Memorandum of Law in Support of Precluding "Excited Utterance" Evidence

The excited utterance exception to the hearsay rule should be abandoned in light of developments in neuroscience and cognitive psychology which debunk the antiquated assumptions underlying the exception.

Hearsay is generally inadmissible because it is unreliable and not subject to testing by cross-examination. See People v. Buie, 86 N.Y.2d 501, 511-12 (1995); Richardson, On Evidence § 8-102 (11th ed. 1995). Only hearsay evidence that falls within a recognized exception is admissible, and, even then, only if its proponent can establish its reliability. See People v Brensic, 70 N.Y.2d 9, 14 (1987).

The "excited utterance" exception to the hearsay rule took hold in American jurisprudence in the early 1900's, championed by Professor Wigmore, who opined that, under the stress of nervous excitement, a person's "reflective faculties" will be "still[ed]," thus making the resulting utterance "a spontaneous and sincere response," to the event, that is "particularly trustworthy." 6 John Henry Wigmore, Evidence in Trials at Common Law § 1747 (James H. Chadbourn rev. ed., 1976). A person so incapacitated by emotion, Professor Wigmore thought, would be unable or unlikely to lie. Decisions from the New York Court of Appeals relied on this assumption and have carried the exception over largely unchanged to present day. See People v. Edwards, 47 N.Y.2d 493, 497 (1979)("Underlying this exception is the assumption that . . . [an excited utterance] will be spontaneous and

trustworthy."); People v. Cantave, 21 N.Y.3d 374, 381 (2013)("The spontaneity of the declaration guarantees its trustworthiness and reliability.").

However, the assumption underlying the excited utterance exception has been debunked by science and fact. Hearsay evidence allowed in under its banner is neither necessarily reliable nor accurate. For this reason, Judge Rivera, concurring in People v. Twanek Cummings, 31 N.Y.3d 204, 215 (2018), recommended "cabin[ing], if not outright abandonin[ing] the exception." [1] Judge Rivera pointed to the numerous studies showing that a person is neither less likely to lie or fabricate in the immediate wake of a startling event, nor to be accurate in their perceptions, even if they do lose the capacity for reflection. There is no assurance that an "unreflective utterance, provoked by excitement, is reliable." Id. at 214-15, quoting United States v. Boyce, 742 F.3d 793, 802 (7th Cir. 2014)(Posner, J., concurring).

As Judge Rivera pointed out, advances in neuroscience and psychology "demonstrate an individual's inability to accurately recall facts when experiencing trauma, and, in turn to create falsehoods immediately." Studies demonstrate that "less than one second is required to fabricate a lie." Cummings, 31 N.Y.3d at 214

[1] The parties had not raised the issue in Cummings; Judge Rivera raised this concern on her own. Subsequently, in People v. Almonte, 2019 WL 2618060 (June 27, 2019), the parties raised the issue, but the Court declined to reach it as it had not been preserved at the trial level.

Indeed, psychological studies suggest that deceptive statements may actually be a natural component of a stressful event. See id. at 215 (citing Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 Seattle U L Rev 111, 114 (2017); Melissa Hamilton, *The Reliability of Assault Victims Immediate Accounts: Evidence from Trauma Studies*, 26 Stan L & Pol'y Rev 269, 304 (2015)).

Judge Rivera found unpersuasive the longstanding jurisprudential acceptance of the judicially-created excited utterance exception, agreeing with Judge Posner of the Seventh Circuit that this merely reflects "judicial habit, in turn reflecting judicial incuriosity and reluctance to reconsider ancient dogmas." Cummings, 31 N.Y.3d at 215, citing United States v. Boyce, 742 F.3d 792, 801-02 (7th Cir. 2014). Judge Rivera found this "no reason to guard this exception so tightly, especially in the face of criticism stemming from an informed understanding of human cognitive behavior." Id. at 215-16.

In light of "science, fact, and common sense," Cummings, at 215, establishing that excited utterances do not bear any genuine assurances of reliability, trustworthiness, or accuracy, this Court should preclude admission of the evidence proffered by the People on that theory. Admission of the proffered hearsay under that discredited and unjustified exception would violate New York State evidentiary rules against hearsay, as well as the defendant's due process and

confrontation rights under the federal and state constitutions. Alternatively the defense requests a hearing at which it could present expert testimony and evidence to disprove the assumptions underlying the exception.