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ISSUES TO DEVELOP AT TRIAL

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It's a common scenario: The People proffer a 911 call in which someone (perhaps unidentified) names your client or describes the perpetrator. The prosecution argues for its admission as an excited utterance because it was made within minutes of the event, and the caller sounds "excited," "hysterical," "agitated," etc. The court allows this hearsay into evidence with little discussion. After all, excited utterances are an entrenched exception to the hearsay rule. Everyone knows that in the wake of a stressful event, a spontaneous declaration is inherently trustworthy. **Not.**

This issue sets out a challenge that the Court of Appeals (or at least Judge Rivera) has invited you to make – **that the excited utterance exception to the hearsay rule should be abolished because it is based on discredited assumptions about the reliability and accuracy of such out-of-court statements.** In People v. Cummings, 31 N.Y.3d 2014 (2018), the Court of Appeals reversed on the ground that there was inadequate record support that the unidentified speaker, heard in the background of the 911 call, personally observed the shooting. Judge Rivera, concurring, strongly voiced her larger concerns with the foundation for the exception, but noted the parties hadn't raised the issue.

In People v. Almonte, __ N.Y.3d __, 2019 WL 2618060 (June 27, 2019), the parties did raise the issue in the Court of Appeals, but the Court stated that the "continued viability of the excited utterance exception" was not preserved for appellate review.

Judge Rivera, dissenting on other grounds in Almonte, indicated that to preserve the issue, the "defendant should have developed a record below on the state of the science." We believe that if you sufficiently bring to the court's attention the developments in psychology and neuroscience that were discussed in Cummings, this should preserve the issue for appeal. However, in the alternative to disallowing the evidence, you should ask for a hearing to present expert testimony relevant to disproving the underlying assumption that people don't or can't lie immediately after a startling event. It is not likely a court will want to conduct such a hearing, but it will preserve that remedy for appeal.

To further assist you, we're attaching a template Memorandum for you to submit along with your objection. It is also available on our website here. You can submit the Memorandum as is, but even better would be to tailor it to your case.

Lodge your objection as soon as the prosecution indicates it will be proffering out-of-court statements as excited utterances:

- Remind the court that the excited utterance exception is based on an *assumption* that under the stress of nervous excitement, a person can be trusted to be telling the truth.

- Argue that the assumption that a startling event makes a person unable to lie has been debunked by "science, fact and common sense," citing Judge Rivera's concurrence in Cummings, 31 N.Y.3d at 215 (Judge Rivera, concurring). As Judge Rivera pointed out, studies show that a person can fabricate a lie in under a second. Id. at 214.

- Further, even if the startled utterances were honest, studies also show that the very stress that makes a person honest can also interfere with their ability to accurately perceive events. In other words, stress caused by a startling event can have a **negative** effect on the accuracy of a declarant's perception. Id. at 214-15.

- Further, there are studies showing that a high-stress situation may even cause individuals to reflexively lie, not tell the truth. Id. at 215.

- Accordingly, the evidence that the prosecution seeks to introduce under the excited utterance exception should be precluded as unreliable and inadmissible hearsay, violative of state evidentiary rules and your client's due process and confrontation rights under the federal and state constitutions.

There are numerous authorities to cite in support of abolishing the exception. Judge Rivera's concurrence in Cummings cites a number of them, as does our Memorandum. Here's a short list. Note that the Hamilton article and the Baiker-McKee article, in particular, discuss at length the underlying science and cite scientific articles.

Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 Stan. L. & Pol'y Rev. 269, 295, 296 (collecting sources); Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 U. Kan. L. Rev. 717, 743 (2015); Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 Seattle U.L. Rev. 111, 114 (2017); Aviva Orenstein, My God: *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 Cal. L. Rev. 159, 178 (1997); James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 Loy. L.A.L. Rev. 203, 237-38 (1995); Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 520-21 (2d Ed. 1982); 2 McCormick on Evidence § 272 (7th ed. 2013).

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

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[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.