The Butler Did It: A Critical Analysis of the Excited Utterance Exception to the Hearsay Rule as Applied in the Third Circuit

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THE BUTLER DID IT!!!: A CRITICAL ANALYSIS OF THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE AS APPLIED IN THE THIRD CIRCUIT

"How do you recognize an excited utterance? I can tell you. If hearsay is offered and it begins with 'My God,' and ends with an exclamation point, it is an excited utterance."¹

I. Introduction

Two frightened men approach a police officer walking the beat. The men are extremely upset and nervous, claiming there is a man two blocks away who is wielding a gun and threatening to "shoot somebody." The officer accompanies the men to where they saw the individual with the gun and observes the individual a block and a half away from his original location. After subduing the threatening individual, the officer arrests the man and books him. At the defendant's trial for gun possession, the officer testifies in open court. When he reports that two men approached him and said there was a man with a gun claiming he was going to "shoot somebody," the defendant's attorney objects to the officer's testimony on the basis of hearsay. The trial court properly admits the officer's testimony into evidence under the excited utterance exception to the hearsay rule.²

This Casebrief concerns the familiar, common law hearsay exception for excited utterances, codified by Federal Rule of Evidence 803(2).³ Although the premise of the excited utterance exception may seem simple on its face, the United States Circuit Courts of Appeals have developed various methods for determining when hearsay evidence is admissible under the exception.⁴ Many judicial opinions and scholars approve of the excited utterance exception to the hearsay rule; nevertheless, some re-

¹ Irving Younger, The Section of Litigation Monograph Series, No. 3: An Irreverent Introduction to Hearsay 33 (1977) [hereinafter Younger, Irreverent Introduction].
² The facts in this hypothetical are similar to the facts in the case of United States v. Brown, 254 F.3d 454, 456-57 (3d Cir. 2001).
³ See Brown, 254 U.S. at 458 (acknowledging excited utterance exception as "a long recognized one"); Stephen A. Saltzburg, Excited Utterances and Family Violence, 15-WTR CRIM. JUST. 39, 39 (2001) (observing excited utterance exception to hearsay rule as "well-known, common law hearsay exception"). Black's Law Dictionary defines an excited utterance as a statement concerning a startling event while the declarant is under the stress and excitement caused by the event. See Black's Law Dictionary 585 (7th ed. 1999) (defining excited utterance). Black's recognizes that an excited utterance "may be admissible as a hearsay exception." Id.
⁴ See Fed. R. Evid. 803(2) (defining excited utterance exception to hearsay rule in one sentence). For explanations of different United States Circuit Courts
main wary of the accuracy of statements that constitute excited utterances.5

This Casebrief explores the development of the law surrounding the excited utterance exception to the hearsay rule in the United States Court of Appeals for the Third Circuit. Part II examines the basics of hearsay to provide a foundational understanding of why hearsay is generally excluded at trial and moreover, why some hearsay is admissible.6 Part III defines and rationalizes the excited utterance exception to the hearsay rule and explains how the different United States Circuit Courts of Appeals have approached the problem of developing a means for determining when hearsay evidence qualifies under the excited utterance exception.7 Part IV analyzes the Third Circuit’s approach to the excited utterance exception in the case United States v. Brown,8 and considers some possible paths for enhancing the Third Circuit’s excited utterance law.9 Part V provides a brief summary of the hearsay topics discussed in this Casebrief and the impact that the Third Circuit excited utterance test has for practitioners.10

II. AN INTRODUCTION TO HEARSAY, ITS GENERAL PROSCRIPTION IN THE FEDERAL COURTS AND EXCEPTIONS

A. What Is Hearsay?

The Federal Rules of Evidence define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”11 This

5. For a discussion of conflicting views on the accuracy of excited utterances, see infra notes 30-34 and accompanying text.
6. For an introductory discussion on hearsay evidence, see infra notes 11-29 and accompanying text.
7. For a discussion on the excited utterance exception to the hearsay rule and the diverse approaches taken by the Federal Circuit Courts of Appeals, see infra notes 35-88 and accompanying text.
8. 254 F.3d 454 (3d Cir. 2001).
9. For an analysis of the Third Circuit’s approach to the excited utterance exception in the case of United States v. Brown and some possible paths for enhancing the Third Circuit’s approach, see infra notes 89-120 and accompanying text.
10. For a brief summary of the issues discussed in this Casebrief, see infra notes 121-27 and accompanying text.
11. FED. R. EVID. 801(c); see also Ohio v. Roberts, 448 U.S. 56, 62 n.4 (1980) (“McCormick defines hearsay evidence as ‘testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.’”); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 801.02[1] (Joseph M. McLaughlin ed., 2d ed. 2001) (“Rule 801 defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted.”). Federal Rule of Evidence 801 provides the definition of hearsay and codifies the common law conception of hearsay. See id. (discussing hearsay evidence).
somewhat awkward definition can be simplified to the two-pronged “working rule” that hearsay is (1) an out-of-court statement; (2) offered to proved the truth of the matter asserted.\textsuperscript{12} An out-of-court statement is an assertion “made other than formally by a witness during trial of the case at hand.”\textsuperscript{13} Out-of-court statements are not hearsay, however, if the statement is offered to prove anything besides the truth of the matter asserted, making a hearsay determination dependent on the statement’s use at trial.\textsuperscript{14}

**B. Hearsay Is Not Admissible: A General Rule**

Hearsay and its procedures have troubled the legal world with perhaps the most litigated and famous rule from the common law.\textsuperscript{15} The seemingly simple hearsay rule is that hearsay is not admissible at trial.\textsuperscript{16}

\textsuperscript{12} See David F. Binder, Hearsay Handbook 7-8 (2d ed. 1983) (providing both working and Federal Rule of Evidence definition of hearsay); Irving Younger, Hearsay: A Practical Guide Through the Thicket 7-9 (1988) [hereinafter Younger, Practical Guide] (recognizing that working rule is necessary for trial lawyers to have at their “fingertips in the courtroom” to determine if statements are hearsay); Younger, Irreverent Introduction, supra note 1, at 6-7 (titling two prong definition of hearsay as “working rule”). Younger discusses the need for trial lawyers to be able to use the working rule and make an immediate determination as to whether an out-of-court statement is hearsay or not. See Younger, Practical Guide, supra, at 7-9 (discussing application of rule of evidence). The first test Younger develops for determining whether or not a statement constitutes hearsay is: “Does the answer to [a] question depend for its probative value upon the credibility of someone who cannot be cross-examined?” Id. at 7. Younger concedes, however, that this test is far too cumbersome for the courtroom setting. See id. at 8 (noting complication for lawyers). The question as to whether or not a statement is hearsay “is addressed to the trial lawyer on the firing line in the courtroom, who must apply the rule in the hurly-burly circumstances of a trial.” Id. at 7. Because of this, a less complicated rule (the working rule) is necessary so that trial lawyers can apply it instantaneously with the “ease and simplicity of application of ‘two plus two equals four.’” Id. at 8.

\textsuperscript{13} Binder, supra note 12, at 8 (defining “formally” as “under oath or affirmation subject to the penalty of perjury,” with ability for all adverse parties to cross-examine before trial of fact).

\textsuperscript{14} See Anderson v. United States, 417 U.S. 211, 219 (1974) (determining that out-of-court statements were not hearsay because “[o]ut-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted”); Binder, supra note 12, at 13 (recognizing that use of out-of-court statement determines whether that statement is hearsay); Younger, Practical Guide, supra note 12, at 10 (stating that out-of-court statement is not hearsay if it is offered for “any other purpose in the world” than to prove truth of matter asserted) (emphasis in original).

