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DISTORTED VISION: SPONTANEOUS EXCLAMATIONS AS A "FIRMLY ROOTED" EXCEPTION TO THE HEARSAY RULE

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I. INTRODUCTION

In *Ohio v. Roberts*[1] the Supreme Court of the United States concluded that the Confrontation Clause of the sixth amendment of the United States Constitution demands that hearsay from a declarant who has not been confronted by the party against whom the hearsay is directed must possess adequate "indicia of reliability" before the hearsay may be used against a criminal defendant.[2] The *Roberts* Court further found that sufficient "indicia of reliability" under the Confrontation Clause can be "inferred" if the hearsay statement falls within a "firmly rooted" hearsay exception.[3] Thus, hearsay falling within such an exception presumptively possesses sufficient indicia of reliability to be constitutionally admissible.[4]

With respect to which hearsay exceptions qualify as "firmly rooted," the Court stated that "certain hearsay exceptions rest upon such solid foundations that admission of *virtually any* evidence within them comports with the 'substance of the constitutional protection.' "[5] In other words, those exceptions satisfying this general standard can properly be classified as "firmly rooted." On the other hand, if the hearsay does not fall within this general standard, the Court has reasoned that it still may be constitutionally admissible if the prosecution can establish that the statement was made under circumstances involving "particularized guar-

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1. 448 U.S. 56 (1980).

2. *Id.* at 73. *See also* Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); Dutton v. Evans, 400 U.S. 74, 88-89 (1970). For a general discussion of the hearsay rule, see C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 244-53, at 724-58 (3d ed. 1984). The sixth amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

3. *Roberts*, 448 U.S. at 66.

4. *Id.* at 73. For an extensive discussion of the "firmly rooted" exception, see Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1 (1987).

5. *Roberts*, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)) (emphasis added).

antees of trustworthiness."[6]

In a footnote, the *Roberts* Court offered four examples of "firmly rooted" hearsay exceptions: (1) previously cross-examined former testimony; (2) properly administered business records; (3) properly administered public records; and (4) dying declarations.[7] The *Roberts* Court's discussion reveals that these four exceptions were not intended to be the only exceptions classifiable as "firmly rooted".[8] For example, in recent years the Court has added the co-conspirator exception to the list of "firmly rooted" exceptions.[9] Even so, not all traditionally recognized hearsay exceptions fall within the category of "firmly rooted." Had the Court believed that all traditional hearsay exceptions were "firmly rooted," presumably it would have said so. Thus, additions to the list of "firmly rooted" exceptions must be made on a case by case basis.

In addition to the Supreme Court, lower courts may also classify additional hearsay exceptions as "firmly rooted." Following *Roberts*, lower federal and state courts have found several other exceptions worthy of such classification.[10] This Article will examine a recent trend by some lower courts to add the spontaneous exclamation exception to the list of "firmly rooted" hearsay exceptions. This Article posits that many out of court assertions admitted under the spontaneous exclamation exception are not made under sufficiently reliable circumstances to warrant a presumption in favor of their constitutionality.

II. EXPANDING THE LIST OF "FIRMLY ROOTED" HEARSAY EXCEPTIONS

Lower courts are in dispute as to which criteria properly qualify an exception as "firmly rooted." For example, some courts have equated "firmly rooted" with "long established."[11] These courts reason that if an

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6. *Id.*

7. *Id.* at 66 n.8. For a general discussion of the hearsay exceptions that the Supreme Court has classified as "firmly rooted," see Goldman, *supra* note 4, at 11-26.

8. This becomes apparent upon examination of certain parts of the opinion. *See, e.g., Roberts*, 448 U.S. at 66 n.8.

9. Bourjaily v. United States, 483 U.S. 171, 183 (1987). For a general discussion of co-conspirator statements, see C. MCCORMICK, *supra* note 2, § 267, at 792-94.

