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# A SHOCK TO THE SYSTEM: ANALYZING THE CONFLICT AMONG COURTS OVER WHETHER AND WHEN EXCITED UTTERANCES MAY FOLLOW SUBSEQUENT STARTLING OCCURRENCES IN RAPE AND SEXUAL ASSAULT CASES

COLIN MILLER\*

## INTRODUCTION

A four-year-old girl visits with her mother for the weekend and then becomes upset at the prospect of returning to her father's house.<sup>1</sup> After crying, she tells her mother that she was improperly touched by her babysitter's son at her father's house.<sup>2</sup> A mentally and physically challenged nineteen-year-old is told by her mother that she is being returned to her aunt's house.<sup>3</sup> She begins to cry hysterically and eventually tells her mother that her aunt's live-in boyfriend raped her and she fears she might be pregnant.<sup>4</sup> In the first case, the court reverses the lower court's decision to exclude the girl's statement, holding that it could qualify as an excited utterance.<sup>5</sup> In the second case, the court allows the mother to testify about her daughter's statements because they constitute excited utterances.<sup>6</sup> In both, the rationale is the same — a subsequent startling occurrence can trigger associations with the crime being prosecuted, rekindling the stress of the original occurrence and forming the predicate for an excited utterance.<sup>7</sup> Each court asserts that the return of a victim to the place where she was allegedly abused could qualify as a subsequent

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1. *In re Troy P.*, 842 P.2d 742, 743-44 (N.M. Ct. App. 1992).

2. *Id.* at 744.

3. *Esser v. Commonwealth*, 566 S.E.2d 876, 878 (Va. Ct. App. 2002).

4. *Id.*

5. *Troy P.*, 842 P.2d at 747.

6. *Esser*, 566 S.E.2d at 879-80.

7. *Id.* at 879:

We see no reason, however, given the rationale for the excited utterance exception . . . , why a subsequent related startling event cannot be the startling event that produces an excited utterance about a prior event or why that excited utterance cannot be considered for admission under the excited utterance exception to the hearsay rule.

*Id.*; *Troy P.*, 842 P.2d at 747 (holding that "[c]ourts have . . . admitted spontaneous utterances made well after the event when the declarant was suddenly subjected to rekindled excitement").

startling occurrence, triggering associations with prior sexual abuse and prompting excited utterances.<sup>8</sup>

A thirteen-year-old girl is allegedly sexually abused by her mother's ex-husband.<sup>9</sup> The next night, the girl becomes "visibly upset at the prospect of having to return" to the apartment where the alleged assailant resides, and she recounts the details of the sexual abuse.<sup>10</sup> A three-year-old girl becomes "agitated and 'panicky' at the prospect of returning to visit" her father while staying with her step-grandmother, crying and recounting episodes of abuse.<sup>11</sup> In each case, the court excludes admission of these statements as excited utterances.<sup>12</sup> Both courts acknowledge that the victim making the statement was indeed suffering from the stress of being returned to the environment in which she was abused.<sup>13</sup> Yet, each court rejects the statements as excited utterances. The former was excluded because the victim's emotional state of stress was not continuous between the original crime and her statement, and the latter was excluded because the victim was not still under the original stress of the crime when making her statements.<sup>14</sup>

The differences among these cases are striking. These are not examples of courts coming to disparate factual conclusions based on the same underlying legal framework; instead, courts appear to be interpreting the excited utterance exception to the rule against hearsay in fundamentally antithetical manners. While some courts categorically require that such an utterance immediately follow the stress caused by the underlying crime,<sup>15</sup> others allow an utterance to follow a subsequent startling occurrence that can transpire well

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8. *Esser*, 566 S.E.2d at 880 (admitting the girl's statements as excited utterances because they were "made the first time she believed she was to be returned to the place where she was assaulted and to the control of appellant, the man who had raped and sexually assaulted her"); *Troy P.*, 842 P.2d at 747 ("[W]e believe the imminent return of the victim to her father could support admission of her statements as an excited utterance.").

9. *State v. Lafrance*, 589 A.2d 43, 44 (Me. 1991).

10. *Id.*

11. *Mosley v. State*, 960 S.W.2d 200, 202 (Tex. App. 1997).

12. *Id.* at 204; *Lafrance*, 589 A.2d at 46.

13. *Mosley*, 960 S.W.2d at 204 (acknowledging that the victim's agitation at the prospect of returning to her father "may, indeed, be genuine, and springing from the event which she described"); *Lafrance*, 589 A.2d at 46 ("[T]he record shows that [the victim] was experiencing the stress of fear over returning to her own apartment while [the assailant] was still living there.").

14. *Mosley*, 960 S.W.2d at 204 ("The 'excitement' experienced by the declarant must be continuous between the event itself and the statement describing it."); *Lafrance*, 589 A.2d at 46 (rejecting admission of the victim's statements because there was no evidence that she "was still under the stress of excitement caused by [the defendant's] alleged unlawful sexual conduct").

15. See, e.g., *Mosley*, 960 S.W.2d at 204; *Lafrance*, 589 A.2d at 46.

after the stress from the underlying offense has subsided.<sup>16</sup> These differences are not limited to the unique factual situations cited above. Courts have also admitted and excluded statements made by victims soon after exhibiting fear of the pain of urinating<sup>17</sup> and after being discovered by adults while mimicking sexual positions “learned” from prior abuse<sup>18</sup> (to name the most frequently repeated situations) based upon reasoning similar to the aforementioned cases. Whether excited utterances can follow subsequent startling occurrences is an issue that arises with high frequency due to rape and sexual assault victims frequently not reporting their abuse soon after it has occurred.<sup>19</sup>

In rape and sexual assault jurisprudence (and in evidence law generally), much of the vitriol of critics has been directed against rape shield laws and the laws allowing the admission of evidence of prior sexual offenses against a defendant charged with rape or sexual assault. Many critics continue to argue strenuously for the repeal of these laws, even though they have been in effect for around thirty<sup>20</sup> and ten years, respectively,<sup>21</sup> with no indication that they will be overturned, despite the frequent attacks. Unfortunately, there has been relatively little dialogue about the inconsistent application of the excited utterance exception in rape and sexual assault cases and its effect on rape victims’ rights. Perhaps this is because those interested in defending the rights of rape and sexual assault victims have been busy defending these two laws against charges of “feminist” lawmaking.<sup>22</sup>

This article will argue that emotional statements made by rape and sexual assault victims in response to subsequent startling occurrences, even when removed in time from the original crime,

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16. See, e.g., *Troy P.*, 842 P.2d at 747; *Esser*, 566 S.E.2d at 879-80.

17. See, e.g., *State v. Gordon*, 952 S.W.2d 817, 821 (Tenn. 1997) (“We agree that the victim’s painful urination was a sufficiently serious and startling event under the rule.”).

18. See, e.g., *W.C.L. v. People*, 685 P.2d 176 (Colo. 1984).

19. Aviva Orenstein, “My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 200 (1997).

20. See Ellen Goodman Op-Ed., *Rethinking the Rape Shield*, BOSTON GLOBE, July 31, 2003 (discussing how rape shield laws have been in place for approximately thirty years).

21. Federal Rules of Evidence Rules 413-15 were added as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796 (1994) (codified as amended in part at 18 U.S.C.S. § 921 (2005)).

22. The only articles extensively addressing the juxtaposition of the excited utterance exception and sexual abuse cases are Orenstein, *supra* note 19, and Randolph N. Jonakait, “My God!” Is This How a Feminist Analyzes Excited Utterances, 4 WM. & MARY J. WOMEN & L. 203 (1997). Both of these articles address whether the excited utterance standards should be applied more liberally in sexual abuse cases but do not address in any depth whether such statements made in response to subsequent startling occurrences can qualify as excited utterances.

should potentially be admissible as excited utterances. Those courts categorically excluding these statements rely on old *res gestae* rationales that are unrelated to the excited utterance exception. Section I considers the history and underpinnings of hearsay, *res gestae*, and the excited utterance exception. This section delineates why *res gestae* was admitted as an exception to the rules against hearsay, why excited utterances are admissible, and how the rationales for the two exceptions differ. It also analyzes how courts and legislatures have altered the application of the excited utterance exception for child and adult sexual assault victims. Finally, it considers how questioning plays a role in the application of the excited utterance exception.

Section II then considers the split among courts over whether and when subsequent startling occurrences can form the predicates for excited utterances. It first identifies those courts claiming that subsequent startling occurrences can form such predicates, even though the actual reasoning by the judges on those courts reveals that they are relying on old *res gestae* rationales to automatically exclude statements made in response to subsequent startling occurrences. It then looks at three frequently recurring factual scenarios to argue that courts categorically excluding these statements are doing so improperly, principally because of reliance on old *res gestae* rationales.

## I. HISTORY AND UNDERPINNINGS OF HEARSAY, *RES GESTAE*, AND THE EXCITED UTTERANCE EXCEPTION

### A. A General Introduction to Hearsay

"My daughter told me that her uncle touched her private parts." "Someone ran out from the alley and said that a woman was being raped." "A month after it happened, I told my mother that the babysitter sexually assaulted me."<sup>23</sup> Under both the Federal Rules of Evidence and state evidence codes, all three of these statements constitute hearsay and thus cannot be introduced at trial to prove the truth of the matter asserted (*i.e.* that the uncle did touch the daughter inappropriately).<sup>24</sup> Hearsay is an out-of-court statement that a party seeks to introduce at trial to prove that the content of the statement was true.<sup>25</sup> Under evidence law generally, the trier of

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23. These are examples of the types of statements that are considered hearsay under the Federal Rules of Evidence.

24. FED. R. EVID. 802.

25. FED. R. EVID. 801(c).

fact determines the weight to give in-court testimony based on the “perception, memory, and narration” of the witness.<sup>26</sup> Legislators drafted evidence codes to exclude hearsay from courtrooms because it lacks “the following characteristics: assurances of reliability stemming from an in-court oath, the ability of the fact finder to observe the witness’s demeanor, the possibility of prosecuting the declarant [the person making the out-of-court statement] for perjury, and, most importantly, the opportunity for cross-examination.”<sup>27</sup> Essentially, hearsay evidence is inadmissible because the trier of fact cannot properly judge the “perception, memory, and narration” of the declarant at the time she made the out-of-court statement.<sup>28</sup>

Federal Rule of Evidence 803 and similar state evidence code provisions provide exceptions to the rule against hearsay, allowing the admission of out-of-court statements for the truth of the matter asserted when “circumstantial guarantees of trustworthiness” accompany the statement, making in-court testimony unnecessary.<sup>29</sup> One of these exceptions is Federal Rule 803(2) (and similar state evidence code provisions), allowing for the admission of excited utterances.<sup>30</sup> Before considering what “circumstantial guarantees of trustworthiness” accompanying excited utterances make in-court testimony unnecessary, it is important to consider *res gestae*, the exception which eventually spawned the excited utterance exception.

### *B. The Birth and Death of Res Gestae*

Beginning in the early nineteenth century, courts began recognizing the *res gestae* exception to the hearsay rule.<sup>31</sup> Under the *res gestae* exception, a statement was admissible if it was “literally . . . so closely connected to [the] occurrence or event in both time and substance as to be part of the happening.”<sup>32</sup> According to Professor John Henry Wigmore, the exception is slightly more liberal: “statements which would otherwise be inadmissible as hearsay may be admitted if they closely accompany material acts or situations.”<sup>33</sup>

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26. FED. R. EVID. 801 advisory committee’s note.

27. Orenstein, *supra* note 19, at 166 (internal citations omitted).

28. FED. R. EVID. 801 advisory committee’s note.

29. FED. R. EVID. 803 advisory committee’s note.

30. FED. R. EVID. 803(2).

31. See *United States v. Rouse*, 452 F.2d 311, 313 n.3 (5th Cir. 1971) (“[*Res gestae*] was relied upon widely in 19th century case law.”); Orenstein, *supra* note 19, at 168 (“Courts began to employ the term [*res gestae*] in the early 1800s . . .”).

32. BLACK’S LAW DICTIONARY 1305 (6th ed. 1990).

33. *Rouse*, 452 F.2d at 313 (construing 6 WIGMORE, EVIDENCE §§ 1746, 1747 (3d ed. 1940)); see also, *Keefe v. State*, 72 P.2d 425, 427 (Ariz. 1937) (“The phrase ‘*res gestae*’ means literally ‘the thing done.’”).

Courts allowed these statements to be admitted despite the rule against hearsay because they believed that the statements constituted "the automatic and undesigned incidents of the particular act in issue . . . ."<sup>34</sup>

Under the *res gestae* exception, statements were admitted only because they were a "continuing part of the transaction," the transaction being the original event prompting the statement.<sup>35</sup> Thus, for a statement to be admissible as *res gestae*, it had "to 'explain, elucidate, or in some way characterize [the] event.'"<sup>36</sup> Essentially, a statement had to relate directly to the event which immediately preceded it in order to constitute *res gestae*.<sup>37</sup>

Courts and scholars have concluded that what was generally referred to as *res gestae* in fact encompasses four distinct hearsay exceptions: "(1) declarations of present bodily condition, (2) declarations of present mental state and emotions, (3) excited utterances, and (4) declarations of present sense-impressions."<sup>38</sup> As a result, the phrase *res gestae* has fallen out of favor,<sup>39</sup> primarily because courts using this term can confuse evidentiary issues. Whereas *res gestae* is an "umbrella term cover[ing] a wide variety of analytically distinct rationales,"<sup>40</sup> individual hearsay exceptions are based on narrower principles. Thus, courts using the term *res gestae*, rather than specifically considering one of the four distinct hearsay exceptions it spawned, may lose sight of the purpose for the distinct exception. As a result, courts may require a statement to comply with one of the rationales which is the basis for another hearsay exception, but not the one at issue.<sup>41</sup>

34. *Keefe*, 72 P.2d at 427.

35. *Bayne v. State*, 632 A.2d 476, 484 (Md. Ct. Spec. App. 1993).

36. *State v. Chapin*, 826 P.2d 194, 198 (Wash. 1992) (quoting *Beck v. Dye*, 92 P.2d 1113 (Wash. 1939)).

37. *Id.*

38. *Rouse*, 452 F.2d at 313 n.3. Other courts have been less helpful in dividing *res gestae* into two categories: "spontaneous exclamations" and "verbal acts." *Keefe*, 72 P.2d at 427.

39. *Rouse*, 452 F.2d at 313 n.3 ("Use of the term *res gestae* is now somewhat archaic."); *Bayne*, 632 A.2d at 484 ("Whatever could be analyzed under one or another of the forms of *res gestae* can now be analyzed more clearly in a water-tight compartment of its own. The phrase *res gestae* had its day but that day is done."); *State v. Carpenter*, 773 S.W.2d 1, 9 (Tenn. Crim. App. 1989) ("This court prefers to avoid the murky concept of *res gestae*.").

40. *Moore v. State*, 338 A.2d 344, 346 n.1 (Md. Ct. Spec. App. 1975) ("In this case, we will not rely upon the undifferentiated phrase *res gestae*, because that umbrella term covers a wide variety of analytically distinct rationales, including excited utterances . . . ."); *Cassidy v. State*, 536 A.2d 666, 671 n.4 (Md. Ct. Spec. App. 1988) (citing *Moore*, 338 A.2d at 346 n.1). *See also Carpenter*, 773 S.W.2d at 9.