\textsuperscript{15} See Michael H. Graham, Witness Intimidation: The Law’s Response 59-61 (1985) (noting development of hearsay rule in English courts in 1600s); Younger, Practical Guide, supra note 12, at 3 (heralding rule that “[h]earsay is inadmissible” as “[t]he most celebrated rule in the entire seamless web of the common law, the most litigated rule we have, the keystone of the law of evidence . . . “); Weinstein, supra note 11, at § 802.02[1][a] (observing that one-third of evidence law concerns hearsay questions).

\textsuperscript{16} See Binder, supra note 12, at 58 (“The hearsay rule is a simple one. Hearsay is excludable at trial.”); Younger, Practical Guide, supra note 12, at 5 (noting
The Federal Rules of Evidence codify this general rule against hearsay evidence in Rule 802.\(^{17}\) Rule 802, however, allows for exceptions to this general proscription against hearsay evidence at trial.\(^{18}\) Exceptions to the hearsay rule are numerous, with many provided by sources other than the Federal Rules of Evidence.\(^{19}\)

C. Rationale for the Hearsay Rule and Its Exceptions

Hearsay is generally inadmissible in American courts because allowing it can lead to the admission of inaccurate statements at trial.\(^{20}\) There are three devices that prevent admitting unreliable statements in court: (1) personal in-court oath, (2) personal presence at trial and (3) the possibility of cross-examination.\(^{21}\) Because a hearsay statement is by definition an

that inadmissibility of hearsay is most basic evidence rule; Stephen A. Saltzburg et al., Federal Rules of Evidence Manual § 802.02[1] (8th ed. 2002) (asserting that general exclusion of hearsay evidence is basic rule); Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 165 (1997) (providing that out-of-court statements cannot be used to prove truth of matter asserted). Orenstein clarifies the rule against the admission of hearsay at trial by stating, "A party cannot introduce a statement made outside the trial to persuade the trier of fact that the statement is substantively true." Id. at 165.

17. See Fed. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

18. See Fed. R. Evid. 803 (allowing for exceptions to hearsay rule); Saltzburg, supra note 16, at § 802.02[1] ("[H]earsay is simply inadmissible unless an exception is applicable.").

19. See Fed. R. Evid. 803 (providing for exceptions in Federal Rules of Evidence, rules made by Supreme Court and rules made by Act of Congress); Ohio v. Roberts, 448 U.S. 56, 62 (1980) ("The basic rule against hearsay, of course, is riddled with exceptions developed over three centuries."); Younger, Irrelevant Introduction, supra note 1, at 18 (discussing existence of numerous exceptions to hearsay rule); Weinstein, supra note 11, at § 802.02[1][a] (declaring that most questions dealing with hearsay rule concern its exceptions). For a discussion concerning the rationale for exceptions to the hearsay rule, see infra notes 21-29 and accompanying text.

20. See Williamson v. United States, 512 U.S. 594, 598 (1994) ("The hearsay rule ... is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener."); Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (grounding hearsay rule on notion that triers of fact should not see untrustworthy evidence); United States v. Console, 13 F.3d 641, 656 (3d Cir. 1993) (acknowledging that hearsay statements are inherently "untrustworthy"); Weinstein, supra note 11, at § 802.02[3] (stating that hearsay rule seeks to remove dangerous possibility that evidence lacks reliability); Orenstein, supra note 16, at 166 (observing that hearsay lacks assurances of reliability).

21. See Weinstein, supra note 11, at § 802.02[2][a]-[c] (listing and explaining three devices that help ensure reliability of statements).

22. See California v. Green, 399 U.S. 149, 158 (1970) (determining that dangers of admitting out-of-court statements are overcome by (1) witness giving statement under oath, (2) having witness sit in front of jury for observance of witness' demeanor and (3) exposing witness to cross-examination, "the 'greatest legal en-
“out-of-court” statement, these devices remain unused on hearsay and cannot assure the statements’ reliability. This potential unreliability of hearsay statements renders them suspect and generally inadmissible at trial. Nonetheless, if the unreliability of out-of-court statements is overcome, or some exception justifies the admissibility of hearsay, courts can admit statements that are hearsay.

The list of exceptions to the hearsay rule is so vast that some commentators believe the exceptions essentially “subsume the general rule.” Several ever invented for the discovery of truth’’); Donnelly v. United States, 228 U.S. 243, 273 (1913) (noting that courts exclude hearsay because it lacks safeguards of oath, presence of declarant in court and ability to cross examine); Weinstein, supra note 11, at § 802.02[2][a]-[c] (explaining protections of “(1) the oath, (2) personal presence at the trial . . . , and (3) cross-examination”); Orenstein, supra note 16, at 166 (listing in-court oath, observance of witness demeanor, possibility of prosecution for perjury and cross-examination as assurances of reliability). Commentators consider cross-examination to be perhaps the most important device to ensure the trustworthiness of statements at trial. See Younger, Irrelevant Introduction, supra note 1, at 2 (positing that touchstone of common law trial is cross-examination); John Henry Wigmore, Evidence in Trials at Common Law § 1367 (Chadbourne rev. 1974) (cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth”).

23. See Williamson, 512 U.S. at 598 (“[T]he ways in which these dangers are minimized for in-court statements—the oath, the witness’ awareness of the gravity of the proceedings, the jury’s ability to observe the witness’ demeanor, and, most importantly, the right of the opponent to cross-examine—are generally absent for things said out of court.”); Weinstein, supra note 11, at § 802.02[3] (noting that there are currently no protective devices to assure reliability).

24. See Chambers, 410 U.S. at 298 (noting that hearsay statements are excluded because they lack “conventional indicia of reliability: they are usually not made under oath . . . ; the declarant’s word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury”); Donnelly, 228 U.S. at 273 (asserting that courts exclude hearsay because “relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice”); United States v. Parry, 649 F.2d 292, 294 (5th Cir. 1981) (explaining that hearsay statements are excluded because jury has no basis for evaluating declarant’s trustworthiness, thus making hearsay statements unreliable).

25. See Williamson, 512 U.S. at 598 (recognizing that some hearsay evidence is less susceptible to hearsay dangers); Ohio v. Roberts, 448 U.S. 56, 66 (1980) (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”); Younger, Practical Guide, supra note 12, at 45 (explaining that trial judges admit hearsay evidence when it is not inherently suspect or lacking reliability); Orenstein, supra note 16, at 167 (acknowledging that hearsay exceptions exist because they belong to “established categories of statements for which the traditional concern with sincerity is offset by some presumed guarantee of reliability”). Moreover, “no coherent unifying theory explains the ‘crazy quilt’ of hearsay exceptions.” Id. Additionally, necessity and the adversary system are justifications providing reasons to admit hearsay into evidence. See id. (citing reasons to admit hearsay evidence).

26. See Younger, Irrelevant Introduction, supra note 1, at 19 (speculating that courts admit hearsay approximately ninety-percent of times when offered); I. Daniel Stewart, Jr., Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah L. Rev. 1, 7 (noting general rule of
eral of the exceptions to the hearsay rule, as laid out in Rule 803, allow courts to receive hearsay evidence without a showing that the declarant is unavailable.27 Courts allow these exceptions because “[j]udicial experience has shown these kinds of evidence to be reliable even in the second-hand form that hearsay, by definition, takes.”28 The excited utterance exception falls into a hearsay exception listed in Rule 803.29

excluding hearsay “even though numerous exceptions largely subsume the general rule”); Jack B. Weinstein, Probative Force of Hearsay, 46 Iowa L. Rev. 331, 346 (1961) (referring to excluded hearsay as “a small and lonely island” in sea of admitted hearsay).