10. *See, e.g.*, Puleio v. Vose, 830 F.2d 1197, 1205 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988) (spontaneous exclamation is "firmly rooted" hearsay exception); State v. Marshall, 113 Wis. 2d 643, 335 N.W.2d 612 (1983) (adoptive admissions exception is "firmly rooted"). For a further discussion of these cases see Goldman, *supra* note 4, at 26-39.

11. *See, e.g.*, McLaughlin v. Vinzant, 522 F.2d 448, 450 (1st Cir.), *cert. denied*, 423 U.S. 1037 (1975) (excited utterance is long-standing exception to hearsay rule); People v. Nieves, 67 N.Y.2d 125, 131, 492 N.E.2d 109, 112, 501 N.Y.S.2d 1, 4 (1986) (court favored well-established reliance on specific categories of hearsay exceptions rather than amorphous "reliability"

exception has survived the test of time, any statement falling within the exception should be presumptively constitutional.[12] The proponents of this position find support in *Bourjaily v. United States*,[13] where the United States Supreme Court found the co-conspirator hearsay exception to be "firmly enough rooted in our jurisprudence" so as to qualify as a firmly rooted exception.[14] The majority opinion supported this conclusion with the fact that co-conspirator's statements have been a recognized hearsay exception since 1827.[15]

Though this language in *Bourjaily* could be read as support for equating firmly rooted with "long established,"[16] such a conclusion would mean that the Confrontation Clause is controlled by factors having little to do with the purpose of the clause itself. Rather, the application of the clause would be governed by what often amounts to little more than the historical accident of early recognition, even if founded upon an erroneous rationale.

A more reasoned analysis demands that longevity alone should not provide the basis for establishing a statement's compliance with the mandates of the Confrontation Clause. The classification of an exception as firmly rooted should depend on whether the requirements of that exception guarantee the reliability of "virtually any" hearsay falling within the exception.[17] Any other conclusion would be inconsistent with the purpose of the Confrontation Clause as identified by the United States Supreme Court.[18]

As noted by a Wisconsin state court,[19] "the question of whether a hearsay exception is firmly rooted does not turn upon how long the rule has been accepted but rather how solidly it is grounded on considerations of reliability and trustworthiness—the very reasons for the right to con-

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test); State v. Dorsey, 103 Wis. 2d 152, 163, 307 N.W.2d 612, 617 (1981) (citing Baker v. State, 80 Wis. 416, 420, 50 N.W. 518, 520 (1891) (recognizing well-established admissibility of statements of co-conspirator).

12. *See, e.g.*, Puleio v. Vose, 830 F.2d 1197, 1205 (1st Cir. 1987) ("[T]o the extent that a traditional hearsay exception has sufficiently long and sturdy roots, a determination that the exception applies obviates the need for a separate assessment of the indicia of reliability."), *cert. denied*, 108 S. Ct. 1297 (1988). However, despite the language in the *Puleio* decision, the court proceeded to examine the spontaneous exclamation in question for its reliability after determining that it qualified as a firmly rooted exception. *Id.* at 1207.

13. 483 U.S. 171 (1987).

14. *Id.* at 183.

15. *Id.* (citing United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827)).

16. *See id.*

17. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

18. *Id. See also* Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

19. State v. Wyss, 124 Wis. 2d 681, 370 N.W.2d 745 (1985).

frontation."[20] An out of court assertion may satisfy the requirements of a long-observed hearsay exception, yet not necessarily possess sufficient reliability to meet the requirements of the Confrontation Clause.