41. *Bayne*, 632 A.2d at 483-84 ("There has been such a confounding of ideas, and such profuse and indiscriminate use of the shibboleth *res gestae*, that it is difficult to disentangle the real basis for the principle involved."); *Commonwealth v. McLaughlin*, 303 N.E.2d 338, 346 (Mass. 1973):

There are two major problems when courts attempt to admit a potential excited utterance under old *res gestae* rationales instead of analyzing it as an excited utterance. First, they tend to require that the statement be a "continuing part of the transaction," a requirement for *res gestae* but not for excited utterances.<sup>42</sup> Second, they require that the statement "elucidate, explain, or . . . characterize the [startling] event."<sup>43</sup> While it is somewhat unclear to what extent an excited utterance must relate to the startling occurrence, it is almost universally accepted that the relationship need not be as close as the relationship required under the *res gestae* exception.<sup>44</sup> The advisory committee notes to the Federal Rules of Evidence indicate that, while the present sense impression exception (like the *res gestae* exception) only applies when the statement explains the occurrence it follows, an excited utterance "need only 'relate' to the startling event or condition, thus affording a broader scope of subject matter coverage."<sup>45</sup> Courts generally have concurred that the "elucidation" requirement of the *res gestae* exception "is not a part of [the excited utterance exception]."<sup>46</sup>

### C. The Excited Utterance Exception

#### 1. Foundations of the Excited Utterance Exception

As noted, courts and scholars began to break down *res gestae* into distinct hearsay exceptions, including the excited utterance

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The phrase '*res gestae*' has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology.

42. *Bayne*, 632 A.2d at 484 ("The otherwise independent excited utterance exception has generally been included under the umbrella of *res gestae* . . . This has created the improper perception that an excited utterance *must* be a 'continuing part of the transaction.'").

43. *State v. Chapin*, 826 P.2d 194, 198 (Wash. 1992) (quoting *Beck v. Dye*, 92 P.2d 1113 (Wash. 1939)) ("Under the *res gestae* rule, which is the common law rule from which [the excited utterance exception] was derived, the utterance also had to 'explain, elucidate, or in some way characterize [the] event.'").

44. *See, e.g., id.* ("For purposes of 803(a)(2), an utterance may 'relate to' the startling event even though it does not explain, elucidate, or in any way characterize the event. Any utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event meets this requirement.").

45. FED. R. EVID. 803 advisory committee's note.

46. *Chapin*, 826 P.2d at 198.



exception.<sup>47</sup> Looking at *res gestae* and prior case law,<sup>48</sup> Professor John Henry Wigmore deduced the existence of the excited utterance exception based on his theory that statements made by an individual while controlled by stress tend to be sincere.<sup>49</sup> As many scholars have noted, courts admitted *res gestae* statements primarily because they were uttered contemporaneously with key occurrences, making them a continuing part of the transaction and likely to be truthful.<sup>50</sup>

Wigmore decided that statements made spontaneously while under the stress of startling occurrences are just as reliable as statements made contemporaneously with those events.<sup>51</sup> With *res gestae*, the essential question is whether the statement was made at the same time as the key occurrence; for excited utterances to be admissible, they must be made while the declarant is still controlled by the stress of that occurrence.<sup>52</sup> Because the stress associated with an occurrence is likely to last significantly longer than the occurrence itself, the time requirements for the excited utterance exception are concomitantly more liberal than the time requirements for *res gestae*.<sup>53</sup>

The central theory behind the excited utterance exception is that startling events and conditions cause a certain level of stress in an individual. While the individual is controlled by the stress caused by such an event or condition, her mind is completely focused on the occurrence, and she is unable to use her reflective capacity to lie.<sup>54</sup> More specifically, the theory is that the individual is so

47. See *supra* note 38 and accompanying text.

48. See WIGMORE, EVIDENCE § 1747, at 196 (James K. Chadbourn ed. 1978).

49. *Moore v. State*, 338 A.2d 344, 348 (Md. Ct. Spec. App. 1975) ("From the mists of *res gestae* there has emerged, under Wigmore's discerning analysis, an exception to the hearsay rule for statements uttered under stress of excitement produced by a startling event and made before the declarant has had time or opportunity to reflect or contrive.") (internal citations omitted).

50. *Id.* ("[C]ontemporaneousness rather than spontaneity was emphasized, although the latter was clearly recognized as highly important.") (internal citations omitted).

51. *Id.*

52. *Id.* ("[E]xcitement flowing from a startling event is the key requirement now.") (internal citation omitted).

53. *Id.*

54. See *Commonwealth v. Santiago*, 774 N.E.2d 143, 147 (Mass. 2000) ("We next consider whether the declarant displayed a degree of excitement sufficient to conclude that her statement was a spontaneous reaction to the exciting event, rather than the product of reflective thought . . ."); see also *In re Troy P.*, 842 P.2d 742, 746 (N.M. Ct. App. 1992) ("The assumption underlying the excited utterance exception is that the utterance is 'precipitated by an external startling event [and] will be bereft of the reflective capacity essential for fabrication.'") (internal citations omitted); *Moore*, 338 A.2d at 347:

This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the

consumed by the stress of the startling occurrence that she is unable to act to promote her own self-interest.<sup>55</sup> The necessary principle underlying this theory is that people's instinct is to tell the truth and that it is only when they begin to reflect on an occurrence that they begin to twist or create facts for their own benefit.<sup>56</sup>

In a sense, courts admit excited utterances because they are involuntary reactions to the stress of a startling occurrence, rather than anything conscious and thus subject to manipulation by the speaker.<sup>57</sup> As some courts have put it, excited utterances are reliable because they are "the event speaking through the person and not the person speaking about the event."<sup>58</sup> While many critics have attacked the underpinnings of this exception by claiming, for instance, that stress distorts memory, the excited utterance exception remains viable under both the Federal Rules of Evidence and state evidence codes.<sup>59</sup>

Although the rationale for the excited utterance exception is important, the elements of *res gestae* that are not a part of the excited utterance exception are perhaps more important. As noted,<sup>60</sup> the key to excited utterances is that they are made spontaneously while under the stress of a startling occurrence; there is no need that they be contemporaneous with the occurrence itself.<sup>61</sup> Also, unlike some of the other exceptions derived from *res gestae*, excited utterances do not derive their reliability from the fact that the startling event is fresh in the memory of the declarant.<sup>62</sup> In fact, only a few sources have even mentioned this factor as having any

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utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. (internal citations omitted).

55. *Moore*, 338 A.2d at 347-48 ("Since this utterance is 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, the utterance may be taken as particularly trustworthy . . .") (internal citations omitted).

56. *State v. Padilla*, 329 N.W.2d 263, 266 (Wis. Ct. App. 1982) ("The underlying basis for this exception is that people instinctively tell the truth, but when they have time to stop and think, they may lie.").

57. *Couchman v. State*, 3 S.W.3d 155, 159 (Tex. App. 1999) ("This exception is founded on the belief that statements made as a result of a startling event or condition are involuntary and do not allow the declarant an adequate opportunity to fabricate, thereby ensuring enough trustworthiness to fall outside the hearsay exception.").

58. *First Southwest Lloyds Ins. Co. v. MacDowell*, 769 S.W.2d 954, 959 (Tex. App. 1989).

59. *FED. R. EVID.* 803(2); *see, e.g., TENN. R. EVID.* § 803(2).

60. *See supra* notes 54-56 and accompanying text.

61. *See United States v. Scarpa*, 913 F.2d 993, 1017 (2nd Cir. 1990) ("An excited utterance need not be contemporaneous with the startling event to be admissible under rule 803(2).").

62. *State v. Gordon*, 952 S.W.2d 817, 819-20 (Tenn. 1997) ("Second, ordinarily the statement is made while the memory of the event is still fresh in the declarant's mind. This means that the out-of-court statement about an event may be more accurate than a much later in-court description of it.").

impact on the admissibility of excited utterances. And even when freshness has been mentioned, it has been in cases where courts have admitted excited utterances made after subsequent startling occurrences removed in time from the underlying offense.<sup>63</sup>

## 2. *Elements of the Excited Utterance Exception*

Under the Federal Rules of Evidence and most state codes of evidence, in determining whether a statement qualifies as an excited utterance, courts must look at whether (1) a startling event or condition occurred; (2) the declarant made a statement while still under the stress of that startling event or condition; and (3) the statement relates to the startling event or condition.<sup>64</sup> Some courts, however, have held that the admissibility of an excited utterance is judged only under the first two elements; as long as a statement is made while under the stress of a startling occurrence, it is irrelevant whether the statement relates to the event or explains it.<sup>65</sup>

Other courts have similarly held that the third element should never be applied to exclude a statement as failing to meet the admissibility test for excited utterances.<sup>66</sup> According to these courts, "the third element, mechanically and narrowly construed, is a spurious

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63. *Id.* at 819-21 (stating that one of the rationales for the excited utterance exception is that the occurrence "is still fresh in the declarant's mind," yet admitting statements made possibly twenty-four hours or more after the underlying offense); *Moore v. State*, 338 A.2d 344, 349 (Md. Ct. Spec. App. 1975) (citing a source stating that excited utterances avoid the "dangers of faulty recollection," but admitting statements made "within hours" after the underlying offense).

64. *Murphy Auto Parts Co. v. Ball*, 249 F.2d 508, 511 (D.C. Cir. 1957):

A majority of decided cases and authorities appear to require the presence of three elements in order for an out of court statement to qualify as an excited utterance or spontaneous declaration. These are (a) an exciting event (b) an utterance prompted by the exciting event without time to reflect, [*i.e.*], dominated by the nervous excitement of the event, and (c) the utterance must explain or illuminate the exciting event.

65. See, e.g., *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988) ("To qualify as an excited utterance, the declarant must (1) have experienced a startling event or condition and (2) reacted while under the stress or excitement of that event and not from reflection and fabrication."); *People v. Dement*, 661 P.2d 675, 679 n.2 (Colo. 1983) (noting that "[s]ome courts have also required that the substance of the assertion relate to the startling event").

66. See *Ball*, 249 F.2d at 511 ("The test for receiving the utterance, therefore, should be whether it meets the first two requirements of a spontaneous declaration or excited utterance referred to earlier."); *Commonwealth v. Santiago*, 774 N.E.2d 143, 147 (Mass. 2002):

Those cases tend to suggest that there is a third aspect to the test of admissibility. To the contrary, the nexus between the statement and the event that produced it is but one of many factors to consider in determining whether the declarant was, in fact, under the sway of the exciting event when she made the statement.

See also *Bayne v. State*, 632 A.2d 476, 486 (Md. Ct. Spec. App. 1993).

element, and . . . reliability of the utterance is not inflexibly dependent upon the subject matter of the utterance.”<sup>67</sup> Instead, when a startling occurrence prompts a declarant to make statements unrelated to the occurrence, indirectly related to that occurrence, or related to some prior occurrence, the court should note that the statement could “take on a reflective quality and must be more carefully scrutinized with respect to the second element, that of true spontaneity.”<sup>68</sup> Other courts have taken more of a middle ground, holding that there is a third element but that it can be satisfied as long as the statement relates broadly to the circumstances surrounding the occurrence.<sup>69</sup>

In *Bondurant v. State*, the appellant allegedly murdered his live-in girlfriend’s lover on July 13, 1994.<sup>70</sup> On July 16th, the appellant told his girlfriend that he was going back to their home to commit suicide and threatened that if she told anyone he would pin the murder on her.<sup>71</sup> After the appellant left, his girlfriend made statements to witnesses “concerning the appellant’s suicide plans, the murder of [the victim], and fear for her own life.”<sup>72</sup> The court admitted her entire statement, including the portions of the statement dealing with the murder even though these statements did not relate directly to the appellant’s threats on July 16th.<sup>73</sup> The court reasoned that the suicidal statement and threat by the appellant were prompted by the murder three days earlier and, because these events were interwoven, the declarant’s statements about the murder explained the “startling conduct on July 16[th].”<sup>74</sup>

Even courts that interpret the third element more strictly recognize that it is more liberal than the similar requirement under

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67. *Ball*, 249 F.2d at 511.

68. *Bayne*, 632 A.2d at 486; *see also Santiago*, 774 N.E.2d at 148:

In cases, such as this, where the startling event elicits a statement concerning some prior event, a judge may examine the nexus between the startling event, the excited utterance generated by it, and the prior event about which the declarant comments to determine whether the statement was made without reflection.

69. *Bondurant v. State*, 956 S.W.2d 762, 766 (Tex. App. 1997) (“While the third prong of the test requires the statement to be related to the startling event, it may also relate to the circumstances surrounding the event. The requirement that the statements must relate to the startling event has been liberally interpreted.”).

70. *Id.* at 763-64.

71. *Id.* at 764.

72. *Id.*

73. *Id.* at 766 (“[T]he fact that portions of the spontaneous utterance relate to an event prior to the startling event, does not make those portions of the utterance inadmissible.”).

74. *Id.*

*res gestae*.<sup>75</sup> These courts recognize that, under the excited utterance exception, there is no requirement that the statement "explain, elucidate, or in any way characterize the event."<sup>76</sup> Instead, a potential excited utterance which "may reasonably be viewed as having been about, connected with, or elicited by the startling event meets this requirement."<sup>77</sup>

At the same time, some courts have held that the first element need not be satisfied or at least that the first element is not independent from the second element.<sup>78</sup> Many courts do not question whether the underlying event or condition was sufficiently startling. The first element is satisfied if the statement made by the declarant indicates that the occurrence was startling to her.<sup>79</sup> For example, in *People v. Franklin*, the court determined that a surgical procedure was unquestionably startling based on the declarant's description of the procedures done by the doctor, even without reference to the event itself.<sup>80</sup> Other courts have phrased it slightly differently, holding that "[t]he appearance, behavior and condition of the declarant may establish that a startling event occurred."<sup>81</sup> Thus, one court determined that a worker's discovery of mail fraud by a co-worker was startling, not based on the event itself, but on the fact that an observer stated that the declarant "was not normally an excitable person and she had never before seen her so excited."<sup>82</sup>

These rulings comport with a general proposition in excited utterance jurisprudence that the determination of whether an occurrence is startling is subjective, not objective.<sup>83</sup> Under this proposition, courts must look at the effect of the occurrence on the declarant and not at the inherent qualities of the occurrence.<sup>84</sup> Thus, most courts have held that certain occurrences may be startling to children even though the same occurrence would not be startling to most adults.<sup>85</sup>

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75. *State v. Chapin*, 826 P.2d 194, 198 (Wash. 1992).

76. *Id.*

77. *Id.*

78. *See, e.g., United States v. Moore*, 791 F.2d 566, 571 (7th Cir. 1986); *see also, W.C.L. v. People*, 685 P.2d 176, 179 (Colo. 1984).

79. *People v. Franklin*, 683 P.2d 775, 781 (Colo. 1984) ("Independent proof of an exciting event is not always necessary; the declaration itself may be sufficient proof of such an event.").

80. *Id.* at 781.

81. *Moore*, 791 F.2d at 570.

82. *Id.* at 571.

83. *Id.* at 571 n.2 (rejecting the argument that a startling occurrence "must be one that the trier of fact can objectively perceive as one, such as a sudden fall or an automobile accident").

84. *Id.*

85. *See infra* note 117 and accompanying text.

