

## 8.17. Excited Utterance <sup>1</sup>

**A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication.**

### Note

This rule is derived from the formulations of the exception as stated by the Court of Appeals. (*See e.g. People v Johnson*, 1 NY3d 302, 306 [2003] [“An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication”]; *People v Brown*, 70 NY2d 513, 518 [1987] [“An excited utterance is one made “under the immediate and uncontrolled domination of the senses and during the brief period when consideration of self-interest could not have been brought fully to bear by reasoned reflection”]; *People v Nieves*, 67 NY2d 125, 135 [1986] [“Statements within this exception are generally made contemporaneously or immediately after a startling event which affected or was observed by the declarant, and relate to the event. The essential element of the exception is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that his reflective capacity was stilled. An utterance made ‘as a direct result of sensory perception during that brief period when considerations of self-interest cannot be immediately brought to bear’ is deemed sufficiently trustworthy to be admitted into evidence as an expression of the true belief of the declarant with respect to the facts observed” (citations omitted)]; *People v Edwards*, 47 NY2d 493, 496-497 [1979] [referring to exception as “excited utterance” and observing that underlying it “is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication”]; encompasses statement “which asserts the circumstances of (the) occasion as observed by the declarant”]; *People v Caviness*, 38 NY2d 227, 230-231 [1975] [“spontaneous declarations made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while his reflective powers are stilled and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection and deliberation, are admissible as true exceptions to the hearsay rule”]; Court also rejected decisions that excluded declarations by bystanders].)

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<sup>1</sup> In May 2018, this rule was revised to substitute the words “a person who personally observed” the event for the words “a bystander to” the event to better reflect the need for the “bystander” to have personally observed the incident, as explained in the Note, and as emphasized by the Court of Appeals in *People v Cummings*, 31 N.Y.3d 204 (May 8, 2018).

The Court of Appeals has cautioned that “it must be inferable that the declarant had an opportunity to observe personally the event described in the declaration . . .” (*People v Fratello*, 92 NY2d 565, 571 [1998].) Overall, the Court has instructed that

“[t]he admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection.” (*People v Edwards*, 47 NY2d at 497.)

With respect to the difference between the “excited utterance” exception and its “close relative” the “present sense impression” exception, the Court of Appeals has explained:

“ ‘Excited utterances’ are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. ‘Present sense impression’ declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of ‘excited utterances’ are their spontaneity and the declarant’s excited mental state, the key components of ‘present sense impressions’ are contemporaneity and corroboration.” (*People v Vasquez*, 88 NY2d 561, 574–575 [1996] [citations omitted].)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be “testimonial.” (*But see People v Nieves-Andino*, 9 NY3d 12 [2007] [as police officer reasonably assumed that there was an ongoing emergency, the victim’s responses to the officer’s inquiries were nontestimonial and were admissible as excited utterances]; *People v Bradley*, 8 NY3d 124 [2006] [admission into evidence of a statement as an excited utterance was not barred by the Confrontation Clause as it was not testimonial because it was made in response to

a question from a police officer and the officer's evident reason for asking the question was to deal with an emergency].)