27. See Fed. R. Evid. 803 (providing exceptions to hearsay rule); Saltzburg, supra note 16, at 803.02[1] (8th ed. 2002) (declaring that rationale for unavailability being irrelevant is that statements coming under Rule 803 exceptions are as reliable as declarant giving in-court testimony); Weinstein, supra note 11, at § 803.02 (noting that hearsay allowed without showing that declarant is unavailable under Rule 803). The hearsay exceptions allowed by Rule 803 apply when the availability of the declarant is immaterial. See Fed. R. Evid. 805 (providing exceptions). Moreover, Rule 804 provides hearsay exceptions when the declarant is unavailable as a witness. See Fed. R. Evid. 804 (defining unavailability and listing hearsay exceptions when declarant is unavailable as witness). Furthermore, Rule 807 allows trial courts the discretion to admit other hearsay evidence that is not explicitly excepted from the hearsay rule by Rule 803 or 804. See Fed. R. Evid. 807 (providing “Residual Exception”); Weinstein, supra note 11, at § 807.02 (discussing residual exception).

Interestingly, the United States Supreme Court has suggested that almost all hearsay exceptions require the hearsay declarant to be unavailable, thereby removing the distinction made between the Federal Rules of Evidence 803 and 804 hearsay exceptions. See Roberts, 448 U.S. at 65 (explaining requirement in most cases that prosecution demonstrate that hearsay declarant is unavailable). Specifically, the Court stated:

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers’ preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

Id. In Roberts, the Court cited several cases supporting this proposition, but recognized that demonstrating unavailability is not always necessary. See id. (citing Dutton v. Evans, 400 U.S. 74 (1970), to support proposition that proof of hearsay declarant’s unavailability is not always necessary). Despite making this distinction between Federal Rules of Evidence 803 and 804, the Court retreated from potentially canceling the distinction between these two rules in Bourjaily v. United States, 483 U.S. 171 (1987). In Bourjaily, the Court recognized that “Ohio v. Roberts laid down only ‘a general approach to the problem’ of reconciling hearsay exceptions with the Confrontation Clause.” Id. at 182. Justice Rehnquist explained that in some circumstances, demonstrating the unavailability of the declarant is unnecessary when admitting hearsay evidence. See id. (citing United States v. Inadi, 475 U.S. 387 (1986)).

28. Weinstein, supra note 11, at § 803.02.

29. See Fed. R. Evid. 803(2) (setting out excited utterance exception to hearsay rule); David v. Pueblo Supermarket, 740 F.2d 230, 235 (3d Cir. 1984) (stating availability of declarant is immaterial); Saltzburg, supra note 3, at 39 (noting that exception does not require excited utterance declarant to be unavailable for court to admit statement).
III. THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE

A. The Excited Utterance Exception and Its Rationale

Federal Rule of Evidence 803(2) codifies the common-law excited utterance exception to the hearsay rule.\(^3\) Rule 803(2) states that whether or not the declarant is available as a witness, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded from evidence by the hearsay rule.\(^4\) The rationale behind Rule 803(2) is that people who are under the influence of excitement triggered by an external startling event will not have the reflective capabilities necessary for fabrication.\(^5\) Some commentators disapprove of the rationale that sup-

30. See Fed. R. Evid. 803(2) (establishing excited utterance exception to hearsay rule); Saltzburg, supra note 5, at 39 (observing that Rule 803(2) creates "well-known, common law" excited utterance exception to hearsay rule).

31. See Fed. R. Evid. 803(2) (providing language for hearsay exception); Saltzburg, supra note 3, at 39 ("The requirements of an excited utterance are met when an individual witnesses a startling event or condition causing such stress that the witness makes a statement relating to the cause of the stress.").

32. See United States v. Joy, 192 F.3d 761, 766 (7th Cir. 1999) ("This exception is premised on the belief that a person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while his mind is preoccupied with the stress of an exciting event."); United States v. Tocco, 135 F.3d 116, 127 (2d Cir. 1998) (providing rationale for hearsay exception where declarant has limited capacity to fabricate statements); Cole v. Tansi, 926 F.2d 955, 958 (10th Cir. 1991) (finding unidentified witness' statement to fall within excited utterance exception to hearsay rule and that statement was not product of conscious reflection); David, 740 F.2d at 235 (holding that trial judge did not abuse discretion and that it was reasonable that declarant did not have time to fabricate); Fed. R. Evid. 803 advisory committee's note (urging spontaneity as key factor and that exclamations under excited conditions are unfettered by conscious fabrication); Saltzburg, supra note 16, at § 803.02[3][a] (stating that excitement lessens reflective capacity, which provides for trustworthiness); Weinstein, supra note 11, at § 803.04[1] ("The premise underlying the exception for excited utterances is that a person under the stress of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication."); Wigmore, supra note 22, at § 1747 (explaining that stress of nervous excitement produces spontaneous truthful responses to perceptions derived from external shock). But see Ferrer v. Duckworth, 902 F.2d 545, 548 (7th Cir. 1990) ("[T]he excited utterance may not be as reliable a form of hearsay as some have thought."); Fed. R. Evid. 803 advisory committee's note (observing that theory of truthfulness spawned by excited state has been criticized and that excitement potentially lessens accuracy of observation) (citing Robert M. Hutchins and Donald Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 COLUM. L. REV. 432 (1928)); Stanley A. Goldman, Not So "Firmly Rooted": Exceptions to the Confrontation Clause, 66 N.C. L. REV. 1, 31 (1987) ("Although strong emotion may negate the power to fabricate, it may also distort the ability to observe or recall and thereby reduce the trustworthiness of the declarant's account."); Edmund M. Morgan, Res Gestae, 12 WASH. L. REV. 91, 98 (1937) (criticizing startling occurrence for res gestae "for it insists upon an element which has a positive tendency to produce inaccurate observation—and inaccuracy of observation is one of the greatest obstacles to the discovery of facts in litigation"); Orenstein, supra note 16, at 178-83 (critiquing excited utterance exception on psychological grounds).
ports the excited utterance exception.\textsuperscript{33} Despite this disapproval, the inability to fabricate continues to be the reason why courts consider excited utterances trustworthy and allowable as evidence.\textsuperscript{34} 

B. How Courts Outside the Third Circuit Apply the Excited Utterance Exception

The United States Circuit Courts of Appeals vary on how they determine what constitutes an excited utterance under Rule 803(2).\textsuperscript{35} The courts of appeals have developed a total of seven different methods to determine whether hearsay evidence is admissible under the excited utterance exception.\textsuperscript{36} This section discusses the various methods used by the different circuits, later drawing from several of them to discuss possible enhancements to the Third Circuit's approach.\textsuperscript{37}

1. First, Seventh and Tenth Circuits' Three-Element Approach

The First, Seventh and Tenth Circuit Courts of Appeals utilize a three-element test to establish what hearsay evidence is admissible under Rule 803(2).\textsuperscript{38} These three circuits apply the test of whether: "1) a startling

\textsuperscript{33} See Orenstein, supra note 16, at 197-212 (employing "a feminist method to challenge the wisdom and fairness of the excited utterance exception"). For Professor Morgan's critical view of the reasoning supporting the excited utterance exception, see supra note 32 and accompanying text.