At the same time, some courts have looked at the first element with a higher level of scrutiny.<sup>86</sup> Although *W.C.L. v. People* was decided by the same court as *Franklin* later in the same year, and although the court cited the general rule that “the sufficiency of the event or occurrence to qualify as the ‘startling event’ . . . is not questioned,” the court decided to question whether the event it was considering was, in fact, startling.<sup>87</sup> In *W.C.L.*, a three-year-old girl and her six-year-old nephew were undressing to bathe when the girl “spread her legs[] and said, ‘Get me.’”<sup>88</sup> The children’s aunt, who was preparing them for their baths, then “spoke the victim’s name and asked what she was doing *in a tone that apparently startled the child*.”<sup>89</sup> Yet, despite the fact that the event was “apparently startl[ing],” the court relied on a case from another jurisdiction to hold that the event was not, in fact, startling.<sup>90</sup>

Further, courts have come to different conclusions as to the application of the excited utterance elements. Some courts strictly require that all three elements must be met for a statement to be admitted as an excited utterance.<sup>91</sup> Others hold that admissibility is determined by looking at the combined effect of the two or three elements.<sup>92</sup> According to these courts, the second factor is the critical factor.<sup>93</sup> Essentially, when the proponent can show that the statement was made while under the stress of a startling occurrence, there is a strong suggestion that there was, in fact, a startling

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86. See, e.g., *W.C.L. v. People*, 685 P.2d 176 (Colo. 1984).

87. *Id.* at 179.

88. *Id.* at 177.

89. *Id.* (emphasis added).

90. *Id.* at 180 (construing *Keefe v. State*, 72 P.2d 425 (Ariz. 1937)). While the court also held that the child’s statements lacked other indicia of reliability, it made clear that this determination was separate from its determination of whether the event was startling. See *id.* (“Even were we to conclude that the aunt’s reaction to the child’s suggestive gesture was a startling event sufficient to meet the first requirement of the excited utterance exception, we would also need to consider whether the child’s statements were spontaneous under the second requirement.”).

91. See, e.g., *Glover v. State*, 102 S.W.3d 754, 764-65 (Tex. App. 2002) (excluding a statement that met two of the three excited utterance elements, despite stating that admissibility is based on the combined effect of the three factors).

92. See *Couchman v. State*, 3 S.W.3d 155, 159 (Tex. App. 1999); *Bondurant v. State*, 956 S.W.2d 762, 765 (Tex. App. 1997) (“The focus of the inquiry is whether the cumulative effect of the three requisites is sufficient to show the reliability of the statement.”).

93. See *Couchman*, 3 S.W.3d at 159 (“Although the other factors are relevant, the critical issue is whether the declarant made the statement while dominated by the emotion arising from a startling event or condition.”); *Bondurant*, 956 S.W.2d at 765 (“The critical factor, however, is whether the declarant made the statement while dominated by the emotion arising from a startling event or condition.”).

occurrence and that the statement very likely related to that event, or at least was prompted by it.<sup>94</sup>

A few courts, such as the Courts of Appeals for the Fourth and Eighth Circuits, have also explicitly set out specific standards to consider when applying the excited utterance exception.<sup>95</sup> These factors, which to an extent are at least implicitly considered by many other courts, are: "(1) [t]he lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements."<sup>96</sup>

Most courts consider the first standard, the lapse of time, at least partially in determining whether a declarant's utterance was made while still under the stress of the startling occurrence.<sup>97</sup> Still, most courts have held that the lapse of a certain amount of time is not dispositive of admissibility.<sup>98</sup> As will be expounded upon more fully in *infra* section I.C.3.a., consistent with the second standard, most courts are more lenient in admitting the excited utterances of children, primarily because children lack the capacity to fabricate relative to adults.<sup>99</sup>

When courts determine whether a declarant is still startled when making a statement, they must consider her physical and mental state, as is done under the third standard.<sup>100</sup> Finally, the fourth and fifth standards codify a basic principle of excited utterance jurisprudence: the more startling the occurrence, and thus the more disturbing the subject matter of the statement, the more likely courts are to admit excited utterances further removed in time from the startling occurrence.<sup>101</sup> Most would agree that rape

94. *State v. Chapin*, 826 P.2d 194, 198 (Wash. 1992).

95. *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988); *United States v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir. 1980).

96. *Foretich*, 846 F.2d at 947; *see also Iron Shell*, 633 F.2d at 85-86.

97. *In re Ne-kia S.*, 566 A.2d 392, 394 (R.I. 1989) ("In determining whether Ne-kia and Levi were 'under the stress of excitement' when they made statements to Russo, we are not unmindful that there was a significant time lapse between the last alleged incident of abuse and the statements made to Russo by the children.").

98. *Gross v. Greer*, 773 F.2d 116, 119-20 (7th Cir. 1985) ("It is well-established that the lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive in the application of the *res gestae* exception to the hearsay rule.").

99. *See infra* notes 112-13 and accompanying text.

100. *See, e.g., Salazar v. State*, 38 S.W.3d 141, 154-55 (Tex. App. 2001) ("The trial court could reasonably have found that the victim's statement to Aguirre 'relat[ed] to a startling event or condition,' that being the 'startling event' of the victim sustaining the injury or the 'startling condition' of the pain the victim suffered when her coat was removed, and that the victim was still under the physical and emotional 'stress of the excitement caused by the event or condition' when she made the statement to Aguirre." (alteration in original)).

101. *See, e.g., Lieberenz v. State*, 717 N.E.2d 1242, 1246 (Ind. Ct. App. 1999) (admitting an

and sexual assaults are among the most devastating crimes with survivors, prompting harrowing statements about the event by traumatized victims. Interestingly, however, while most courts analyze excited utterances under the logic of these last three standards, as will be discussed in *infra* section I.C.3.b., few have extended the time frame for excited utterances relating to rapes and sexual assaults either generally or under the facts before them.<sup>102</sup>

These differences make it clear that courts in different states and circuits are interpreting and applying the excited utterance exception in widely disparate manners. It is clear that when even the same court *in the same year* comes to opposite conclusions about how to apply the exception, clarification of the exception's standards is necessary.<sup>103</sup> This article, however, will not attempt to resolve the dispute over how to apply the excited utterance exception. Instead, the article will assume that the court applying the exception requires that all three elements be fulfilled, with the third element being less demanding than the similar requirement for *res gestae* but still applicable.

### 3. *Loosening of the Excited Utterance Exception*

#### a. *Applying the Excited Utterance Exception More Leniently for Child Sexual Abuse Victims*

From the time that Wigmore created the excited utterance exception until the 1980s, most courts applied the excited utterance elements with uniform strictness, whether the statements were made by adults or children.<sup>104</sup> In the 1980s, however, many sources began criticizing the courts for applying the elements of the excited utterance exception indiscriminately, claiming that they should be applied more liberally when the declarant was a child.<sup>105</sup> Based on these criticisms, many courts began to acknowledge that they should apply the elements more liberally to the statements of children while some states began enacting legislation explicitly changing the rules governing admission of excited utterances or similar statements by children.

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excited utterance made hours after a rape because "the greater the stress caused by the startling event . . . , the longer the effects of the stress may last").

102. See *infra* note 146 and accompanying text.

103. See *supra* note 90 and accompanying text.

104. See, e.g., *People v. Franklin*, 683 P.2d 775 (Colo. 1984).

105. *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988) ("Indeed, much criticism has been directed at courts which place undue emphasis on the spontaneity requirement in child sexual abuse cases.").



*i. Judicial Loosening of the Exception for Child Sexual Abuse Victims*

Most courts now recognize that the typical standards for admissibility are loosened when potential excited utterances are made by children, especially in sexual abuse cases.<sup>106</sup> This is based on several factors. First, courts generally have recognized that children tend to process stress differently than adults.<sup>107</sup> On the one hand, children may not initially understand that sexual abuse is wrong, either leading to: a) delayed, emotional reporting when the child finally understands the nature of the abuse, or b) more casual reporting by a child who never comes to understand that the abuse was wrong.<sup>108</sup> This is especially the case when a child is abused by a trusted family member who assures the child that nothing wrong is being done.<sup>109</sup> Also, children tend to suffer stress as the result of sexual abuse for longer periods of time than do adults.<sup>110</sup>

Even when children do understand that sexual abuse is wrong, they may delay in reporting it because of confusion, guilt, and fear.<sup>111</sup> Children are also likely to repress these incidents before fully

106. See, e.g., *Commonwealth v. Crawford*, 629 N.E.2d 1332, 1334 (Mass. 1994) ("Particularly when the declarant is a young child who remains in the company of the alleged perpetrator after a traumatic event, precise contemporaneousness is not required."); *State v. Creighton*, 462 A.2d 980, 982 (R.I. 1983) ("Generally speaking, a less demanding time requirement is necessary in sexual-offense cases, particularly when the victim is a child of tender years.").

107. See *In re Troy P.*, 842 P.2d 742, 747 (N.M. Ct. App. 1992) ("In situations such as that at bar, many courts have also considered the likelihood that children react to and relate traumatic events somewhat differently than adults.").

108. *Foretich*, 846 F.2d at 947 ("It has been argued that children do not necessarily understand sexual contact by adults to be shocking . . ."); *Cassidy v. State*, 536 A.2d 666, 676 (Md. Ct. Spec. App. 1988) (internal citations omitted):

[M]ost children do not view a sexual episode as shocking or even as particularly unusual. Children thus often do not recount the event with the shock or emotion required under the exception. Children are simply not as highly sexualized or moralized as adults. They may not know what has happened to them is wrong.

109. *Foretich*, 846 F.2d at 947 (holding that children are particularly unable to understand sexual abuse as wrongful when the perpetrator "is a parental figure from whom the child desires love and affection"); *Cassidy*, 536 A.2d at 676 (quoting Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COL. L. REV. 1745, 1756-57 (1983) ("This may be especially true if the child has been involved in an incestuous relationship. A parental imprimatur on the entire situation may often cause the child to view everything as normal . . .")).

110. *State v. Taylor*, 704 P.2d 443, 454 (N.M. Ct. App. 1985) (holding that "children usually suffer prolonged stress" after sexual abuse).

111. *Foretich*, 846 F.2d at 947 (citing Yun, *supra* note 109, at 1757) ("Even if the child is aware of the nature of the abuse, significant delays in reporting this abuse may occur because of confusion, guilt, and fear on the part of the child.").

experiencing the stress from them.<sup>112</sup> Further, children lack the capacity to fabricate, at least relative to adults.<sup>113</sup> This is especially true in sexual abuse cases, where it is unlikely that children possess the detailed knowledge of sexual intercourse to be able to create a believable story about it.<sup>114</sup>

Courts also look at the unique circumstances of child sexual abuse victims in applying the excited utterance elements more liberally. They often note how children will not report sexual abuse while still in the company of the alleged perpetrator and thus courts often admit reports made by children at their first opportunity outside the presence of the perpetrator, even if made hours or days after the assault.<sup>115</sup> Many courts, when admitting delayed reports by children, have also noted that children are unlikely to report such incidents to anyone except a trusted family member.<sup>116</sup>

Courts also recognize that some events or conditions may be startling to children even if they would not be startling to adults.<sup>117</sup> Thus, in *Couchman v. State*, the court admitted a four-year-old

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112. *Taylor*, 704 P.2d at 454 (“[I]nterrogation will not defeat the characterization of a statement of a child as an excited utterance because of the tendency of children to repress these incidents.”); *State v. Padilla*, 329 N.W.2d 263, 266 (Wis. 1982) (“[A] child is apt to repress the incident.”).

113. *Gross v. Greer*, 773 F.2d 116, 120 (7th Cir. 1985) (holding that the victim’s young age “render[ed] it improbable that her utterance was deliberate and its effect premeditated”); *People in Interest of O.E.P.*, 654 P.2d 312, 318 (Colo. 1982) (quoting FED. R. EVID. 803(2) advisory committee’s note) (“The element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in ‘the lack of capacity to fabricate rather than the lack of time to fabricate.’”); *Taylor*, 704 P.2d at 454 (holding that children “do not consciously lie or fabricate these type[s] of incidents”); *Padilla*, 329 N.W.2d at 266 (“[T]he characteristics of young children work to produce declarations ‘free of conscious fabrication’ for a longer period after the incident than with adults. It is unlikely a young child will review the incident and calculate the effect of the statement.”).

114. *Foretich*, 846 F.2d at 948 (internal citation omitted) (“[I]t is virtually inconceivable that a child of this age would have either the extensive knowledge of sexual activities or the desire to lie about sexual abuse that would be required to fabricate a story such as the one told by Hilary.”).

115. *Id.* at 947 (“[C]ourts must also be cognizant of the child’s first real opportunity to report the incident.”); see also *Commonwealth v. Crawford*, 629 N.E.2d 1332, 1334 (Mass. 1994) (“Particularly when the declarant is a young child who remains in the company of the alleged perpetrator after a traumatic event, precise contemporaneity is not required.”); *People v. Sandoval*, 709 P.2d 90, 92 (Colo. Ct. App. 1985) (“Moreover, given the fact that the victim told Kim about the incident at the first opportunity she had outside the defendant’s presence, we perceive no error in the submission by the trial court of an instruction regarding prompt outcry.”); *United States v. Donaldson*, 58 M.J. 477, 484 (CAAF 2003) (“[C]ourts have been more flexible in cases in which the declarant is young, particularly where the statement was made during the child’s first opportunity alone with a trusted adult.”).

116. *Padilla*, 329 N.W.2d at 266 (“[I]t is often unlikely that a child will report this kind of highly stressful incident to anyone but the mother.”).

117. *Couchman v. State*, 3 S.W.3d 155, 159 (Tex. App. 1999).

child's report of a sexual assault made after becoming startled by a burning sensation when she was urinating, noting that the same condition may not have been startling to an adult victim.<sup>118</sup> Some courts have even held that it is in the interests of justice to admit children's reports of sexual abuse as excited utterances even when the elements of that exception are not literally fulfilled.<sup>119</sup>

At the same time, not every court is persuaded to apply the excited utterance elements more liberally to the statements of children. In *State v. Taylor*, the court acknowledged all of the above factors as making a child's statements more reliable, yet concluded that, "[i]f there are special reliability characteristics inherent in the statements of children, they should be analyzed under Evid. Rule [sic] 803(24), [the federal catch-all] recognizing them for what they are."<sup>120</sup>

A few courts have also held that this loosening of the excited utterance elements for child victims has "virtually destroyed the integrity of the exception, stretching it far beyond its traditional bounds, and creating much uncertainty in its application."<sup>121</sup> Meanwhile, some courts continue to apply the excited utterance elements uniformly for adults and children without even mentioning the precedent holding in the alternative. In *State v. Walton*, a six-year-old girl was allegedly sexually assaulted by her babysitter's father and reported the incident to her mother two days later after stating that she "had a black mark on her heart."<sup>122</sup> The court refused to admit the statement as an excited utterance because of the lapse in time between the event and the statement without using any language to acknowledge the precedent loosening application of the elements in the case of child sexual abuse victims.<sup>123</sup>

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118. *Id.* ("Undoubtedly, some events or conditions that may not be startling to an adult may be overwhelming for a child. It would be reasonable to infer that a four-year-old child would be scared and upset by a burning sensation in her female sexual organ.").

119. *Foretich*, 846 F.2d at 948 (quoting *United States v. Nick*, 604 F.2d 1199, 1204) ("The interests of justice were served by admitting the declaration of this child, who was the victim of a sexual assault, and far too young to appreciate the implications of that assault.").

