, hearsay exceptions stem from necessity.[223] Thus, when there is an available complaining witness, it is not necessary for a police officer or an ADA to sign a supporting deposition justified by hearsay exceptions.[224] The complainants in *Solomon*, *Swinger*, *Foster*, and *Rasoully* were not unavailable, but simply chose not to sign supporting depositions.[225] Allowing unnecessary hearsay exceptions in an accusatory instrument implicates a defendant's Sixth Amendment right to confront the available witnesses against him.[226]

Although this constitutional protection generally applies during a trial, the Confrontation Clause should extend to the pleading stage because an accusatory instrument is the sole document needed to prosecute someone for a misdemeanor.[227] Approximately ninety-four percent of misdemeanor cases are disposed of via plea-bargaining; therefore, there is a strong chance the case may never go to trial.[228] Even if the case does go to trial, the defendant will not be able to confront his accuser face-to-face.[229] Instead, he will only be able to confront a police officer or an ADA, who will simply reiterate hearsay declarations because neither of them actually witnessed the incident.[230]

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[222] *Crawford*, 541 U.S. at 68; *California*, 399 U.S. at 186 ("What I would hold binding on the States as a matter of due process is what I also deem the correct meaning of the Sixth Amendment's Confrontation Clause—that a State may not in a criminal case use hearsay when the declarant is available.").

[223] *Barber*, 390 U.S. at 722; Ohio v. Roberts, 448 U.S. 56, 65 (1980) ("The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. 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.").

[224] *See* United States v. Inadi, 475 U.S. 387, 394 (1986) ("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."); *see Brown*, 610 N.E.2d at 374 ("If such an eyewitness is available to testify to the events, there is certainly no pressing need for the hearsay testimony.").

[225] *See* discussion *supra* Section I.

[226] *See supra* notes 216-19 and accompanying text.

[227] *See supra* notes 65, 68 and accompanying text.

[228] Goode, *supra* note 35.

[229] *See Lopez*, 728 N.Y.S.2d at 145-46 (stating that the complainant did not testify at trial, but her "statements in the apartment to a police officer were admitted over defendant's hearsay objection").

[230] *See id.*

Thus, a police officer or an ADA should not be allowed to sign a supporting deposition in lieu of the actual complaining witness's supporting deposition because the Supreme Court has established that hearsay exceptions should only be used when necessary, meaning the declarant must be unavailable.[231]

V. SOLUTIONS

A. Advice for Defense Attorneys

When hearsay exceptions are used in accusatory instruments, defense attorneys must address it or the objection will be waived.[232] In order to preserve the issue for appeal, defense attorneys must write a motion to dismiss based on facial insufficiency or object to the pleading defect on the record at the next relevant court date.[233] The facial insufficiency motion should attack each element of the crime charged. Defense attorneys should argue that each element of the crime has not been established by non-hearsay, factual allegations as required by the CPL.[234] In addition, the hearsay exceptions themselves should be attacked as not rising to the level of an excited utterance or a present sense impression.[235]

B. Guidance for the Court

If the court deems it necessary to admit hearsay exceptions in accusatory instruments, certain safeguards should be in place. First, in order to admit an exited utterance, there should be some form of corroborating evidence to ensure the statement is valid.[236] Corroborating evidence will protect defendants from hearsay declarants who are not credible, or declarants who are plainly lying

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[231] *See supra* notes 217-219 and accompanying text.

[232] *Casey*, 740 N.E.2d at 241 ("[H]earsay pleading defects in the factual portion of a local criminal court information must be preserved in order to be reviewable as a matter of law on appeal. Because defendant failed to interpose a timely objection or motion before the trial court which addressed the hearsay defect in the misdemeanor information in this case, we are precluded from considering it.").

[233] *Id*.

[234] N.Y. CRIM. PROC. LAW § 100.40(1)(c) (McKinney 1972).

[235] *See* discussion *supra* Section III.

[236] *See Fratello*, 706 N.E.2d at 1179-80 (Smith, J., dissenting) (arguing that corroborating evidence should be required for excited utterances just as it is required for present sense impressions).

about the incident, because it will provide independent evidence aside from the statement itself.[237] Second, hearsay exceptions should be admitted if the defendant is truly unavailable, not merely choosing to recant his or her statement.[238] Third, New York should implement a rule pertaining to the impeachment of a non-testifying hearsay declarant because it would safeguard the defendant against a biased declarant as well as provide Confrontation Clause protection.[239] New York courts should allow the testimony of rebuttal witnesses who can impeach a hearsay declarant by prior inconsistent statements.[240]

VI. CONCLUSION

New York trial courts have begun a trend of holding accusatory instruments facially sufficient, without a complainant's supporting deposition.[241] Those accusatory instruments contained depositions of officers and ADAs using hearsay exceptions, such as excited utterances and present sense impressions, to relay statements made to them by the true complainants.[242] This trend needs to end and should not be permitted for several reasons.

First, permitting the use of hearsay in an accusatory instrument violates the rule against hearsay stated in the CPL.[243] Second, the declarant may be biased or not credible.[244] Third, permitting hearsay exceptions in accusatory instruments arguably violates a defendant's Sixth Amendment Confrontation Clause rights.[245] Lastly and most

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[237] *See id.*; *see also supra* notes 157-61 and accompanying text.

[238] *See* discussion *supra* Section IV.

[239] *See* FED. R. EVID. 806 ("When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination."); *see also* People v. Devalle, 670 N.Y.S.2d 827, 828 (App. Div. 1st Dep't 1998) (admitting "a prior inconsistent statement to impeach" a non-testifying hearsay declarant and holding "'if there was never any opportunity to cross-examine the declarant, the inconsistent statement may be shown without a foundation.'").

[240] *Id.*

[241] *See* discussion *supra* Section I.

[242] *See* discussion *supra* Section I.

[243] *See* N.Y. CRIM. PROC. LAW § 170.35(1)(a) (McKinney 1972).

[244] *See* discussion *supra* Section III.

[245] *See* discussion *supra* Section IV.

importantly, without any other safeguards, a defendant may be prosecuted and deprived of liberty based solely on a hearsay statement, which may not be accurate or reliable.[246]

In order to preserve this issue for appeal, defense attorneys must address the pleading defect in a motion or on the record in court.[247] To minimize the unreliability of hearsay exceptions, New York courts should require corroborating evidence and should permit hearsay declarants to be impeached by prior inconsistent statements.[248] In conclusion, hearsay exceptions should not be permitted in accusatory instruments as the sole form of evidence against a defendant because it violates the CPL and unfairly prejudices a defendant in that he or she may be prosecuted based solely on hearsay exceptions, instead of concrete facts.[249]

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[246] *See* discussion *supra* Section III.

[247] *See* discussion *supra* Section V.

[248] *See* discussion *supra* Section V.

[249] *See supra* notes 31-32 and accompanying text.