\textsuperscript{34} See White v. Illinois, 502 U.S. 346, 357 (1992) (finding that excited utterance exception to hearsay rule is "firmly rooted" and trustworthy); Idaho v. Wright, 497 U.S. 805, 820 (1990) (claiming that basis for Rule 803(2) "is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous"); United States v. Brown, 254 F.3d 454, 458 (3d Cir. 2001) (explaining that premise of excited utterance exception is that excitement nullifies ability to reflect and fabricate); Joy, 192 F.3d at 766-67 (discussing inability to deliberately reflect while exciting event flusters declarant's mind); Fed. R. Evin. 803 advisory committee's note (recognizing that although some commentators criticize concept behind excited utterance exception, it nonetheless "finds support in cases without number").

\textsuperscript{35} For a discussion concerning the various methods of determining what statements constitute excited utterances, see infra notes 38-88 and accompanying text. In United States v. Brown, the Third Circuit explained that courts have developed various methods for determining what are excited utterances. See Brown, 254 F.3d at 458 (noting popular three-element approach and Third Circuit's four-element approach).

\textsuperscript{36} For a discussion of these various methods, see infra notes 38-88 and accompanying text.

\textsuperscript{37} For a discussion concerning the enhancement of the Third Circuit methodology, see infra notes 117-24 and accompanying text.

\textsuperscript{38} See Joy, 192 F.3d at 766 (pronouncing three elements that party seeking admission of hearsay evidence must demonstrate); United States v. Hall, 165 F.3d 1095, 1109 (7th Cir. 1999) (allowing introduction of hearsay evidence if three conditions are met); United States v. Zizzo, 120 F.3d 1338, 1355 (7th Cir. 1997) (acknowledging that Rule 803(2) "comes into play only when" three factors met); United States v. Sowa, 34 F.3d 447, 453 (7th Cir. 1994) (citing United States v. Hart
event or condition occurred; 2) [whether] the statement was made while the declarant was under the stress of excitement caused by the event or condition; and 3) [whether] the statement relates to the startling event or condition. There is rarely dispute as to whether the proponent admitting the hearsay has satisfied the first or third elements. Thus, most of the litigation concerns whether the test's second element is satisfied. Courts addressing the stress of excitement requirement focus on whether the declarant personally observed the startling event. Furthermore, they concentrate on whether the statement was a product of the declarant's mental state caused by the startling event rather than focusing on rigid time restrictions during which declarants can make excited utterances.

\[39.\] 39. [Defendant] contends that his brother was not under the stress of the excitement when he made the statements at issue, as several minutes had passed. "An excited utterance need not be contemporaneous with the startling event to be admissible under rule 803(2)." Rather, the utterance must be contemporaneous with the excitement engendered by the startling event.
2. The Fifth Circuit's Application of the Webb Test

The Fifth Circuit applies the Webb test, which is based on the test formulated in the Seventh Circuit case Webb v. Lane. This non-elemental approach asks the question of "whether the statements were the product of reflective thought or whether they were the result of the startling event." When determining whether the statement is an excited utterance, the Fifth Circuit considers relevant, but not dispositive, the time elapsed between the startling event and the hearsay statement. Therefore, the Fifth Circuit, like the Seventh Circuit, focuses on the declarant's mental state rather than deferring to the time elapsed.

3. The Eighth Circuit's Multi-Factor Test

The Eighth Circuit takes into account six relevant factors when considering whether a hearsay statement was an excited utterance to ensure that "the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation." The six factors, set forth in

Id. (citations omitted); see also Hall, 165 F.3d at 1109 (noting that length of time following startling event is not dispositive, but finding two days to be too much time for conscious reflection); Akins, 1998 WL 380509, at *3 (stating that "lapse of time does not necessarily negative the existence of an excited state" and recognizing previous case where court admitted excited utterance that happened nine hours after startling event because declarant was under stress of startling event) (citing Garcia v. Watkins, 604 F.2d 1297, 1300 (10th Cir. 1979)); Zizzo, 120 F.3d at 1355 (holding that declarant was not excited enough to preclude conscious reflection, considering that federal agents described declarant as calm and collected); Sowa, 34 F.3d at 453 (intimating that time element is not controlling and, in this case, essentially inconsequential considering that declarant remained under influence of excitement from startling event as he cried for twenty minutes after startling event occurred); Martinez, 951 F.2d at 135 ("Though John was not an innocent bystander, the facts do support a finding that he was startled or excited at the time of the statements."); Webb v. Lane, 922 F.2d 390, 394 (7th Cir. 1991) ("[I]t is well settled law in this circuit that the amount of time between the startling event and the hearsay statement, although relevant, is not dispositive as to the question of whether the statement is an excited utterance."); Moore, 791 F.2d at 572 (holding that time passage is not dispositive in determining whether statement is excited utterance and that testimony that declarant was excited during statement may be sufficient). But see Bailey, 834 F.2d at 228 ("It was satisfied that the time lapse—apparently about three minutes—was short enough to warrant the conclusion that Grant was still under the excitement of the event when she spoke.")

44. 922 F.2d 390; see United States v. Baptiste, 264 F.3d 578, 590-91 (5th Cir. 2001) (applying and citing Webb v. Lane, 922 F.2d 390, 394 (7th Cir. 1991)).
45. Id. at 590.
46. See id. at 590-91 (citing Webb for proposition that time elapsed is relevant).
47. See id. at 591 (holding that declarant's statements were not inadmissible hearsay even though it was possible that thirty minutes had passed).
48. Reed v. Thalacker, 198 F.3d 1058, 1061-62 (8th Cir. 1999) (maintaining that two-year-old's statement, made either days or months after event, required cross examination and possibly was result of coaching); see United States v. Marrowbone, 211 F.3d 452, 455 (8th Cir. 2000) (holding statements concerning molestation charge were not excited utterances because of possible fabrication due to lapse of time and declarant's age, motive to lie, and known actions); United
"United States v. Iron Shell" are: (1) the amount of time between the startling event and the statement; (2) whether the statement was the product of an inquiry; (3) the declarant’s age; (4) the declarant’s physical and mental condition; (5) the event’s characteristics; and (6) the statement’s subject matter. The courts in the Eighth Circuit efficaciously use these factors to fairly determine what are excited utterances. A benefit of using these six factors is that it forces courts within the Eighth Circuit to focus on whether the declarant was under the influence of continuing stress and prevents them from concentrating too greatly on any one aspect of the hearsay statement.

49. 633 F.2d 77 (8th Cir. 1980).

50. See Marrowbone, 211 F.3d at 454-55 (citing Moses for six factors to consider whether hearsay statement was excited utterance); Reed, 198 F.3d at 1061 (same); Phelps, 168 F.3d at 1054 (same); Martin, 59 F.3d at 769 (same); Moses, 15 F.3d at 777-78 (citing Iron Shell for six factors to consider whether hearsay statement was excited utterance); Iron Shell, 633 F.2d at 85-86 (setting forth six factors).

51. See Marrowbone, 211 F.3d at 455 (examining six factors and finding no excited utterance); Moses, 15 F.3d at 778 (applying three of six factors to find hearsay statement admissible as excited utterance).

52. See Marrowbone, 211 F.3d at 455 ("L.D.'s actions also do not show continuous excitement or stress from the time of the event until the time of the statements."); Reed, 198 F.3d at 1061 ("The difficulty for the state in this case is that the record fails to establish that VR's statements to her mother and the babysitter occurred while VR was under the continuing stress of the alleged sexual assault."); Phelps, 168 F.3d at 1055 (finding excited utterances because during one statement declarant "sounded upset," in another she was "scared and nervous," and in final statement she was "visibly distraught"); Martin, 59 F.3d at 769 (holding that trial court did not abuse its discretion in finding excited utterance exception because declarant was scared and nervous); Moses, 15 F.3d at 778 (finding declarant was "under the stress of excitement of the assault when he made the statement").