120. 704 P.2d 443, 454.

121. *Cassidy v. State*, 536 A.2d 666, 676 (Md. Ct. Spec. App. 1988) (quoting Yun, *supra* note 109, at 1759).

122. 432 A.2d 1275, 1277 (Me. 1981).

123. The court did state generally that it "decline[d] to broaden what has been a narrow exception to the hearsay rule, particularly in an area so fraught with danger to our conception of a fair trial." *Id.* at 1277-78. It is unclear whether this language was meant to apply to the precedent loosening application of the excited utterance elements for child victims or whether it was a more general indictment of judicial activism.

*ii. Legislative Loosening of the Exception for Child Sexual Abuse Victims*

Under the Texas Criminal Code, statements made by sexual assault victims twelve years of age or younger that do not meet the excited utterance elements may be admitted under its "outcry" provision.<sup>124</sup> Courts will only admit these "outcry" statements if the prosecution can prove several elements. First, the statement must be made by the child "to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense."<sup>125</sup> This requirement builds off the analysis used by several courts in holding that delayed reports by child sexual abuse victims are admissible when the child makes the report at her first real opportunity after remaining in the custody of the assailant.<sup>126</sup>

Second, in a hearing conducted outside the presence of the jury, the court must determine "that the statement is reliable based on the time, content, and circumstances of the statement."<sup>127</sup> This standard gives courts much more leeway than the excited utterance exception, which requires that courts only admit statements made while the declarant is still under the stress of the startling event or condition.<sup>128</sup> Conversely, unlike evidence submitted under the excited utterance exception, which can be mentioned for the first time at trial, the party submitting an "outcry" statement must, fourteen days before trial, provide the adverse party with: a) notice of intent to introduce the statement; b) the name of the witness who will provide the testimony; and c) a written summary of the proposed statement.<sup>129</sup>

Finally, also unlike the excited utterance exception, the child must testify or be "available to testify at the proceeding in court or in any other manner provided by law"<sup>130</sup> for an "outcry" statement to be admissible. This final limitation ensures that the code provision is rather unhelpful to many child sexual abuse victims. Many child sexual abuse victims suffer so deeply from the abuse that they are unable both physically and mentally to face their attacker in court.<sup>131</sup> In many cases, the victim is not available to

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124. TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 1995); *Hunt v. State*, 904 S.W.2d 813, 815 n.1 (Tex. App. 1995).

125. TEX. CODE CRIM. PROC. ANN. art. 38.072 § 2(a)(2) (Vernon 1995).

126. See *supra* note 115 and accompanying text.

127. TEX. CODE CRIM. PROC. ANN. art. 38.072 § 2(b)(2) (Vernon 1995).

128. See *supra* notes 64-65 and accompanying text.

129. TEX. CODE CRIM. PROC. ANN. art. 38.072 § 2(b)(1)(A)-(C) (Vernon 1995).

130. *Id.* at § 2(b)(3).

131. See Michael J. Martin, *Child Sexual Abuse: Preventing Continued Victimization by the*

testify, resulting in the exclusion of potential "outcry" witness testimony.<sup>132</sup>

In Rhode Island, the legislature enacted § 14-1-69 in 1985 to relax the standards necessary for applying the excited utterance exception to a child making an out-of-court statement about her abuse.<sup>133</sup> Under this section:

[A] Family Court may, in its discretion, permit as evidence "any statement by a child under the age of thirteen (13) years old about a prescribed act of abuse, neglect or misconduct by a parent or guardian, if such statement was made spontaneously within a reasonable time after the act is alleged to have occurred, and if the statement was made to someone the child would normally turn to for sympathy, protection or advice."<sup>134</sup>

Relying on the rationale previously cited from *Padilla*,<sup>135</sup> the legislature "replaced the requirement that the declarant be 'laboring under the stress of nervous excitement' with the requirement that the statement be 'made to someone the child would normally turn to for sympathy, protection, or advice.'"<sup>136</sup>

The Rhode Island courts have interpreted this statute fairly liberally. Rhode Island courts have decided on at least two occasions that the person to whom the child would normally turn to for sympathy, protection, and advice need not be a person "previously known to the speaker."<sup>137</sup> In both *In re Ne-kia S.* and *In re Thomas*,<sup>138</sup> courts found that allegations of abuse by children to physicians were admissible under § 14-1-69 because physicians occupy positions of trust. These rulings seem to be a fair extension of the statute since children are likely to feel as secure with physicians as they feel with family members. The extension also appears fair to the extent that these courts have at least hinted in

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*Criminal Justice System and Associated Agencies*, 41 FAM. REL. 330, 330 (1992) (stating that "people fear the child will be so traumatized by the process and the outcome of the criminal justice system that to prosecute would only further victimize the child.").

132. See, e.g., *Glover v. State*, 102 S.W.3d 754, 762 n.4 (Tex. App. 2002) ("A.H. was unavailable to testify, so the State would have been forced to find an alternative basis for admitting the hearsay statements.").

133. *In re Jean Marie W.*, 559 A.2d 625, 631 (R.I. 1989) ("This change, in effect, created a new, relaxed excited-utterance exception to the hearsay rule specifically designed for the young child-witness."); see also *In re Deborah M.*, 544 A.2d 572, 574 (R.I. 1988).

134. *Jean Marie W.*, 559 A.2d at 630 (quoting § 14-1-69).

135. See *supra* note 116 and accompanying text.

136. *In re Ne-kia S.*, 566 A.2d 392, 395 (R.I. 1989) (quoting *In re Deborah M.*, 544 A.2d 572, 574 (R.I. 1988)).

137. *Id.* at 396.

138. 540 A.2d 1027 (R.I. 1988).

dicta that physicians may be the only strangers to qualify under § 14-1-69.<sup>139</sup>

Washington similarly has a provision in its criminal code that allows for the admission of child hearsay statements not qualifying as excited utterances.<sup>140</sup> Under this provision, courts in Washington consider whether “the time, content, and circumstances of the statement provide sufficient indicia of reliability . . . .”<sup>141</sup> When the child is unable to testify at the proceedings, her statements are only admissible after the prosecution produces corroborative evidence of the crime at issue.<sup>142</sup> Courts in Washington have determined that evidence is corroborative when it “‘support[s] a logical and reasonable inference’ that the act of abuse described in the hearsay statement occurred.”<sup>143</sup>

When the child is available to testify, however, her statements may be admitted in their entirety to prove the crime at issue.<sup>144</sup> Conversely, the exception is more limited than other child hearsay exceptions because it only applies when the child is ten years old or younger, whereas the previously cited exceptions apply to statements by children of up to twelve years of age.<sup>145</sup>

In determining the admissibility of child hearsay statements under this exception, Washington has created several factors to weigh relevance. These are:

1. Whether the declarant, at the time of making the statement, had an apparent motive to lie;
2. Whether the declarant’s general character suggests trustworthiness;
3. Whether more than one person heard the statement;
4. The spontaneity of the statement;
5. Whether trustworthiness is suggested from the timing of the declaration and the relationship between the declarant and the witness;

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139. *Ne-kia S.*, 566 A.2d at 396 (noting that children rarely turn to strangers for protection, making physicians likely the only strangers to qualify under the statute).

140. WASH. REV. CODE ANN. § 9A.44.120 (West 2005).

141. *State v. Swan*, 790 P.2d 610, 613 n.13 (Wash. 1990) (quoting WASH. REV. CODE ANN. § 9A.44.120 (West 2005) (The determination is made by the court “in a hearing conducted outside the presence of the jury . . . .”).

142. WASH. REV. CODE ANN. § 9A.44.120(2)(b) (West 2005).

143. *Swan*, 790 P.2d at 615 (quoting *State v. Hunt*, 741 P.2d 566 (Wash. Ct. App. 1987)).

144. WASH. REV. CODE ANN. § 9A.44.120 (West 2005).

145. *Id.*; *State v. Owens*, 899 P.2d 833, 835 (Wash. Ct. App. 1995) (“Because B.K. was over the age of 10 when he made the challenged statements, the child hearsay statute, RCW 9A.44.120, does not apply . . . .”).

6. Whether the statement contains express assertions of past fact;
7. Whether the declarant's lack of knowledge could be established by cross-examination;
8. The remoteness of the possibility that the declarant's recollection is faulty; and
9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.<sup>146</sup>

As with the previous two exceptions, these factors give courts considerably more latitude in determining whether to admit children's hearsay statements than does the excited utterance exception.

*b. Applying the Excited Utterance Exception More Leniently for Adult Sexual Abuse Victims*

*i. Judicial Loosening of the Exception for Adult Sexual Abuse Victims*

Courts have been less willing to accept the theory that the elements for admissibility of excited utterances should be less demanding when made by rape and sexual assault victims. A few courts have noted that courts should be more lenient in admitting the excited utterances of adult sexual abuse survivors, particularly concerning the time requirement.<sup>147</sup> Other courts have explicitly stated that the elements for admissibility are not "at all relaxed in circumstances involving a complaint of rape or sexual assault."<sup>148</sup> Applying the test more liberally for rape and sexual assault victims, however, appears to comport with a general principle of excited utterance jurisprudence that, the more startling the occurrence, the more likely courts are to admit excited utterances further removed in time.<sup>149</sup> Most would agree that rape is among the most traumatizing of crimes where the victim survives. Consequently, a rape victim is under the stress of her rape for a longer period of time than the plaintiff who slipped and fell on a wet store floor. This theory

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146. *State v. Ryan*, 691 P.2d 197, 205 (Wash. 1984) (citing *State v. Parris*, 654 P.2d 77 (Wash. 1982)); see also *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970).

147. See, e.g., *State v. Creighton*, 462 A.2d 980, 982 (R.I. 1983) ("Generally speaking, a less demanding time requirement is necessary in sexual-offense cases. . .").

148. *Commonwealth v. Davis*, 767 N.E.2d 1110, 1116 n.2 (Mass. App. Ct. 2002).

149. See, e.g., *Lieberenz v. State*, 717 N.E.2d 1242, 1246 (Ind. Ct. App. 1999) (admitting an excited utterance made hours after a rape because "the greater the stress caused by the startling event . . . the longer the effects of the stress may last").

is borne out by the findings of many scholars on Rape Trauma Syndrome ("RTS").

Although there is not a set definition of RTS,<sup>150</sup> it generally holds that victims often are confused and disoriented in the immediate wake of a rape or sexual assault, resulting in delayed reporting when the victim finally reconstructs the nature of the event.<sup>151</sup> Both academics and courts have debated the efficacy of using RTS to modify application of evidentiary rules. In the scholarly world, Aviva Orenstein and Randolph N. Jonakait have debated about whether evidence of RTS should be admissible in rape and sexual assault cases to loosen the applicability of the excited utterance elements.<sup>152</sup> Orenstein initially argued that, based on research on RTS, courts should not only apply the excited utterance elements more loosely, but legislatures should also pass legislation explicitly changing the excited utterance elements in rape and sexual assault cases.<sup>153</sup>

Jonakait criticized Orenstein's arguments on several grounds. His first argument was that Orenstein's "proposal would accomplish almost nothing" because, under current laws, "[t]he defense introduces such evidence with hopes that the delayed reports will damage the credibility of the alleged rape victim."<sup>154</sup> This position is either disingenuous or belies a fundamental misunderstanding by Jonakait of the way evidence law works in rape and sexual assault cases. Jonakait cites Andrew E. Taslitz for the proposition that "a common defense strategy in rape cases is to establish the crime was not promptly reported . . . ."<sup>155</sup> Thus, the "evidence" that the defense introduces in these cases is the fact that the alleged victim made a delayed report, not the report itself or any of the graphic details the

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150. Jonakait, *supra* note 22, at 275 ("There are disagreements as to what behavior constitutes RTS . . . . The result is that the term RTS may not have much of a fixed meaning.").

151. Orenstein, *supra* note 19, at 200:

Often the survivor initially suffers disorganization; she may be hysterical or she may be withdrawn and subdued. The recovery from rape and other sexual violence is a slow process. As the survivor begins to reorganize psychologically, she experiences classic signs of post-traumatic stress, usually nightmares, phobias, and sexual fears. Only over time do most survivors process memories, begin to overcome the psychic numbing, and start talking to friends and counselors.

152. Orenstein, *supra* note 19; Jonakait, *supra* note 22; Orenstein, *Response, Evidence in a Different Voice: Some Thoughts on Professor Jonakait's Critique of a Feminist Approach*, 4 WM. & MARY J. WOMEN & L. 295 (1997).

153. Orenstein, *supra* note 19, at 210-22.

154. Jonakait, *supra* note 22, at 269.

155. *Id.* at 269 n.21 (construing Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 447 (1996)).



report might contain.<sup>156</sup> This distinction might seem insignificant to Jonakait, but it is enough of a distinction that several legislatures have created separate exceptions for victims' statements which do not qualify as excited utterances where the fact of the report, but not any of its details, is admissible.<sup>157</sup> Indeed, if Jonakait is correct about the distinction being meaningless, why would there be so many sexual assault cases where the admissibility of a delayed excited utterance is at issue?

Second, Jonakait initially speculated that Orenstein's argument could be that only delayed reports by sexual abuse victims are reliable, which "should lead to more skepticism, and perhaps exclusion, of the immediate report because of its unreliability."<sup>158</sup> To the extent that courts' treatment of children's excited utterances in sexual abuse cases is analogous, Jonakait's argument seems fallacious. As argued in the previous section, courts often admit delayed reports by children in sexual abuse cases as excited utterances for an amalgam of reasons.<sup>159</sup> Yet, despite the fact that courts find these delayed reports to be reliable, there is no indication that they treat prompt reports by child sexual assault victims with any more skepticism.<sup>160</sup>

Jonakait's argument only works if Orenstein's point that delayed reports are reliable necessarily implies that prompt reports cannot be reliable. Orenstein never makes this argument; she only claims that sexual abuse victims may delay in reporting their abuse rather than making a prompt report.<sup>161</sup> In fact, Orenstein never even states that delayed reports are more frequent than prompt reports in sexual abuse cases, a point over which Jonakait later attacks her.<sup>162</sup>

Perhaps recognizing the disingenuousness of his initial position, Jonakait then proceeds to the other extreme. He begins innocently enough, arguing that "[p]erhaps Orenstein does not really mean that the psychology is backward, but instead intends to assert that while prompt reports are trustworthy, delayed reports are even more so."<sup>163</sup> He then asserts that the "only possible ground[]"

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156. Taslitz, *supra* note 155, at 447.

157. *See, e.g., infra* notes 179-81 and accompanying text.

158. Jonakait, *supra* note 22, at 273.

159. *See supra* notes 105-18 and accompanying text.

160. *See id.*

161. Orenstein, *supra* note 19, at 200 (discussing how rape victims "often" delay in reporting the crime to others because of initial disorganization).

162. Jonakait, *supra* note 22, at 276 (arguing that Orenstein "never states that delayed reports are more frequent than immediate ones").

163. *Id.* at 273.