An interesting issue that the Eighth Circuit often considers concerns children and excited utterances referring to sexual abuse. See Marrowbone, 211 F.3d at 455 (considering teenager's sexual abuse allegations); Reed, 198 F.3d at 1062 (finding excited utterance exception did not apply for child's statement concerning sexual abuse). In Reed, the Eighth Circuit discussed the view that children are "less likely to fabricate a claim of sexual assault abuse because of their unfamiliarity with the subject matter, and their limited capacity for conscious reflection motivated by self-interest." Id. The Eighth Circuit, nonetheless, discounted this concept because "it seems to us that infants are also significantly more likely to deliver a distorted recollection." Id. In Marrowbone, however, the Eighth Circuit seemed to agree with the rationale that children will not fabricate a story and contrasted a teenager's "acute ability to deliberate and fabricate." Marrowbone, 211 F.3d at 455.
4. The Fourth Circuit’s Two-Element Approach

The Fourth Circuit applies a two-pronged test for determining whether a hearsay statement is admissible as an excited utterance. The court requires: (1) the declarant to experience a startling event or condition, and (2) the declarant to react from the stress caused by the event and not from reflection or fabrication. Additionally, the Fourth Circuit considers five of the Eighth Circuit’s six factors set forth in Iron Shell to determine if the declarant reacted under the stress of the startling event. A notable advantage is that the court does not rely heavily on the time elapsed between the event and the statement.

5. The Sixth Circuit’s Three-Element Approach

The Sixth Circuit employs a three-part test that is distinct from the First, Seventh and Tenth Circuits’ three-part test. The Sixth Circuit admits hearsay statements under the excited utterance exception when: 1) there is a startling event; 2) the declarant makes the statement before

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54. See Widener, 1992 WL 42949 at *1 (citing Morgan, 846 F.2d at 947); Morgan, 846 F.2d at 947 (“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.”).

The Sixth Circuit also applies a two-pronged test similar to the test used in the Fourth Circuit. See United States v. McLennan, 563 F.2d 943, 948 (9th Cir. 1977) (establishing two-pronged test). In McLennan, the Ninth Circuit established the test for whether a hearsay statement qualifies under the excited utterance exception to the hearsay rule. See id. (holding that statement did not fall within hearsay exception). For a hearsay statement to be admissible as an excited utterance, “[f]irst, there must be some occurrence or event sufficiently startling to render normal reflective thought processes inoperative. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.” Id.; see also People v. Cepeda, 69 F.3d 369, 372 (9th Cir. 1995) (stating rule set out in McLennan). Although the Ninth Circuit’s test is nearly the same as the Fourth Circuit’s test, the Ninth Circuit does not explicitly look to the factors set out in Iron Shell as the Fourth Circuit does. For a further discussion of the Fourth Circuit’s use of Iron Shell, see infra notes 54-55 and accompanying text.

55. See Morgan, 846 F.2d at 947 (considering five of six factors developed in Iron Shell but leaving out factor of whether statement was made in response to inquiry).

56. See Widener, 1992 WL 42949 at *2 (holding statement was excited utterance even though time lapse was not precisely known).

57. Compare United States v. Moore, 791 F.2d 566, 570 (7th Cir. 1986), rev’d 865 F.2d 149 (7th Cir. 1989) (requiring that “1) a startling event or condition occurred; 2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; and 3) the statement relates to the startling event or condition”), with Haggins v. Fort Pillow St. Farm, 715 F.2d 1050, 1057 (6th Cir. 1983) (requiring (1) startling event, (2) that statement be made before time to fabricate and (3) that statement be made while under influence of excitement caused by event)
there is time to fabricate; and 3) the statement is made under the stress of the event’s excitement. 58 The court gives great deference to the amount of time between the event and the statement when determining the spontaneity of an excited utterance. 59 Nevertheless, it does consider other factors when making this determination and draws selectively from the six factors developed in Iron Shell. 60

6. The Second Circuit’s Non-Elemental Method

The Second Circuit does not analyze any itemized components of a hearsay statement when determining whether that statement is admissible as an excited utterance. 61 Instead, the court simply tries to determine whether the declarant was still under the excitement caused by the startling event. 62 This pure approach to the excited utterance exception allows courts within this circuit to focus on the actual mental state of the declarant and the startling event’s effects on him/her. 63

C. The Third Circuit’s Four-Element Approach

The Third Circuit employs a novel four-part test, developed in Miller v. Keating, 64 to determine whether hearsay evidence is admissible as an

58. See Haggins, 715 F.2d at 1057 (setting out three-part test); see also United States v. Taylor, 1992 WL 322369, at *4 (6th Cir. 1992) (citing Haggins).

59. See Haggins, 715 F.2d at 1057-58 (citing McCormick’s HANDBOOK ON THE LAW OF EVIDENCE § 297 (2d ed. 1972)). In Haggins, the court noted that “the most important of the many factors entered into this determination is the time factor[].” Id. (citing McCormick).

60. See id. at 1058 (discussing Iron Shell and applying factors of declarant’s age and physical condition). In United States v. Wolak, the Sixth Circuit made a curious statement about a declarant’s absence at trial. See 923 F.2d 1193, 1196 (6th Cir. 1991) (discussing reasoning). In finding that the trial court did not abuse its discretion by excluding the statement, the Sixth Circuit considered the fact that “[t]here was no claim that Carter was not available to testify and no foundation was laid . . . to explain his absence . . . .” Id. This fact should be irrelevant because the excited utterance exception under the Federal Rules of Evidence, like all other Rule 803 exceptions, allows courts to receive hearsay evidence without a showing that the declarant is unavailable. For a further discussion about the unavailability requirement, see supra note 27 and accompanying text.

61. See United States v. Tocco, 135 F.3d 116, 128 (2d Cir. 1998) (holding statement admissible as excited utterance because declarant was “all hyped up” and “nervous”); United States v. Scarpa, 913 F.2d 995, 1017 (2d Cir. 1990) (admitting hearsay statement because declarant was nervous even hours after crew beat him up).

62. See Scarpa, 913 F.2d at 1017 (“There is little doubt that at the time Leon gave the statements to Detective Rodenburg, he was still under the stress of excitement caused by his beating at the candy store, and by his sister’s screams when DeCarlo appeared at the hospital.”).

63. See Tocco, 135 F.3d at 128 (focusing on nervous character of declarant); Scarpa, 913 F.2d at 1017 (same).

64. 754 F.2d 507 (3d Cir. 1985).
excited utterance.65 None of the other circuits have adopted this approach.66 When examining hearsay evidence for admissibility under the excited utteration exception, the Third Circuit requires: "(1) a startling occasion, (2) a statement relating to the circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time to reflect and fabricate."67

Several issues can arise while litigating the excited utteration exception to the hearsay rule under the Third Circuit's four-part formulation.68 One minor problem that appears is whether the first prong is met—that is, whether the startling event even occurred.69 Litigators, however, can quickly dispose of this argument considering "the generally prevailing rule


66. See Brown, 254 F.3d at 458 ("In the Third Circuit, we have expanded the requirements of admissibility [for excited utterances] ... ").