Orenstein posits for the superior trustworthiness of delayed reporting in sexual abuse cases is their “typicality;” because RTS posits that delayed reports are more frequent than prompt reports, they are more reliable.<sup>164</sup> Yet as noted before and as noted by Jonakait, Orenstein never makes this assertion.<sup>165</sup> In fact, only Jonakait argues that someone attempting to use RTS to alter application of the excited utterance elements must prove that delayed reports are more frequent.<sup>166</sup> And only Jonakait makes the corollary argument that if this is the case, victims who make prompt reports cannot have RTS.<sup>167</sup>

In truth, neither Orenstein nor RTS posits that delayed reports are more typical than prompt reports, and this argument does not need to be proven. Again, a good analogy can be found in courts’ analysis of delayed reports by child sexual abuse victims. Courts have almost universally accepted the proposition that they should apply the excited utterance elements more liberally in cases of child sexual abuse because sometimes children are confused and do not initially understand the abuse.<sup>168</sup> In none of these cases, however, has the court found the need to justify this position by presenting evidence that child sexual abuse victims delay in reporting the abuse any more frequently than promptly reporting it.<sup>169</sup> It is not the typicality of delayed reporting in child sexual abuse cases that justifies this position, but the understanding that children in these cases are initially confused after the abuse, before later becoming controlled by the stress of it. Thus, while a “regular” victim might only be under the stress of the startling occurrence for minutes or hours after a crime, a child sexual abuse victim might be under the stress of the startling occurrence for days, weeks, or even months after the startling event when she finally understands the abuse.

Since RTS posits that many adult rape and sexual assault victims suffer through a similar stage of confusion and disorder initially after the crime as do child victims, courts should similarly be more lenient in admitting their excited utterances. Most courts, while not explicitly accepting this analysis, have generally been willing “to allow RTS evidence to explain delay, recantations, and

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164. *Id.* at 274.

165. *Id.* at 276.

166. *Id.*

167. *Id.*

168. *See supra* note 108 and accompanying text.

169. None of the cases in *supra* notes 105-18 ever discusses extension of the excited utterance exception in child sexual abuse cases being premised on the finding that children predominantly delay in reporting this crime.

seemingly normal or casual activities after the rape or other sexual violence."<sup>170</sup>

Further, although courts have not explicitly accepted this analysis, they also have not been presented with the argument that the delayed stress posited by RTS should be the basis for liberalizing the time element in excited utterance jurisprudence. Orenstein argued that RTS rendered the excited utterance exception meaningless in rape and sexual assault cases and thus proposed a separate exception that "eliminate[d] all timing requirements."<sup>171</sup> Courts, however, may be more receptive to the argument that RTS should result in the modification, rather than the revocation, of all timing requirements under the excited utterance exception. Finally, courts might be even more receptive to the argument that RTS makes it more likely that subsequent occurrences would be startling for rape and sexual assault victims than such occurrences would be for most other victims.

#### *ii. Legislative Loosening of the Exception for Adult Sexual Abuse Victims*

Some states, such as Massachusetts, have allowed statements to be introduced as fresh complaints when those statements would not otherwise qualify as excited utterances. The fresh complaint rule recognizes that it is normal for a sexual assault victim to complain to others about sexual abuse and states that if the complaint is "fresh," it is unlikely to be a fabrication by the alleged victim.<sup>172</sup> Compared to the excited utterance exception, the standard for admission of a fresh complaint is relaxed.<sup>173</sup> Excited utterances must be made while the declarant is under the stress of a startling occurrence; whereas, with a fresh complaint, the question is merely whether the alleged victim acted reasonably in making the complaint considering the specific facts of the case.<sup>174</sup> Factors that a court may consider in making the reasonableness determination include: a) the age of the victim and particularly whether the victim was a child; b) how long the victim was away from the abusive setting before making the complaint; c) whether the assailant

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170. Orenstein, *supra* note 19, at 202. In contrast, courts have been "particularly reluctant to allow experts to testify that a survivor of rape or other sexual violence suffers from RTS in order to prove that the woman did not consent." *Id.*

171. *Id.* at 215.

172. *Commonwealth v. Foskette*, 568 N.E.2d 1167, 1170-71 (Mass. App. Ct. 1991).

173. See *Commonwealth v. Dockham*, 542 N.E.2d 591, 596 (Mass. 1989); *Commonwealth v. Allen*, 665 N.E.2d 105, 112 (Mass. App. Ct. 1996).

174. See *Dockham*, 542 N.E.2d at 596; *Allen*, 665 N.E.2d at 112.

threatened the victim in the event that she spoke; and d) when the victim is a child, whether the assailant was a relative or friend.<sup>175</sup> As with excited utterances, there is no specific time frame for admissibility,<sup>176</sup> and courts apply the law more flexibly when the victim is a child.<sup>177</sup>

Fresh complaints can only be used in limited circumstances and for limited purposes. First, juries "may consider fresh complaint evidence only to the extent that it corroborates evidence given by the alleged victim. . . . Evidence of a fresh complaint witness cannot stand by herself and establish the factual assertions in evidence."<sup>178</sup> Obviously, this is distinct from the excited utterance exception, where statements of a victim or observer may be admitted even if the declarant is unable or unwilling to testify at trial.<sup>179</sup> Equally important, fresh complaint evidence must be sanitized and unoriginal; it cannot contain any new information, and it must merely be a short summary of the victim's statements.<sup>180</sup> If the fresh complaint contains details "so graphic, colorful or gruesome as to have an important effect on the jury," a court may exclude it.<sup>181</sup>

Thus, if a victim testifies in court in detail about how the defendant brutally beat, cut, choked, and raped her, the observer to whom the fresh complaint was made may then only generally testify that the victim reported that the defendant raped her. The observer can repeat benign details that the victim told her while making the fresh complaint, but she cannot report any new or "graphic" details that could influence the jury.<sup>182</sup> If the victim told the observer any detail in her fresh complaint and forgot that detail when testifying, the observer could not then testify to the omitted detail.<sup>183</sup> This underscores the fact that the purpose of a fresh complaint witness

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175. See *Dockham*, 542 N.E.2d at 596; *Allen*, 665 N.E.2d at 112.

176. See *Dockham*, 542 N.E.2d at 596; *Allen*, 665 N.E.2d at 112.

177. See *Dockham*, 542 N.E.2d at 596.

178. *Commonwealth v. Scanlon*, 592 N.E.2d 1279, 1285 (Mass. 1992).

179. FED. R. EVID. 803.

180. *Commonwealth v. Snow*, 569 N.E.2d 838, 840 (Mass. App. Ct. 1991) (quoting *Commonwealth v. Bailey*, 348 N.E.2d 746 (Mass. 1976)) ("Fresh complaint witnesses may testify [in sexual assault prosecution] to 'details' where the testimony contains 'no new information' and is 'merely a short summary of the testimony the victim [himself or] herself gave about the criminal events.'").

181. *Snow*, 569 N.E.2d at 840 (citing *Commonwealth v. Blow*, 348 N.E.2d 794 (Mass. 1976)).

182. *Id.* (citing *Commonwealth v. Kirouac*, 542 N.E.2d 270 (Mass. 1989) ("Witnesses may not testify to details which add substantively to the complainant's account.")).

183. See *Commonwealth v. Coleman*, 567 N.E.2d 956, 960 (Mass. App. Ct. 1991) ("[F]resh complaint evidence could only be used to corroborate and not to fill any gap in the prosecution's case.").

is to corroborate the gist of the victim's story rather than to provide any substantive evidence about the crime itself.

In Maine, statements that are inadmissible as excited utterances still may be admissible as first complaints or first reports.<sup>184</sup> The first complaint exception combines elements of the exceptions in Texas and Massachusetts. As with the "outcry" witness exception in Texas, only the first statement made by the sexual abuse victim is admissible under this exception.<sup>185</sup> Like the fresh complaint exception in Massachusetts, a first complaint cannot be used to prove the facts of an allegation and can only be used to corroborate a victim's testimony.<sup>186</sup> In fact, the exception is even more restrictive than the fresh complaint exception because the latter actually allows a witness to testify about non-graphic details in the utterance that reiterate in-court testimony.<sup>187</sup> In contrast, the first complaint exception is much narrower, only allowing the bare fact of the complaint to be admitted without any details, including the name of the assailant.<sup>188</sup> Thus, under the first complaint exception, a party may introduce a witness to testify solely to the fact that the victim told her about the rape, without any more detail, and only after the victim testifies.

### *c. Conclusions*

The efforts by both courts and legislatures to allow for the admission of statements not qualifying as excited utterances for both child and adult sexual assault victims are commendable, yet it is clear that the separate exceptions created for these statements still exclude several statements or their details. Furthermore, courts have been reluctant to apply the excited utterance elements more loosely, particularly in cases involving adult victims of rape and sexual assault. Thus, although these legislative and judicial efforts in some way diminish the damage from the disparate manners in which courts have applied the excited utterance exception in sexual

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184. *State v. Ricker*, 770 A.2d 1021, 1025 (Me. 2001); *State v. Palmer*, 624 A.2d 469, 471 (Me. 1993); *State v. Lafrance*, 589 A.2d 43, 45 (Me. 1991).

185. See *supra* note 131 and accompanying text.

186. *Lafrance*, 589 A.2d at 45 ("The fact that a complaint has been made is generally admissible only to corroborate the victim's testimony, not to prove the crime."); *State v. True*, 438 A.2d 460, 464 (Me. 1981); *State v. King*, 122 A. 578, 579 (Me. 1923).

187. See *supra* notes 182-83 and accompanying text.

188. See *Ricker*, 770 A.2d at 1025 (quoting *State v. Joel H.*, 755 A.2d 520, 526 (Me. 2000)) ("This exception is 'very narrow and allows only the bare fact of the complaint to be admitted . . . .'"); *Palmer*, 624 A.2d at 471; *State v. Calor*, 585 A.2d 1385, 1387 (Me. 1991); *Lafrance*, 589 A.2d at 45.

abuse cases, the divisions among courts are still relevant in many cases.

#### 4. *How Being Questioned About an Event Plays a Part*

It is universally accepted that the fact that a statement is made in response to a question does not necessarily prevent it from being an excited utterance.<sup>189</sup> Thus, any court would admit a victim's emotional reporting of a rape a minute after the crime, even if the report followed questioning from a concerned observer. Courts do, however, vary considerably in the weight to which they accord such questioning. Some courts merely consider whether the occurrence in question was startling and, when questioning accompanied the occurrence, go on to state the general rule finding that the questioning will not alter their decision.<sup>190</sup> Other courts have held that the fact that a statement is made in response to a question makes its spontaneity more questionable, resulting in a closer analysis of whether the statement was made while under the stress of the startling occurrence.<sup>191</sup>

Conversely, building off of the general theory that courts should be liberal in admitting the excited utterances of children, some courts have found that this theory also applies to children. In *People in the Interest of O.E.P.*, the court construed several cases as holding that "[a]n inquiry, especially one addressed to a child of tender years, is not sufficient in itself to undo the underlying basis in reliability for the excited utterance exception."<sup>192</sup>

Further, some courts have found that under certain conditions, questioning can be a startling occurrence or at least a factor

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189. See, e.g., *Gross v. Grier*, 773 F.2d 116, 120 (7th Cir. 1985) (quoting *United States v. Glenn*, 473 F.2d 191 (D.C. Cir. 1972) ("Such statements may be admissible although made in response to an inquiry.")).

190. *Id.*; *In re Ne-kia S.*, 566 A.2d 392, 395 (R.I. 1989); *State v. Creighton*, 462 A.2d 980, 982 (R.I. 1983) ("The fact that the statement was made in response to an inquiry does not render the excited utterance doctrine inapplicable."); *State v. Gordon*, 952 S.W.2d 817, 821-22 (Tenn. 1997) ("[S]tatements made in response to questions may still be admissible if the declarant is under the excitement or stress of the event.").

191. *Guthrie v. United States*, 207 F.2d 19, 23 (D.C. Cir. 1953) (quoting *Beausoleil v. United States*, 107 F.2d 292, 294-95 (D.C. Cir. 1939) ("That the statements in the present case were made in response to inquiry is not decisive of the question of spontaneity, as appellant contends, although that fact is entitled to consideration.")); *Couchman v. State*, 3 S.W.3d 155, 160 n.2 (Tex. App. 1999) (holding that a statement being in response to a question is a "factor[] for the trial court to consider in weighing whether the victim's statements were sufficiently reliable and spontaneous"); *State v. Chapin*, 826 P.2d 194, 199 (Wash. 1992) ("The fact that a statement is made in response to a question will not by itself require [that] the statement be excluded, but it is a factor that raises doubts as to whether the statement was truly a spontaneous and trustworthy response to a startling external event.").

192. 654 P.2d 312, 318 (Colo. 1982).

contributing to the stress a declarant is under from a subsequent startling occurrence. In *State v. Owens*, for example, a child ("B.K.") was allegedly molested repeatedly by the defendant ("Owens").<sup>193</sup> The child's health had continually worsened after his family moved in with Owens, prompting his mother to take him to the doctor.<sup>194</sup> After an intrusive medical examination, the doctor concluded that B.K. might have been sexually abused, leading his mother to ask him "pointed questions . . . as to whether he had been molested . . ." <sup>195</sup> In response to the questioning, B.K. screamed, cried, and admitted that he had been molested by Owens.<sup>196</sup> The court found that the medical examination, combined with the questioning, "recreated the original stress caused by the acts of abuse and constituted a startling event . . ." <sup>197</sup>

In *Glover v. State*, however, a court in Texas misinterpreted the excited utterance exception in excluding purported excited utterances made by a fourteen-year-old victim of sexual assault.<sup>198</sup> There, the victim's parents were separated, and the victim was at her father's house when she snuck out and was picked up by the twenty-six-year-old defendant, who took her to his place.<sup>199</sup> Her mother then found out about her daughter's actions and called the defendant to confirm that he had picked her up, but she had no knowledge of any sexual activity between the two.<sup>200</sup> When the victim arrived at her mother's house, the mother said she had talked to the defendant and "knew everything," but wanted to hear it from her daughter."<sup>201</sup> According to the mother, the victim then became "uptight, emotional, [and] increasingly shaky . . . coupled with agitated behavior including crying and wringing of hands" while telling her mother of the sexual activity.<sup>202</sup>

Despite the declarant's obviously emotional state, the court excluded her statements as excited utterances, distinguishing the case from another Texas case, *Hunt v. State*.<sup>203</sup> In *Hunt*, an eleven-year-old girl became emotional after seeing a news program about a young rape victim.<sup>204</sup> When her mother asked her why she was

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193. 899 P.2d 833, 836 (Wash. Ct. App. 1995).

194. *Id.* at 835.

195. *Id.* at 836.

196. *Id.* at 835.

197. *Id.* at 836.

198. 102 S.W.3d 754 (Tex. App. 2002).

199. *Id.* at 761.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 764 (citing *Hunt v. State*, 904 S.W.2d 813 (Tex. App. 1995)).

204. *Id.* (citing *Hunt*, 904 S.W.2d).

crying, she said that she was scared that she might be pregnant from a rape three months earlier.<sup>205</sup> The court found that the child's stress in *Hunt* was the result of an "independent and otherwise nonstressful experience."<sup>206</sup> Since the mother's "question was generalized and did not anticipate any particular response," the daughter's statement was admissible as an excited utterance.<sup>207</sup>

The court in *Glover* found that the questioning in the case before it was "calculated to elicit information," and direct and specific, in contrast to the generalized questioning in *Hunt*.<sup>208</sup> The court then rejected the girl's statements as excited utterances because "[r]esponses to this type of questioning are not spontaneous."<sup>209</sup> This analysis seems contrary to a guiding principle of excited utterance jurisprudence that "what makes an event startling is its effect upon the person perceiving it."<sup>210</sup> Under this principle, questioning could be extremely generalized in nature, and the situation would still not be stressful unless the declarant found it to be stressful. Conversely, a mother could intend for her questioning to elicit the exact response given by her daughter, and the situation would still be stressful if the declarant found it to be stressful. By relying on the nature of the questioning, and not its effect on the declarant, the Texas court inappropriately applied the excited utterance exception. As will be found in the subsequent section, courts in Texas have had similar difficulties applying the excited utterance exception in cases with subsequent startling occurrences based on a failure to look at the effect of these occurrences on the declarant.