67. Miller, 754 F.2d at 510; see also Brown, 254 F.3d at 458-59 (applying four-part excited utterance test to determine whether statements concerning man with gun were excited utterances); United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998) (reciting four-part test and determining whether note concerning car change at robbery was excited utterance); Coyle v. Kristjan Palusu Marines Maritime Co., Ltd., 83 F. Supp. 2d 535, 542-44 (E.D. Pa. 2000) (applying four-part test to two statements concerning fall taken by man and finding one statement admissible as excited utterance and other inadmissible as hearsay); Boucher v. Grant, 74 F. Supp. 2d 444, 450-51 (D.N.J. 1999) (holding that statement made concerning car accident was admissible as excited utterance under four-part excited utterance formulation); Shinners v. K-Mart Corp., 847 F. Supp. 31, 34 (D. Del. 1994) (holding unidentified declarant's statement inadmissible because of failure to meet heavier burden for unidentified declarant established in Miller).

This four-part test, however, has not always been the test the Third Circuit has utilized to determine which statements are considered excited utterances. In 1984, the Third Circuit used a three-part test, set forth in David v. Pueblo Supermarket, 740 F.2d 230 (3d Cir. 1984), and less than a year later, noted a two-part test in United States v. Downing, 753 F.2d 1224 (3d Cir. 1985). Within a month of the Downing decision, however, the Third Circuit developed the four-part test in Miller that is the current standard used to determine what statements are considered excited utterances. See Brown, 254 F.3d at 458-59 (utilizing four-part Miller test for excited utterance exception to hearsay rule).

68. See generally Brown, 254 F.3d at 458-62 (discussing issues of whether startling event occurred and whether statement was product of reflection and fabrication); Mitchell, 145 F.3d at 576-77 (analyzing whether declarant personally perceived event and whether declarant was under stress of excitement caused by event); Miller, 754 F.2d at 510-12 (addressing problem of personal perception); Coyle, 83 F. Supp. 2d at 543 (finding no excited utterance because problem concerning whether wire placement was personally perceived); Boucher, 74 F. Supp. 2d at 451 (discussing "whether Grant was 'under the stress of excitement' while speaking to Boucher 'immediately after the accident'"); Shinners, 847 F. Supp. at 34 (failing to find that plaintiffs met heavier burden for unidentified declarant).

69. See Brown, 254 F.3d at 459 ("Brown contends . . . that the government failed to provide evidence of the startling event . . . ").
that an excited utterance may of itself be sufficient to establish the startling event."\(^{70}\)

Likewise, it is a relatively minor issue as to whether a party has satisfied the second prong of the test.\(^{71}\) A disputable issue that litigators need to deal with, however, is whether the declarant personally perceived the startling occasion.\(^{72}\) The Third Circuit does not require direct proof of personal perception but utilizes a preponderance standard when evaluating the statement.\(^{73}\) Thus, courts cannot draw an inference of personal perception when the words of the statement or the surrounding circumstances do not "show more likely than not that the declarant saw the event."\(^{74}\) It is the vague and case-specific nature of this preponderance of the evidence standard that exposes the test's third prong to litigation.\(^{75}\)

\(^{70}\) *Id.* In *Brown*, the Third Circuit cited a decision from the Seventh Circuit and also decisions from several state courts for the proposition that the declarant's statement was sufficient to establish that the startling event occurred. See *id.* (citing courts from Colorado, Minnesota, West Virginia, Texas and Seventh Circuit's decision in *United States v. Moore*, 791 F.2d 566, 571 (7th Cir. 1986)). The Third Circuit also cited the advisory committee note for Rule 803(2) to demonstrate that this method of establishing the startling event is the "prevailing practice." See *id.* (noting that if hearsay statement itself did not establish startling event, too much valuable evidence would be excluded). Judge Rendell, however, who dissented in *Brown*, disagreed with the proposition that a hearsay statement, alone, can verify that a startling occasion occurred. See *id.* at 465 (disapproving of majority's application of excited utterance exception). Judge Rendell stated that "[w]hile the majority's view may be 'the majority view,' that does not remove the need for an assessment on a case-by-case basis of the appropriate ruling regarding admissibility. The unique factual setting presented here required a different result." *Id.*

\(^{71}\) See *Miller*, 754 F.2d at 510-11 ("There is . . . little doubt that the declarant's statement relates to the circumstances of the occurrence."); *Coyle*, 83 F. Supp. 2d at 542 ("Finally, it is clear that Mr. Coyle's statement that he backed into the wire . . . is related to the startling event of falling."); *Boucher*, 74 F. Supp. 2d at 451 (disposing quickly of first three elements of excited utterance exception).

\(^{72}\) See *Mitchell*, 145 F.3d at 576 (noting that appellant's "principal challenge" to admission of hearsay evidence is whether declarant personally perceived what statement contained); *Miller*, 754 F.2d at 511-12 (addressing personal knowledge problem); *Coyle*, 83 F. Supp. 2d at 543 (holding that plaintiff cannot show that statement was based on personal perception).

\(^{73}\) See *Miller*, 754 F.2d at 511 ("Direct proof of perception, or proof that forecloses all speculation is not required."); *Coyle*, 83 F. Supp. 2d at 543 (stating that proof that removes all speculation is not necessary). In *Miller*, the Court of Appeals suggested that the statement itself can, under certain circumstances, prove personal perception by a preponderance of the evidence. See 754 F.2d at 511 (noting in dicta that statement itself can help establish admissibility).


\(^{75}\) See *Mitchell*, 145 F.3d at 577 (noting that even though "the government argues that '[a] common sense reading of the note suggests that the person writing the note was perceiving the event and in close proximity,' . . . the record here is devoid of circumstances indicating by a preponderance that the author of the anonymous note actually saw Mitchell change cars"); *Miller*, 754 F.2d at 511 (sig-
Furthermore, when the identity of the declarant is unknown, proving the third prong of the test becomes even more complicated. The cases have suggested a "heavier" burden when proving that an anonymous declarant personally perceived a startling event. Nevertheless, Third Circuit courts have applied a preponderance standard to prove personal perception of both identified and unidentified declarants.

The final significant hurdle for litigators trying to admit an excited utterance in the Third Circuit concerns the temporal limitations involved when considering whether a declarant has had time to "reflect and fabricate." The question the courts ask is whether the declarant's statement "likely occurred during the period of excitement engendered by their suggesting several circumstances under which declarant could have made statement without actually personally observing event).

76. See Mitchell, 145 F.3d at 576 (citing Miller for proposition that parties need to meet heavier burden for third prong when attempting to admit statement of unidentified declarant); Miller, 754 F.2d at 511 ("[C]ircumstantial evidence of the declarant's personal perception must not be so scanty as to forfeit the 'guarantees of trustworthiness' which form the hallmark of all exceptions to the hearsay rule.") (citing Fed. R. Evid. 803 advisory committee's note).

77. See Miller, 754 F.2d at 510 ("A party seeking to introduce such a statement carries a burden heavier than where the declarant is identified to demonstrate the statement's circumstantial trustworthiness."); see also Mitchell, 145 F.3d at 576 (relying on Miller formulation).

78. Compare Mitchell, 145 F.3d at 577 (applying preponderance of evidence test to determine whether anonymous note established personal perception) and Miller, 754 F.2d at 511 (using preponderance of evidence test and finding that record did not establish that anonymous declarant saw other driver "cut in"), with Coyle, 83 F. Supp. 2d at 545 (applying preponderance of evidence test to whether identified declarant personally perceived event). The drawback to comparing Coyle with Mitchell and Miller is that the second statement in Coyle could easily be considered a statement about an event that is not startling, while the statements in Mitchell and Miller are more clearly "related" to a startling event. See Mitchell, 145 F.3d at 577 (noting statement of anonymous note concerning switching cars during robbery); Miller, 754 F.2d at 511 (premising holding on statement that concerned car accident); Coyle, 83 F. Supp. 2d at 543 (discussing statement about wire placement and not about startling event of plaintiff's fall plaintiff took). Thus, the statement in Coyle and the statements in Miller and Mitchell are not completely analogous, but the courts nonetheless apply the preponderance standard for personal observation to both identified and unidentified declarants. See Mitchell, 145 F.3d at 577 (applying preponderance of evidence test for personal observation of anonymous declarant); Miller, 754 F.2d at 511 (same); Coyle, 83 F. Supp. 2d at 543 (applying preponderance of evidence test for personal observations of known declarant).

79. See United States v. Brown, 254 F.3d 454, 460 (3d Cir. 2001) ("Brown also asserts that the government failed to satisfy the fourth criterion of the Mitchell test: that the statements were made before declarants had time to reflect and fabricate."); Mitchell, 145 F.3d at 577 (noting that evidence did not suggest that statement was made before time to reflect and fabricate); Miller, 754 F.2d at 512 ("The circumstances external to the statement itself . . . fail to show that the declarant was excited when he spoke."); Boucher v. Grant, 74 F. Supp. 2d 444, 451 (D.N.J. 1999) ("[T]his Court must make a determination whether Grant was 'under the stress of excitement' while speaking to Boucher 'immediately after the accident.'").
sighting of the [startling event]. An affirmative answer assures courts that the statement was not a product of conscious reflection. The Third Circuit, however, does not answer this question by directly regarding the declarant’s mental state. Instead, the courts rely on the amount of time that had passed since the startling event occurred to ascertain whether the declarant was still under the influence of the excitement of the event. Although time is not claimed to be the determinative factor in making an excited utterance decision, it is given substantial consideration at times.

IV. ANALYSIS OF UNITED STATES v. BROWN AND POTENTIAL DEVELOPMENT OF THE THIRD CIRCUIT’S EXCITED UTTERANCE LAW


A. Facts of United States v. Brown

At 10:50 pm on May 25, 1998, Police Officer Michael Hughes was investigating a missing youth report on Clinton Street in Camden, New

80. Brown, 254 F.3d at 460; see also Boucher, 74 F. Supp. 2d at 451 (making determination whether declarant was under stress of excitement and whether state of mind “ruled out the possibility of conscious reflection”).

81. See Miller, 754 F.2d at 512 (“The assumption underlying the hearsay exception of Rule 803(2) is that a person under the sway of excitement temporarily loses the capacity of reflection and thus produces statements free of fabrication.”).

82. See Brown, 254 F.3d at 461 (relying on elapsed time). In Brown, the Third Circuit held that:

it was entirely reasonable for the District Court to infer from the testimony that only a short time had passed between the startling event and the statements, that the declarants were still visibly in an excited state, that their statements thus were likely made in a state of excitement originating with the event, and consequently that their statements were admissible as excited utterances pursuant to Rule 803(2).

Id. But see Miller, 754 F.2d at 512 (answering question directly by holding “it is not necessarily an abuse of discretion to admit the statement so long as the trial court explicitly finds it was not the product of conscious reflection”).

83. See Brown, 254 F.3d at 460 (discussing Second, Eighth and Tenth Circuit decisions concerning elapsed time and its relation to excited utterance); Mitchell, 145 F.3d at 577 (refusing to apply excited utterance exception because “trial court could not reasonably find that there was no time to fabricate the statement”); Boucher, 74 F. Supp. 2d at 451 (“The brief lapse of time coupled with [defendant’s] mental state cannot give rise to a finding of conscious reflection.”).

84. See Mitchell, 145 F.3d at 577 (citing Third and Seventh Circuit cases concerning excited utterance time allowances and holding that in present case enough time could have elapsed for fabrication); Miller, 754 F.2d at 512 (stating proposition that there are no arbitrary time limits for operation of Rule 803(2), and basing decision on McCurdy v. Greyhound Corp., 346 F.2d 224, 226 (3d Cir. 1965)).

85. 254 F.3d at 454.

86. See id. at 458 (citing Miller v. Keating).
While there, two nervous men approached him and yelled, in an excited tone, that there was a man approximately two blocks away who had a gun and was threatening to shoot somebody. Officer Hughes and the two men found Brown, a block and a half away from where the men originally saw him, brandishing a gun. Officer Hughes radioed for help, subdued Brown and then arrested him.

Federal authorities prosecuted Brown for possession of a firearm by a convicted felon. "When Officer Hughes testified at trial that the two men had told him about the man waving the gun and saying he was going to shoot somebody, Brown’s attorney objected and requested a mistrial." The trial court issued a memorandum opinion admitting Officer Hughes’ testimony as an excited utterance. Brown was subsequently convicted and sentenced to seventy-eight months in prison. Brown appealed his conviction, but the Third Circuit affirmed the trial court’s opinion.

### B. The Legal Analysis in Brown

In Brown, the Third Circuit held that the testimony of Officer Hughes, which included the statements of the two men who approached him about Brown’s dangerous behavior, was properly admitted in the trial court under the excited utterance exception to the hearsay rule. The court began its analysis by recognizing that excited utterances are admissible hearsay evidence because “excitement suspends the declarant’s powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self interest and therefore rendered unreliable.” The court then proceeded to recite the four-element test used to determine which hearsay statements are admissible under the excited utterance exception.

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87. See Brown, 254 F.3d at 456 (discussing reason Hughes was dispatched to Clinton Street).
88. See id. at 456-57 (recounting testimony of Officer Hughes).
89. See id. at 457 (approximating distance at one and one half blocks).
90. See id. (noting that ammunition in Brown’s gun was not chambered and that firing pin was broken).
91. See id. ("In light of Brown’s prior federal convictions for six counts of armed robbery and other convictions for automobile theft and possession of a loaded firearm, the gun possession case was referred to federal authorities for prosecution.").
92. Id.
93. See id. (explaining procedural history).
94. See id. (stating that three-year term of supervised release would follow Brown’s prison term).
95. See id. at 462 (affirming trial court).
96. See id. (stating holding of court).
97. Id. at 458 (citing Seventh Circuit decision in United States v. Joy).
98. See id. (citing prior Third Circuit decisions in United States v. Mitchell and Miller v. Keating). For a discussion concerning the application of the Third Circuit’s four-element excited utterance test, see supra notes 64-88 and accompanying text.
After establishing the Third Circuit's precedent concerning the excited utterance exception, the court addressed Brown's arguments concerning why the trial court should not have admitted Officer Hughes' hearsay testimony.99 Brown's first contention was that the prosecution did not succeed in providing any evidence of the startling event other than Hughes' testimony concerning the hearsay statements themselves.100 The court, however, denied the merit of this argument, stating the "generally prevailing rule that an excited utterance may of itself be sufficient to establish the occurrence of the startling event."101

The court then attended to the issue of whether the declarants made the hearsay statements before they had time to reflect and fabricate.102 The court held that the declarants made the statements before they had time to fabricate, and based this decision on the concept that Federal Rule of Evidence 803(2) does not require that the statement be contemporaneous with the event's excitement.103 Here, the Third Circuit agreed with the trial court that the declarants made the statements under the excitement caused by the event because the trial court could reasonably "infer from the testimony that only a short time had passed between the startling event and the statements, [and] that the declarants were still visibly in an excited state..."104 Although the court ultimately held that the statements were admissible because of the excited mental state of the declarants, it nonetheless centered much of its discussion on the time lapse between a startling event and an excited utterance, basing its final decision on the "short time" that transpired in the case.105