## II. THE HEART OF THE SPLIT — CAN AN EXCITED UTTERANCE BE PROMPTED BY A SUBSEQUENT STARTLING OCCURRENCE?

*The argument that statements made after one has calmed down can never be excited utterances presents an unsettled legal question.*<sup>211</sup>

Many courts have concluded that "[t]he startling occurrence that triggers an excited utterance need not necessarily be the crime

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205. *Id.* (citing *Hunt*, 904 S.W.2d at 815).

206. *Id.*

207. *Id.* at 765 n.5 (construing *Hunt*, 904 S.W.2d at 815).

208. *Id.* at 765.

209. *Id.*

210. *State v. Owens*, 899 P.2d 833, 836 (Wash. Ct. App. 1995).

211. *United States v. Donaldson*, 58 M.J. 477, 483 (CAAF 2003).



itself.”<sup>212</sup> Rather, a second startling occurrence, removed in time from the crime at issue, can “trigger[] associations with an original trauma, thereby recreating the original stress and causing the declarant to exclaim spontaneously.”<sup>213</sup> Other courts have either explicitly held that the startling occurrence precipitating an excited utterance must be the “offense being prosecuted” or have failed to consider whether subsequent startling occurrences can so qualify.<sup>214</sup>

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212. *Aguilera v. State*, 75 S.W.3d 60, 68 (Tex. App. 2002) (citing *Couchman v. State*, 3 S.W.3d 155, 159 (Tex. App. 1999)).

213. *Owens*, 899 P.2d at 835; see also *Murphy Auto Parts Co. v. Ball*, 249 F.2d 508, 511-12 (D.C. Cir. 1957):

Most often the excited utterance, as a practical matter, relates to the exciting cause, i.e., description of an accident, an attack, etc., but if the utterance goes beyond a description of the occurrence and still meets the other tests of the excited utterance rule, we think it should be received if it is relevant.

See, e.g., *United States v. Moore*, 271 F.2d 566, 572 (7th Cir. 1986) (“[T]he caselaw indicates that even statements that refer to prior events or thoughts may be admissible as excited utterances.”); *In re Troy P.*, 842 P.2d 742, 747 (N.M. Ct. App. 1992) (“Courts have, therefore, admitted spontaneous utterances made well after the event when the declarant was suddenly subjected to rekindled excitement.”); *State v. Carpenter*, 773 S.W.2d 1, 9 (Tenn. Crim. App. 1989) (“Despite the length of time within which the victim reflected on the missing money, this court believes that her final comments resulted from the suspect’s return to the scene rather than the theft itself.”); *Couchman v. State*, 3 S.W.3d 155, 159 (Tex. App. 1999) (“We also note that the startling occurrence that triggers an excited utterance need not necessarily be the crime itself.”); *Bondurant v. State*, 956 S.W.2d 762, 765 (Tex. App. 1997) (“The startling event which triggers an excited utterance need not necessarily be the crime itself.”); *Britton v. Washington Water Power Co.*, 110 P. 20, 21 (Wash. 1910):

The time of the occurrence of the principal act is sometimes by reason of some special circumstance, extended forward so as to make it coincident and connected with subsequent declarations by constructive continuity of time, as, for instance, when the party making the declarations having become unconscious at the very moment of the occurrence of the principal act, the declarations are made by him at the very moment of his regaining consciousness . . . .

214. *United States v. Knox*, 46 M.J. 688, 695 (N.M. Ct. Crim. App. 1997) (“To be admissible, an excited utterance must be made while under the excitement of the offense being prosecuted.”); see, e.g., *Keefe v. State*, 72 P.2d 425, 428 (Ariz. 1937):

[T]he evidence in no way indicates that the statements of the children were the result of nervous excitement and shock caused by the crime with which the defendant is charged, but rather that they were an attempt at an excuse for an entirely independent incident, occurring a number of days after the alleged crime could have been committed.

See also, *State v. Messamore*, 639 P.2d 413, 419 (Hawaii App. 1982) (rejecting a girl’s excited statements about prior sexual abuse when they were made while being spanked for urinating on the stairs, after stating her fear of urinating because these statements were “made not in response to the actual event in question”); *State v. Lafrance*, 589 A.2d 43, 46 (Me. 1991) (rejecting a girl’s excited statements about prior sexual abuse because “[she] was behaving normally until she learned that her mother would not let her stay overnight,” leading her to suffer “the stress of fear over returning to her own apartment while [the defendant] was still living there”); *Deloso v. State*, 376 A.2d 873, 877 (Md. App. 1977) (holding that there must be a continuance of the stress caused by the offense being prosecuted for a statement to qualify as an excited utterance although, “as is obvious from [*Moore v. State*, 338 A.2d 344 (Ct. App. Md. 1975)], time is not a conclusive factor”); *Harnish v. State*, 266 A.2d 364, 366 (Md. App. 1970):

Finally, other courts have given lip service to the theory that subsequent startling occurrences can give rise to excited utterances while the actual reasoning in their cases has made clear that only the crime itself can give rise to an excited utterance.

Two cases from Texas clearly illustrate this point. In *Mosley v. State*,<sup>215</sup> a three-year-old girl ("S.M.") lived with her step-grandmother and frequently visited her father. She was allegedly sexually assaulted by her father on several of these visits.<sup>216</sup> In the week before a visit with her father, the daughter "became agitated and 'panicky' at the prospect of returning to visit [her father]," crying and claiming that he had hurt her.<sup>217</sup> The court found that these statements did not constitute excited utterances because "[t]he 'excitement' experienced by the declarant must be continuous between the event itself and the statement describing it."<sup>218</sup> Because "a number of days passed between the time S.M. was molested and the time at which she made her statement," S.M. did not have the "uninterrupted emotional state" necessary to have her statements qualify as excited utterances.<sup>219</sup> Thus, even if S.M. were controlled by the stress "springing from the event which she described" — the prospect of returning to her father — her statements were inadmissible because she did not suffer from stress continuously from the last act of abuse until the time of her emotional statements.<sup>220</sup>

By itself, there is nothing inconsistent about the court's opinion. The court apparently sided with the precedent requiring the startling occurrence to be the crime itself, refusing to even consider that the imminent return of a young sexual assault victim to her father could form the predicate for an excited utterance. In *Aguilera v. State*,<sup>221</sup> however, the court relied upon *Mosley* to exclude the hearsay statements of a minor ("Smith") who made statements

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While the statement given to the mother may have been spontaneous in the sense that it constituted a generated or sparked reason for his unwillingness to visit the appellant on that occasion, it is evident that the statement cannot be characterized as being an integral part of the transaction or event which is alleged to have occurred on January 3, 1969.

See also *Commonwealth v. Santiago*, 755 N.E.2d 795, 803 (Mass. App. Ct. 2001), *rev'd by Commonwealth v. Santiago*, 774 N.E.2d 143 (Mass. 2002) (holding that a mother's viewing of the arrest of her boyfriend could not be a startling event because she had "ample time, opportunity and motive to think about her boyfriend's situation and to contrive a story in an effort . . . to exonerate him").

215. 960 S.W.2d 200 (Tex. App. 1997).

216. *Id.* at 202.

217. *Id.*

218. *Id.* at 204.

219. *Id.*

220. *Id.*

221. 75 S.W.3d 60 (Tex. App. 2002).

about sexual abuse by her stepfather upon learning that she would be forced to move back with him.<sup>222</sup> In finding that the statements did not qualify as excited utterances, the court surprisingly noted that "[t]he startling occurrence that triggers an excited utterance need not necessarily be the crime itself."<sup>223</sup> Despite this language, the court then cited *Mosley* for the proposition that "the 'excitement' experienced by the declarant must be continuous between the event itself and the statement describing it."<sup>224</sup> The court held that because a significant period of time had passed between the last alleged act of abuse and the statements, "Smith was not still under the stress or excitement caused by the event."<sup>225</sup>

The question remains as to how, if stress must be continuous between the alleged crime and the statements, a subsequent startling occurrence that is not the crime can ever be the impetus for an excited utterance. If stress must be continuous between the crime and the statements, the second startling occurrence becomes irrelevant because the declarant is still controlled by the stress created by the crime itself. As noted above, the theory behind admitting excited utterances prompted by a subsequent startling occurrence is that such an occurrence rekindles the original stress of the crime.<sup>226</sup> This necessarily requires that the original stress from the crime has dissipated and that the continuous stressful state *Mosley* and *Aguilera* required be interrupted.

What makes these cases more troublesome is the fact that other cases in Texas, including a case upon which the *Aguilera* decision relied, have clearly held that statements made while under the stress of subsequent startling events or conditions may be admissible as excited utterances, even when the declarant was not in a continuously stressful state between the crime and the statements. In *Couchman v. State*,<sup>227</sup> the case cited by *Aguilera* for the proposition that the startling occurrence need not be the crime itself, a four-year-old child ("A.T.") was allegedly sexually abused by her mother's boyfriend ("Tony"). After the alleged abuse, her father and his sister picked her up and she played all day with no signs of discomfort.<sup>228</sup> Later that evening, after the sister washed A.T.'s hair, she told A.T. to wash her body.<sup>229</sup> At this point, "A.T. became upset

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222. *Id.* at 68.

223. *Id.* (citing *Couchman v. State*, 3 S.W.3d 155, 159 (Tex. App. 1999)).

224. *Id.*

225. *Id.*

226. See *supra* note 213 and accompanying text.

227. 3 S.W.3d 155 (Tex. App. 1999).

228. *Id.* at 157.

229. *Id.*

and refused to wash her genital area, saying it hurt and burned. When [the sister] asked why A.T. was hurting, A.T. pointed to her genitals and said Tony had touched her and stuck his finger inside her."<sup>230</sup> The defendant attempted to have these statements excluded as hearsay, claiming that they were "too far removed from the original [offense] to be an excited utterance."<sup>231</sup> The court found that there was no need to consider the underlying offense because "the startling condition that evoked A.T.'s statements could have been the pain she was experiencing."<sup>232</sup> Thus, because the court found that A.T. was still controlled by the stress resulting from the pain in her genital area, it admitted her statements as excited utterances.<sup>233</sup>

Similarly, in the previously cited *Hunt v. State*,<sup>234</sup> an eleven-year-old girl ("K.S.") was allegedly sexually assaulted by a friend's father. Three months later, she began crying profusely after she saw a television program about a young rape victim.<sup>235</sup> Upon questioning from her mother, she cried out that she had been raped by her friend's father and that watching the program made her fearful that she may be pregnant.<sup>236</sup> The defendant attempted to have the statement excluded as hearsay, contending that "the startling occurrence . . . was the alleged assault and could not have been any ideas or notions which arose from K.S.'s viewing of a television news story three months later."<sup>237</sup> The court disagreed, holding that "the startling event which triggers an excited utterance need not necessarily be the crime itself."<sup>238</sup> As with *Couchman*, there was no argument that the victim was in a continuously stressful state from the moment of the assault until the moment of her statement. Instead, the court accepted the argument that watching the program revived the previously dormant stress the girl suffered as a result of the alleged crime.<sup>239</sup>

Regardless of whether the broader or more limited interpretation of what constitutes an excited utterance is proper, the courts in Texas must resolve this conflict. State supreme courts should always strive to resolve obvious splits among state trial courts, but this directive becomes much clearer when trial courts rely on the language of other trial courts to arrive at seemingly contradictory

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230. *Id.* at 157-58.

231. *Id.* at 159.

232. *Id.*

233. *Id.* at 160.

234. 904 S.W.2d 813 (Tex. App. 2001).

235. *Id.* at 815.

236. *Id.*

237. *Id.* at 815.

238. *Id.* at 816.

239. *Id.*

conclusions. Further, if courts, such as those in *Aguilera*, truly believe that stress must be continuous between the crime and the statement, they should dispense with language stating that a startling occurrence need not be the crime itself. Otherwise, both lawyers and their clients will have no clear understanding of which statements may be admissible over hearsay objections. Having dispensed with the conflict in Texas, the central question still remains as to whether statements should be admissible as excited utterances if they are made under the stress of startling occurrences transpiring after the initial crime.

*A. Recurring Situations Involving the Admissibility of Statements Made in Response to Subsequent Startling Events*

The issue of whether subsequent startling occurrences can form the predicates for excited utterances arises in a variety of factual situations. The disputes between courts are best understood through examining three frequently recurring scenarios. These scenarios are a child sexual abuse victim: 1) being returned to the site of her abuse, 2) being caught mimicking sexual positions "learned" from abuse, and 3) experiencing vaginal pain from prior abuse.

*1. Res Gestae Versus Excited Utterances*

The most persistent problem plaguing courts in applying the excited utterance exception is continuing reliance on the elements of the *res gestae* exception that have no application to the excited utterance exception. As previously noted, *res gestae* was admitted only when stress was continuous between the startling occurrence and the declarant's statement. The excited utterance exception has no such requirement, as it is based on spontaneity, not contemporaneity.<sup>240</sup> Second, while *res gestae* had to explain, elucidate, or in some way characterize the startling occurrence, the excited utterance exception allows for a much looser connection (or no connection at all) between utterance and occurrence.<sup>241</sup> When courts have considered the admissibility of statements made by sexually abused children who are faced with the prospect of being returned to the site of their abuse, the situation referenced in the introduction,<sup>242</sup> and when caught mimicking sexual positions "learned" from

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240. See *supra* note 61 and accompanying text.

241. See *supra* notes 79-83 and accompanying text.

242. See *supra* notes 1-14 and accompanying text.

prior abuse, some courts have improperly relied on the vestiges of *res gestae* to exclude statements that should be potentially admissible as excited utterances.

*a. Children Making Excited Utterances upon Being Told That They Are Being Returned to the Site of Their Abuse*

As noted in the introduction to this article, courts in different states have disagreed over whether statements made by alleged sexual abuse victims in anticipation of their imminent return to the site of their abuse may be admitted as excited utterances.<sup>243</sup> In *State v. Lafrance*, the thirteen-year-old victim and the defendant, her mother's ex-husband, lived in the same apartment.<sup>244</sup> One night, the defendant allegedly sexually assaulted the victim, "touch[ing] her breasts and genital area through her clothes."<sup>245</sup> The victim had planned on spending the next night at a friend's house and, when her mother told her that she had to return to the apartment, the victim "became visibly upset . . . [and] blurted out the details of what had transpired the night before . . . ."<sup>246</sup>

The court refused to admit this statement as an excited utterance despite acknowledging that the victim "was experiencing the stress of fear over returning to her own apartment while [the defendant] was still living there."<sup>247</sup> The court first held that the victim's stress in reaction to this subsequent startling event was not sufficient; the victim was not still under the stress of the original sexual assault, therefore, her statement did not qualify as an excited utterance.<sup>248</sup> The court further held that her statement was not made while still under the stress of the assault because the victim had already told her friend the details of the assault before recounting them to her mother.<sup>249</sup>

The court in *Mosley v. State* came to a similar conclusion in a case where a three-year-old girl was allegedly sexually assaulted by her father.<sup>250</sup> The girl's mother was in jail, and her step-grandmother had custody of her, although her father "frequently took her on visitation . . . ."<sup>251</sup> While at her step-grandmother's house after a two

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243. See *supra* notes 1-14 and accompanying text.