C. Positive Aspects of the Third Circuit's Four-Part Approach

The Third Circuit's four-element test to determine if a hearsay statement is admissible as an excited utterance is valuable because it encourages courts to fulfill the vision of the framers of Federal Rule of Evidence 803(2).106 The framers of Rule 803(2) determined that excited utter-

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99. See id. at 459-61 (considering Brown's arguments).
100. See id. at 459 (discussing contentions).
101. Id. (citing United States v. Moore, 791 F.2d 566, 571 (7th Cir. 1986)). In Brown, the Third Circuit noted that academic commentators as well as most jurisdictions find that the hearsay statements in themselves are sufficient proof of the startling event. See id. (requiring no independent corroborating evidence).
102. See id. at 460 (skipping issues of whether prosecution satisfied third and fourth criteria of Third Circuit's excited utterance test).
103. See id. (discounting idea that hearsay statements need to be contemporaneous with event to be admissible under excited utterance exception).
104. Id. at 461.
105. See id. at 460-61 (citing multiple case holdings concerning amount of time courts have allowed to transpire between startling event and excited utterance).
106. See Fed. R. Evid. 803 advisory committee's note ("The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.").
ances should be admitted because people who experience startling events often lack the ability to fabricate stories while under the influence of the event’s excitement.\textsuperscript{107} Thus, by requiring courts to find a startling event, a statement relating to the event, a declarant who personally has observed the event and a statement made before there has been time to fabricate, the Third Circuit attempts to assure that no court will admit unreliable hearsay evidence.\textsuperscript{108}

D. The Third Circuit’s Adoption of Iron Shell Factors

The Third Circuit should consider adopting the six factors set out in the Eighth Circuit case \textit{United States v. Iron Shell}.\textsuperscript{109} As discussed in Part III, the Eighth Circuit, in \textit{Iron Shell}, developed six guiding factors to determine if a hearsay statement was “spontaneous, excited or impulsive rather than the product of reflection and deliberation.”\textsuperscript{110} These six factors include the amount of time between the startling event and the statement, whether the statement was the product of an inquiry, the declarant’s age, the declarant’s physical and mental condition, the event’s characteristics and the statement’s subject matter.\textsuperscript{111} Litigators in the Third Circuit are often presented with the issue of whether the declarant personally perceived the startling occasion.\textsuperscript{112} Accordingly, if the Third Circuit adopted and applied the six \textit{Iron Shell} factors, litigators practicing in the Third Circuit would have more guidance when determining whether a declarant personally perceived the event because the declarant’s physical and mental condition, the event’s characteristics and the statement’s subject matter would all be relevant.\textsuperscript{113}

E. Lessening the Third Circuit’s Focus on Time Lapse

Courts in the Third Circuit should not rely too greatly on the time lapse between a startling event and the declarant’s statement when deter-

\textsuperscript{107} See Weinstein, supra note 11, at § 803.04[1] (“The premise underlying the exception for excited utterances is that a person under the sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication.”); Wigmore, supra note 22, at § 1747 (stating that excitement caused by startling events produces spontaneous truthful responses).

\textsuperscript{108} See Brown, 254 F.3d at 458 (citing Mitchell and Miller for four-part test); see also id. at 461 (holding that trial court reasonably admitted hearsay testimony because declarants were under influence of excitement caused by startling event and therefore did not have ability to reflect and fabricate under fourth criterion).

\textsuperscript{109} 633 F.2d 77 (8th Cir. 1980).

\textsuperscript{110} Id. at 86. For a discussion of the \textit{Iron Shell} factors, see supra notes 47-60 and accompanying text.

\textsuperscript{111} See \textit{Iron Shell}, 633 F.2d at 85-86 (setting out six factors for evaluating excited utterance).

\textsuperscript{112} For a further discussion of the issue concerning whether the hearsay declarant actually perceived the event, see supra notes 76-82 and accompanying text.

\textsuperscript{113} See United States v. Phelps, 168 F.3d 1048, 1054-55 (8th Cir. 1999) (finding no abuse of discretion in district court’s holding that 911 call, phone call to friend and in-person statements to officer were excited utterances).
mining whether hearsay evidence qualifies as an excited utterance. In Brown, the Third Circuit concluded that the hearsay statements were "likely made in a state of excitement originating with the event" by initially noting the "short time [that] had passed between the startling event and the statements . . . ."114 Courts in the Third Circuit may overlook the primary rationale for the excited utterance exception by focusing too intently on rigid time restrictions when making excited utterance determinations.115 By focusing on time restrictions, a court runs the risk of not admitting an excited utterance that furthers the rationale for the exception simply because too much time has elapsed. Thus, the Third Circuit should consider adopting the philosophy of the First, Seventh and Tenth Circuits that concentrates on whether the statement was a product of the declarant's mental state caused by the startling event rather than the time frame between the event and the statement.116

V. CONCLUSION

Federal Rule of Evidence 803(2) codifies the common-law excited utterance exception to the hearsay rule that admits hearsay evidence when a declarant makes a statement "relating to a startling event or condition . . . while the declarant [is] under the stress of excitement caused by the event or condition."117 The excited utterance exception is a valuable exception to the hearsay rule because the circumstances under which declarants make excited utterances assure the trustworthiness of the hearsay evidence.118 Although some commentators do not agree that excited utterances can provide courts with reliable hearsay evidence, the weight of authority maintains that excited utterances are nonetheless trustworthy due to the declarant's inability to reflect and fabricate while under the influence of stress relating to a startling event.119

Litigators practicing in the Third Circuit need to be aware of the intricacies of the Third Circuit's four-element test to effectively argue whether or not to admit hearsay evidence as an excited utterance. The Third Circuit still utilizes the four-element test it developed in Miller v. Keating to determine when a hearsay statement is admissible under the excited utter-

114. Brown, 254 F.3d at 461.
115. See United States v. Mitchell, 145 F.3d 572, 577 (3d Cir. 1998) (reaching decision through analysis that declarant could have had time to fabricate rather than whether declarant's mental state reduced ability to fabricate).
116. See United States v. Akins, No. 97-3353, 1998 WL 580509, at *3 (10th Cir. July 8, 1998) (stating that "lapse of time does not necessarily negative the existence of an excited state" and recognizing previous case where court admitted excited utterance that happened nine hours after startling event because declarant was under stress of exciting event).
118. For a discussion on the rationale for the excited utterance exception to the hearsay rule, see supra notes 32-34 and accompanying text.
119. For a discussion on counterviews to the rationale for the excited utterance exception to the hearsay rule, see supra notes 32-34 and accompanying text.
For hearsay evidence to be admissible under the excited utterance exception, the Third Circuit requires “(i) a startling occasion; (ii) a statement relating to the circumstances of the startling occasion; (iii) a declarant who appears to have had opportunity to observe personally the events; and (iv) a statement made before there has been time to reflect and fabricate.” Practitioners must be able to effectively dispute the arguments that commonly arise under these four elements and also must recognize and avoid contentions that the Third Circuit continually finds meritless. Furthermore, litigators should argue that the Third Circuit enhance and clarify its excited utterance law by adopting the Eighth Circuit’s Iron Shell factors and by focusing less on the time lapse between the startling event and the excited utterance and more on the declarant’s state of mind.

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121. Id.

122. For a discussion of Brown’s contentions that the Third Circuit found meritless, see supra notes 103-04 and accompanying text.