244. 589 A.2d 43, 44 (Me. 1991).

245. *Id.*

246. *Id.* at 44-45.

247. *Id.* at 46.

248. *Id.* (holding that there was no evidence that the victim "was still under the stress of excitement caused by [the defendant's] alleged unlawful sexual contact").

249. *Id.*

250. 960 S.W.2d 200, 202 (Tex. App. 1997).

251. *Id.*

week visit with her father, the victim "became agitated and 'panicky' at the prospect of returning to visit [her father]." <sup>252</sup> While crying, she told her step-grandmother that her father hurt her, and she "demonstrated various forms of sexual assault she alleged [her father] had performed on her." <sup>253</sup>

As in *Lafrance*, the court rejected the victim's statements as excited utterances, despite granting that the victim's "agitation may, indeed, be genuine, and springing from the event she described . . . ." <sup>254</sup> Again, the deficiency with the statement was that it was not made while under the initial stress caused by the sexual assault. <sup>255</sup> According to the court, "[t]he 'excitement' experienced by the declarant must be continuous between the event itself and the statement describing it." <sup>256</sup> Because several days had passed between the alleged assault and the statements, the court excluded the statements, even though they were made after a later, related event causing the agitation. <sup>257</sup>

Other courts, however, have found that this type of subsequent startling event can form the predicate for an excited utterance. In *In re Troy P.*, the parents of a four-year-old girl separated, with the father having custody during weekdays and the mother having custody on weekends. <sup>258</sup> After staying with her mother for a weekend, the girl cried when her mother told her she would be returning to her father's home, saying that she did not want to go. <sup>259</sup> When her mother questioned her, she claimed that someone had "touched" her. <sup>260</sup> The mother did not pursue this allegation, but after the daughter stayed with her again during another weekend, the daughter "began screaming and crying" at the prospect of returning to her father's home. <sup>261</sup> The girl then told her mother that it was her babysitter's son who had "touched" her. <sup>262</sup>

The court determined that "the imminent return of the victim to her father could support admission of her statements as an excited utterance." <sup>263</sup> Unlike the preceding cases, the court in *Troy P.* held that the victim's statement was admissible even though she was not

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252. *Id.*

253. *Id.*

254. *Id.* at 204.

255. *Id.*

256. *Id.*

257. *Id.*

258. 842 P.2d 742, 743 (N.M. Ct. App. 1992).

259. *Id.* at 744.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 747.

in a continuously stressful state between the time of the sexual assault and the time when she made her statements.<sup>264</sup> The court came to this conclusion based primarily on three factors. First, the court cited several cases<sup>265</sup> for the proposition that statements made well after an initially startling occurrence are admissible "when the declarant [i]s suddenly subjected to rekindled excitement."<sup>266</sup>

Second, the court cited *Louisell & Mueller* for the more specific argument that such rekindling is more likely when the underlying startling occurrence is especially stressful, causing deep trauma which makes the declarant more susceptible to renewed stress from related events.<sup>267</sup> Finally, the court premised admission on the generally accepted theory that children tend to react to stress differently than adults, allowing admission of excited utterances made longer after a startling occurrence when the declarant is a child.<sup>268</sup>

The court in *Esser v. Commonwealth* similarly admitted statements by a sexual abuse victim made in response to being told that she was being returned to the custody of her alleged assailant.<sup>269</sup> There, a nineteen-year-old girl with physical and mental disabilities was visiting her aunt when the aunt's live-in boyfriend allegedly "raped and sexually assaulted her."<sup>270</sup> Two days later, when the mother was going to work, the victim became upset, crying hysterically about the possibility of being returned to her aunt's home.<sup>271</sup> The girl told her mother she might be pregnant, prompting the mother to question her daughter's prior claims of virginity.<sup>272</sup> The girl then told her mother about the incident, describing it in detail.<sup>273</sup>

Again, the court found that the prospect of being returned to the site of abuse qualified as a startling event which could form the predicate for an excited utterance.<sup>274</sup> As with *Troy P.*, the court cited several cases to support its holding that statements made about a crime may be admissible when prompted by a subsequent startling

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264. *Id.*

265. *See, e.g.,* *United States v. Scarpa*, 913 F.2d 933, 1016-17 (2d Cir. 1990); *United States v. Napier*, 518 F.2d 316 (9th Cir. 1975).

266. *In re Troy P.*, 842 P.2d 742, 747 (N.M. Ct. App. 1992).

267. *Id.* at 746-47 (quoting 4 DAVID W. LOUISELL & CHRISTOPHER MUELLER, *FEDERAL EVIDENCE* § 439 (1980)) ("Events may so deeply traumatize a person that long after stress has subsided a chance reminder may have enormous psychological impact, causing renewed stress and excitement and educing utterances relating to the original trauma.").

268. *Id.* at 747.

269. 566 S.E.2d 876, 878-79 (Va. Ct. App. 2002).

270. *Id.* at 878.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 878-79.



occurrence that triggers associations with the underlying crime.<sup>275</sup> The court also considered the physical and mental attributes of the girl to conclude that being returned to the site of the abuse would be particularly stressful for her.<sup>276</sup>

When the reasons for these disparate conclusions are considered, it becomes apparent that cases such as *Lafrance* and *Mosley* are being decided incorrectly, primarily because the judges deciding them are considering factors relevant to *res gestae*, but irrelevant to excited utterances. These cases first exclude the victim's statements as excited utterances by relying on the argument that stress must be continuous between the time of the sexual abuse and the time when the victim makes the statements.<sup>277</sup> As *Bayne v. State* noted, however, the argument that stress must be continuous from the crime to the statement is a vestige of the *res gestae* exception, under which statements had to be a "continuing part of the transaction" begun by the underlying event.<sup>278</sup> Unfortunately, as courts have made the transition between the *res gestae* exception and the excited utterance exception, some judges have continued to apply this "continuing part of the transaction" requirement to statements being considered under the excited utterance exception.<sup>279</sup>

This application is fallacious because [t]he primary focus in construing the excited utterance exception is not on the continuation of transaction theory applicable to *res gestae* concepts generally. Rather, the focus in construing the excited utterance exception is on the happening of *an* excitable occurrence sufficient to generate an utterance without reflective opportunity — the very concept of an excited utterance.<sup>280</sup>

Thus, with *res gestae*, for a statement about occurrence A to be admissible, it must be made as a continuing part of that transaction, excluding statements made about occurrence A after the original stress from occurrence A has subsided, even if startling occurrence B subsequently rekindles that stress. Under the excited utterance exception, however, a statement made under this latter scenario should be admissible if: a) it is made while the declarant is still under the stress of occurrence B, and, under some formulations of the exception, b) it bears some relationship to occurrence B.

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275. *Id.* at 879-80.

276. *Id.* at 880 ("Her physical condition made her unable to protect herself from any future assaults.").

277. *See supra* notes 258, 267 and accompanying text.

278. 632 A.2d 476, 484 (Md. App. 1993).

279. *Id.*

280. *Id.*

Of course, as the courts in both *Lafrance* and *Mosley* noted, the statements made by the declarants were made while the declarant was still under the stress of occurrence B, the prospect of being returned to the site of their abuse, so a) is satisfied. While this article does not attempt to resolve the dispute noted in section I.C.2. over the extent to which an excited utterance must relate to the startling occurrence prompting it, it seems safe to say that statements about sexual abuse committed by a person living at a residence relate to the event of a child being told that she is being returned to that residence, satisfying b). Thus, it seems apparent that courts in cases such as *Lafrance* and *Mosley* are improperly excluding statements under the excited utterance exception based on *res gestae* elements. In fact, the only difference between statements made while under the stress of an initial startling occurrence and those made while under the stress of a subsequent startling occurrence is that, in the latter situation, the initial occurrence may not be as fresh in the declarant's mind. As noted, however, this difference has no practical relevance under the excited utterance exception.<sup>281</sup>

Second, in excluding these statements under the excited utterance exception, these cases fail to note the general principle that the excited utterance elements are applied more liberally when the declarant is a child.<sup>282</sup> Of course, the simple fact that the great majority of courts apply this principle does not make the principle correct. Indeed, it is important to note that, unlike in other cases, in neither *Lafrance* nor *Mosley* did the court acknowledge this principle and reject it. Instead, both courts simply neglected to mention it.

Further, as noted in section I.C.3.a., there should be no reason for judges to apply the excited utterance exception in the same manner for children as for adults. The basis for the exception is that statements made while under the stress of a startling occurrence are reliable because they remove the ability of the declarant to fabricate an occurrence, forcing him to tell the truth instinctively. Courts, however, cannot apply this exception in a vacuum. Thus, a central principle in excited utterance jurisprudence is that determination of whether an occurrence is startling is subjective, based on its effect on the declarant, not objective, based on the properties of the occurrence itself.<sup>283</sup> The weight of the research has shown that children respond to stress differently than adults, making their

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281. See *supra* notes 62-63 and accompanying text.

282. See *supra* notes 105-18 and accompanying text.

283. See *supra* notes 79-83 and accompanying text.

statements more trustworthy when separated in time from a startling occurrence than similar statements by adults.<sup>284</sup> Unless courts such as those deciding *Lafrance* and *Mosley* can explain why this research is fallacious, it seems that courts should be bound to accept (or at least address) the argument that the excited utterance elements should be loosened when the declarant is a child.

Third, in excluding these statements, the court in *Lafrance* improperly relied on the fact that the victim had already told her friend the details of the assault before recounting them to her mother.<sup>285</sup> This error is evinced by the Supreme Court of Massachusetts' decision in *Commonwealth v. Santiago*.<sup>286</sup> Previously, the Court of Appeals had found that the arrest of a boyfriend for sexually assaulting his girlfriend's daughter was not a startling event which could form the predicate for an excited utterance.<sup>287</sup> Before this arrest, the mother, with her boyfriend in the room, had received a phone call from the school guidance counselor reporting that her daughter had accused the boyfriend of sexual abuse.<sup>288</sup> The court thus found that her subsequent viewing of the boyfriend's arrest was not a startling event because "the declarant had ample time, opportunity and motive to think about [the] situation and contrive a story in an effort, however naive and ill-conceived, to exonerate him."<sup>289</sup> Therefore, the Court of Appeals held that the trial court erred in admitting her statement that the boyfriend "put his finger into her vagina, but did not have intercourse with [her]."<sup>290</sup>

The Supreme Court of Massachusetts reversed, holding that the Court of Appeals had conducted the analysis incorrectly.<sup>291</sup> Instead of focusing on the declarant's opportunity to fabricate between an initial startling event and a subsequent startling event, the Court of Appeals should have considered whether "the occurrence of the subsequent event (here, the arrest) [was] likely to produce a nonreflective exclamation about the prior event (here, the defendant's statement to her)."<sup>292</sup> Again, the logic behind excited utterances is that they disable the reflective capacity; thus, if an event is determined to be sufficiently startling, it "negate[s] premeditation or possible fabrication," rendering irrelevant any plans the declarant made in the interim.<sup>293</sup>

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284. See *supra* Section I.C.3.a.

285. See *supra* note 248 and accompanying text.

286. 774 N.E.2d 143 (Mass. 2002).

287. *Commonwealth v. Santiago*, 755 N.E.2d 795, 803 (Mass. App. Ct. 2001).

288. *Id.*

289. *Id.*

290. *Id.* at 799.

291. *Santiago*, 774 N.E.2d at 148.

292. *Id.*

293. *Id.*

A court properly determines that an event is not startling when it bases this decision on the event's effect on the declarant. Thus, if the court found that the mother was not actually startled by the arrest, it could have excluded her statement because it failed to meet the "startling event or condition" requirement of the excited utterance exception. When courts exclude statements on the basis of (hypothetical) prior behavior, they are no longer applying the excited utterance elements properly.<sup>294</sup> As the Supreme Court of Massachusetts noted, there was an adequate "degree of excitement displayed by the mother" to convince it that the arrest was startling, rendering meaningless any behavior she engaged in before that event.<sup>295</sup> Whether the mother had previously concocted a story to exonerate her boyfriend was irrelevant. If the court found the subsequent arrest to be sufficiently startling based on its effect on the mother, it should have admitted the statement as an excited utterance under the theory that her statement would be instinctively truthful. Similarly, the *Lafrance* court improperly relied on prior statements by the declarant rather than the fact that she appeared "visibly upset" at being forced to remain at home in excluding her statements as excited utterances.<sup>296</sup>

*b. Children Making Excited Utterances upon Being Caught Mimicking Sexual Positions "Learned" from Prior Abuse*

When courts have been presented with statements made by child sexual abuse victims, after being caught mimicking sexual positions "learned" from prior abuse, some courts have similarly excluded such statements as excited utterances based on misunderstandings of excited utterance jurisprudence. In *Keefe v. State*,<sup>297</sup> a mother walked in on her four-year-old daughter and six-year-old son "engaged in immoral conduct . . . ."<sup>298</sup> When the mother began to chastise her children, the daughter responded that the "defendant did such things to her all the time," and gave "a fairly comprehensive and detailed account" of previous acts of sexual abuse.<sup>299</sup> The court rejected the daughter's statements as excited utterances, holding that the daughter was laboring under the stress of being found engaged in the sexual act and not the stress of the alleged act

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294. *Id.*

295. *Id.*

296. See *supra* notes 248, 267 and accompanying text.

297. 72 P.2d 425 (Ariz. 1937).

298. *Id.* at 426.

299. *Id.* Upon questioning, the brother "confirmed his sister's statements, saying that he had witnessed such acts." *Id.*

of sexual abuse earlier in the week.<sup>300</sup> In doing so, the court rejected the rationale that a subsequent startling event can revive the original stress of the crime and make a later declaration reliable.<sup>301</sup>

In *W.C.L. v. People*,<sup>302</sup> the court rejected statements made by a four-year-old after she was allegedly raped by her sixteen-year-old uncle. After staying with an aunt for two days, the victim went to stay with another aunt.<sup>303</sup> At night, when the aunt was preparing the victim and her son for baths, "and while all the children were undressed, the victim faced the aunt's six-year-old son, spread her legs, and said, 'Get me.'"<sup>304</sup> The aunt "spoke the victim's name and asked what she was doing in a tone that apparently startled the child."<sup>305</sup> Five to ten minutes later, the aunt asked the victim where she learned what she had done, "and the child replied, 'Uncle [W.C.L.] tickles me.'"<sup>306</sup> When the aunt asked her where he tickled her, "the victim pointed to her genitals."<sup>307</sup> While the trial court had admitted the statements as excited utterances because "the startling event was the aunt's response to the child's suggestive gesture," the court relied on *Keefe* to exclude the statements.<sup>308</sup>

In *Bayne v. State*,<sup>309</sup> a Maryland court was presented with a very similar set of facts. An uncle discovered "the five-year-old victim on top of her young cousin in the boy's bed 'riding him in a sexual motion.'"<sup>310</sup> When questioned by her uncle, the victim panicked, left with her grandmother, and eventually told her grandmother about the prior abuse "within twenty minutes of the uncle's discovery."<sup>311</sup> The court noted that *Keefe* was still good law

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300. *Id.* at 428:

The matter which elicited the statements was obviously not any act which had occurred the previous Monday, but the shock caused the children by being found in *flagrante delicto*, and the children's statement was obviously an attempt to justify their behavior at the time by giving defendant's previous conduct as an excuse therefor [sic], rather than the nervous excitement caused by any acts of the latter.

301. *Id.* at 427 (holding that a statement cannot be an excited utterance if the "nervous excitement has died away so that the remark is elicited by the shock of some other act not at issue, which revives the memory of the act in question").

302. 685 P.2d 176 (Colo. 1984).

303. *Id.* at 177.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 180. The court also found that the child's statements were not spontaneous, but this analysis had no impact on the court's decision that the victim's acts combined with the aunt's response did not constitute a startling event. *Id.* (reaching the spontaneity issue only after finding there was not a startling occurrence).

309. 632 A.2d 476 (Md. Ct. Spec. App. 1993).

310. *Id.* at 483.

311. *Id.*

and recognized the precedent holding that subsequent startling occurrences cannot form the predicates for excited utterances.<sup>312</sup> The court, however, rejected this line of precedent, arguing that those decisions were decided improperly based on elements applicable to *res gestae* but not to excited utterances.<sup>313</sup>

First, the court found that those cases rejected statements as excited utterances because the court strictly enforced the third element of excited utterances doctrine, requiring that the statement relate to the startling occurrence.<sup>314</sup> Second, these cases improperly required that excited utterances be a “continuing part of the transaction,” inextricably intertwined with the crime being prosecuted.<sup>315</sup>

For the same reasons articulated in subsection II.A.1.a., the courts in *Keefe* and *W.C.L.* improperly relied on old *res gestae* rationales in excluding these statements because the declarant’s stress was not continuous between the underlying offense and the victim’s statements. For the same reasons cited in subsection II.A.1.a., these courts failed to even consider the rationales for applying the excited utterance exception more liberally when the declarant is a child. Furthermore, these courts never explained where these four-year-old declarants would have learned these sexual positions if not through sexual abuse.<sup>316</sup>

The final point which distinguishes these cases from those in the prior subsection is that these cases also excluded the declarants’ statements because, as noted in *Bayne*, they did not sufficiently ‘relate to’ the original crime.<sup>317</sup> For instance, in *Keefe*, the court excluded the declarant’s statements because “they were an attempt at an excuse for an entirely independent incident, occurring a number of days after the alleged crime could have been committed.”<sup>318</sup> Initially, the court’s analysis was fallacious because the third prong of the excited utterance exception requires that the statement relate

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312. See *supra* notes 212, 299-301 and accompanying text.

313. *Bayne*, 632 A.2d at 489.

314. *Id.* at 484-85.

315. *Id.* at 484.

316. See *supra* notes 299-301 and accompanying text.

317. See *supra* note 308 and accompanying text.

318. *Keefe v. State*, 72 P.2d 425, 428 (Ariz. 1937). Interestingly, in the previously cited case of *Glover v. State*, 102 S.W.3d 754, 764 (Tex. App. 2002), a Texas court noted that it was excluding a victim’s statements because they were made in response to questioning “calculated to elicit a confession,” distinguishing the case from *Hunt v. State*, 904 S.W.2d 813 (Tex. App. 1995), a Texas case in which the questioning was perceived as “independent” from the original crime at issue. Neither formalistic approach, however, seems entirely appropriate because it is the effect on the declarant, and not the dependence or independence of the subsequent startling occurrence, that should determine admissibility. See *supra* notes 83-84 and accompanying text.

to the startling occurrence, not the underlying crime.<sup>319</sup> When a subsequent startling occurrence prompts statements about a prior crime, courts requiring more than that the statement merely 'relate to' the prompting startling occurrence have taken two approaches, both of which would support admitting the statement in *Keefe*. First, some courts hold that such statements, made in response to subsequent occurrences and about past crimes, could take on a reflective quality, creating doubt as to whether the declarant's statement was truly spontaneous.<sup>320</sup> Yet, the court in *Keefe* made it clear that the victim's statement was made in response to the "shock caused the children by being found in flagrante delicto,"<sup>321</sup> so there was no question that the statement was made spontaneously after a startling event. Further, even if there were some question about direct evidence of spontaneity, both the age of the victim generally, and the fact that young children lack the detailed knowledge of sexual behavior necessary to fabricate a story about it, would support the proposition that the statement was spontaneous.<sup>322</sup>

Second, some courts hold that the statements sought to be introduced as excited utterances must broadly relate to the circumstances surrounding an event.<sup>323</sup> For instance, in *Bondurant v. State*, statements about a murder that had occurred three days prior to the startling occurrence were admissible when they were prompted by the defendant threatening to commit suicide and frame his girlfriend if she spoke about the murder.<sup>324</sup> Under this standard, it would be difficult for the court to argue that the victim's statements in *Keefe* about prior sexual abuse did not broadly relate to the circumstance of being found mimicking sexual positions allegedly "learned" from that abuse. Again, for the court to defend this position, it would have to contradict the generally accepted proposition that children's statements about sexual abuse are especially likely to be truthful because a child, particularly a four-year-old child, is unlikely to have the detailed knowledge about sex to be able to fabricate a believable story about abuse.<sup>325</sup>

The only rationale for judges, such as those in *Keefe*, excluding these statements for a failure to "relate to" the occurrence preceding it, is that these judges are relying on the elucidation requirement that was an element of *res gestae*, but is not an element of the

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319. See *supra* note 64 and accompanying text.

320. See *supra* note 68 and accompanying text.

321. 72 P.2d 425, 428 (Ariz. 1937).

322. See *supra* notes 105-113 and accompanying text.

323. See *supra* notes 69-73 and accompanying text.

324. *Bondurant v. State*, 956 S.W.2d 762, 767 (Tex. App. 1997).

325. See *supra* note 113 and accompanying text.

excited utterance exception.<sup>326</sup> As previously noted, both the advisory committee notes to the Federal Rules of Evidence and the bulk of case law indicate that the 'relate to' requirement of the excited utterance exception requires much less than the elucidation requirement of *res gestae* or the present sense impression exception.<sup>327</sup> Thus, it seems apparent that courts in cases such as *Keefe* and *W.C.L.* are improperly excluding excited utterances based on the elucidation requirement of *res gestae* which is non-existent in the excited utterance exception.

## *2. Children Making Excited Utterances in Response to a Startling Condition Caused by Prior Abuse*

The second major mistake courts make in applying the excited utterance exception is failing to recognize that the exception allows for the admission of statements made in response to startling conditions as well as startling events. In *State v. Messamore*,<sup>328</sup> a three-year-old girl was allegedly raped by her father's friend on May 26th. On June 4th, "after complaining about her fear of urinating, the child urinated while standing on the stairs."<sup>329</sup> While her mother was spanking her for urinating on the stairs, "the child related to her the events of May 26[th]."<sup>330</sup> The court excluded the statement, refusing to admit it because it was made ten days after the alleged rape.<sup>331</sup> The court, however, did not even consider whether the statements could be admitted because they were made while under the stress of the startling condition of vaginal pain or the event of being spanked.<sup>332</sup> Instead, the court held that because the statements were "made not in response to the actual event in question, but in response to fear of a spanking for wetting one's pants, an even stronger case for exclusion [was] shown."<sup>333</sup>

In *Couchman v. State*,<sup>334</sup> however, the Court of Appeals of Texas admitted statements made by a four-year-old sexual abuse victim under similar circumstances, affirming the trial court's decision.<sup>335</sup> The four-year-old victim was allegedly sexually abused by her

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326. See *supra* note 49 and accompanying text.

327. See *supra* notes 49-52 and accompanying text.

328. 639 P.2d 413, 416 (Hawaii Ct. App. 1982).

329. *Id.*

330. *Id.*

331. *Id.* at 419.

332. *Id.* at 418-19.

333. *Id.* at 419.

334. 3 S.W.3d 155 (Tex. App. 1999).

335. *Id.* at 162.



mother's boyfriend.<sup>336</sup> Later, when she was at her father's and aunt's house, the aunt washed the victim's hair and "instructed her niece to wash the rest of her body."<sup>337</sup> The girl "became upset and refused to wash her genital area, saying it hurt and burned."<sup>338</sup> When the aunt asked about the source of her pain, the girl pointed to her vagina and told the aunt that the boyfriend "had touched her and stuck his finger inside her."<sup>339</sup>

The court rejected the appellant's argument that the victim's "statements were inadmissible as excited utterances because the trial court expressly ruled that they were 'too far removed from the original [offense] to be an excited utterance.'"<sup>340</sup> The court reached this conclusion by finding that it did not need to "resort back to the actual offense . . . to find a startling occurrence that would bring [the victim's] statements under the Rule 803(2) exception."<sup>341</sup> The court found that the girl could have made her statements while under the stress created by the "burning sensation in her female sexual organ."<sup>342</sup> Her statements were thus admissible because they related to the startling condition: they explained the cause of her genital pain.<sup>343</sup>

The key to the court's decision was the "plain language of Rule 803(2) . . . ."<sup>344</sup> Under the Rule and state codes of evidence, "either a startling event *or condition* may provoke a statement that is admissible as an excited utterance."<sup>345</sup> The court in *Couchman* did not premise its holding on a subsequent startling event rekindling the stress that had subsided since the offense being prosecuted.<sup>346</sup> Instead, the girl's statement was admissible because it was made about a previous startling event while she was under the stress of a startling condition — vaginal pain — which resulted from that previous startling event.<sup>347</sup>

In some cases, defendants have admitted that a child's vaginal pain would constitute a startling condition. In *State v. Gordon*, a three-year-old girl was allegedly raped, possibly within the previous twenty-four hours, before crying out in pain while attempting to

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336. *Id.* at 158.

337. *Id.* at 157.

338. *Id.*

339. *Id.* at 158.

340. *Id.* at 159.

341. *Id.*

342. *Id.*

343. *Id.* at 159-60.

344. *Id.* at 159.

345. *Id.*

346. *Id.*

347. *Id.* at 159-60.

urinate.<sup>348</sup> Rather than challenging whether this pain was a startling condition, the defendant conceded “that the pain experienced by the victim while urinating, as opposed to the sexual offense itself, constituted a startling event.”<sup>349</sup>

When considered, this logic makes sense. If an individual eats spoiled food at a restaurant and then names where and what she ate when she begins to feel intestinal pain the next day, her statements should be admissible as excited utterances whether or not she is available to testify at trial. If someone falls on a slippery floor in a store and then begins to feel sharp, shooting pains in her back a few days later, her statements about the store and its conditions should be similarly admissible. This being the case, it seems clear that statements by a rape victim (particularly a child) should be admissible when her statements are made soon after she suffers vaginal pain, even if this is separated in time from the original crime.

It seems indisputable that such pain, especially when suffered by a child, constitutes a startling condition sufficient to act as the predicate for an excited utterance. In fact, in at least one case the defendant has conceded that such a condition qualifies as a startling condition which could lead to an excited utterance about a prior event.<sup>350</sup> Indeed, excluding statements made in response to a startling condition that relate back to a prior event renders the language in the Federal Rules of Evidence a nullity. By necessity, a startling condition must accompany or follow the underlying offense. A plaintiff who slips on a wet store floor experiences the startling condition of pain at the same time as the event of her fall or at some point afterward, the food poisoning victim experiences the startling condition of intestinal pain after eating, but no declarant ever experiences a startling condition before the underlying offense.<sup>351</sup> When a startling condition is contemporaneous with a startling event, there is no point in separately considering the condition because the startling event itself is sufficient to prompt an excited utterance.

Thus, the only time that the language “or condition” becomes meaningful is when a startling condition occurs after the stress from the underlying startling event has subsided.<sup>352</sup> Thus, even if courts

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348. 952 S.W.2d 817 (Tenn. 1997).

349. *Id.* at 821.

350. *Id.* (“The State contends, and the defendant concedes, that the pain experienced by the victim while urinating, as opposed to the sexual offense itself, constituted a startling event.”).

351. Perhaps under some bizarre factual scenario, a startling condition could precede the underlying offense, but this author was unable to find such a case.

352. Again, there could potentially be some factual scenario where this would not be the

were justified in excluding statements made in response to subsequent startling events, there appears to be no justification for excluding statements made in response to startling conditions simply because those conditions do not coincide with the original startling event. Critics may argue that a distinction should be drawn between cases such as food poisoning, where the event is not revealed to be startling until the startling condition later occurs, and cases such as rape, where the rape is known to be startling even before subsequent vaginal pain. The inquiry should be, however, whether the subsequent occurrence was startling to the declarant, not whether anything prior to that occurrence excludes the declarant's statements as excited utterances. Thus, the fact that the underlying offense was initially startling should have no bearing when the court determines that a subsequent condition resulting from that offense is sufficiently startling to still the declarant's reflective capacity.

### *3. Adults Making Excited Utterances in Response to Subsequent Startling Occurrences*

As part of the general trend to apply the excited utterance elements more liberally for child sexual abuse victims but not for adult rape victims, every case this author found allowing excited utterances following subsequent startling occurrences in rape and sexual assault cases involved child, and not adult, victims. Nonetheless, even if the theory proposed about Rape Trauma Syndrome<sup>353</sup> putting adult rape victims in the same position as child rape victims is not accepted, there should still be no reason to exclude statements made by adult rape victims in response to subsequent startling occurrences. Again, the only reasons courts have given to exclude such statements in child sexual abuse cases have been vestiges of *res gestae*. Thus, for instance, if an adult rape victim unexpectedly runs into her assailant weeks after the offense, there should be no reason to exclude her emotional statement about the offense despite the lapse in time, as long as the statement is made while she is under the stress of the subsequent startling occurrence. The only question in such a case would be whether the statement was, in fact, spontaneous,<sup>354</sup> and scholars have noted that when the underlying

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case. For instance, possibly an otherwise non-startling crime could cause a simultaneous startling condition which would form the predicate for an excited utterance. However, the author found no such cases.

353. See generally *supra* notes 149-150 and accompanying text.

354. See *supra* note 68 and accompanying text.

crime is especially stressful, as is certainly the case with rape and sexual assault, the declarant is more susceptible to renewed stress from subsequent, related events.<sup>355</sup> Thus, in cases involving adult sexual abuse victims, it follows that a victim's statements should be admitted as excited utterances when the victim is exposed to a subsequent startling occurrence.

### CONCLUSION

While the vast majority of the attention in rape jurisprudence has been focused on the rape shield laws and the laws allowing the admission of evidence of prior sexual offenses against a defendant charged with rape or sexual assault, a sharp conflict has arisen among courts over whether and when subsequent startling occurrences can form the predicates for excited utterances. While some courts properly admit statements made in response to such occurrences based on evidence of their effect on declarants, other courts incorrectly exclude such statements based on the vestiges of *res gestae* and misinterpretations of the excited utterance exception. Moreover, most courts have only considered this situation when the declarant is a child and exclude statements under similar circumstances when the rape victim is an adult. When the reasoning behind the excited utterance exception is properly applied, however, it becomes apparent that subsequent startling occurrences should stand on the same legal ground as underlying startling occurrences. If the court believes that either an underlying or a subsequent occurrence is startling to the declarant, the declarant's statements made spontaneously while controlled by the stress of that occurrence should be admissible.

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355. LOUISELL & MUELLER, *supra* note 267, § 507 (1980).