In *Dutton v. Evans*,[21] the United States Supreme Court provided four factors to help measure "indicia of reliability."[22] As provided in *Dutton*, hearsay has a greater likelihood of being trustworthy when: (1) the out of court statement does not contain an express assertion about a past fact; (2) the possibility is extremely remote that the out of court statement is founded on a faulty recollection; (3) the circumstances under which the statement was made indicate that the declarant is not misrepresenting the facts; and (4) the declarant has personal knowledge of the matters asserted in the statement.[23] While compliance with these factors cannot absolutely guarantee reliability, the *Dutton* Court concluded that their presence at least increases the likelihood of trustworthiness.[24]

This author has previously suggested that, based upon the Court's holdings in *Dutton* and *Ohio v. Roberts*,[25] an exception should be classified as firmly rooted only if it meets one of two tests: (1) the exception guarantees that the accused is given a meaningful opportunity in the past or present to question the hearsay declarant; or (2) that the requirements of the exception realistically assure that virtually any statement offered under it is based on personal knowledge and is not the product of either faulty recollection, or intentional or unintentional misrepresentation.[26] Only those exceptions that satisfy one of these tests guarantee the reliability of "virtually any" hearsay falling within them. Many spontaneous exclamations are not made under sufficiently reliable circumstances to satisfy either of the tests; therefore, they should not be classified as a firmly rooted hearsay exception.

III. SPONTANEOUS EXCLAMATIONS SHOULD NOT BE CLASSIFIED AS FIRMLY ROOTED

One of the hearsay exceptions that some lower courts have classified

20. *Id.* at 709-10, 370 N.W.2d at 759.

21. 400 U.S. 74 (1970).

22. *Id.* at 88-89. The plurality in *Dutton* concluded that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Id.* at 89 (quoting California v. Green, 399 U.S. 149, 161 (1970)).

23. *Id.*

24. *Id.*

25. 448 U.S. 56 (1980).

26. *See* Goldman, *supra* note 4, at 46.

as firmly rooted is the spontaneous exclamation exception, also known as the excited utterance exception.[27] Federal courts of appeals for the First,[28] Sixth,[29] and Seventh[30] Circuits, the court of appeal for the District of Columbia,[31] as well as state courts in Arizona,[32] North Carolina[33] and South Dakota[34] have all determined this exception to be "firmly rooted."

The First Circuit's decision in *Puleio v. Vose*,[35] is the most recent illustration of a federal circuit court's approach to this issue. Appellant Puleio had been convicted of first-degree murder in a Massachusetts state court.[36] It had been alleged that during an argument in a bar the accused had pulled a gun and fired a shot which had missed the intended victim and instead had killed a bystander.[37] At the trial, Puleio and his witnesses testified that he was not the one who had fired the fatal shot.[38] One of the prosecution's witnesses was the bartender who had been working the night of the shooting.[39] She had not witnessed the altercation, but had heard the shot and immediately asked those present if anyone had seen who fired the fatal shot.[40] Over defense objection, she was allowed to testify that the defendant's brother's girlfriend, who did not testify at the trial, identified the defendant, Joe Puleio, as the shooter.[41] The admission of this hearsay statement under the state's "spontaneous utterance" exception became a primary basis for Puleio's state appeal and for a subsequent federal writ of habeas corpus.

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27. For a general discussion of spontaneous exclamations, see 6 J. WIGMORE, EVIDENCE §§ 1745-64, at 191-247 (Chadburn rev. ed. 1976).

28. Puleio v. Vose, 830 F.2d 1197, 1205 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988).

29. Haggins v. Warden, 715 F.2d 1050, 1057 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

30. United States v. Moore, 791 F.2d 566, 570 (7th Cir. 1986).

31. Harrison v. United States, 435 A.2d 734, 736 (D.C. 1981).

32. State v. Yslas, 139 Ariz. 60, 65, 676 P.2d 1118, 1123 (1984); State v. Jeffers, 135 Ariz. 404, 419, 661 P.2d 1105, 1120, *cert. denied*, 464 U.S. 865 (1983).

33. State v. Porter, 303 N.C. 680, 696-97, 281 S.E.2d 377, 388 (1981).

34. State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986). *See also* McLaughlin v. Vinzant, 522 F.2d 448, 450-51 (1st Cir.), *cert. denied*, 423 U.S. 1037 (1975) (excited utterance is long standing exception to hearsay rule and does not contravene Confrontation Clause); Harmon v. Anderson, 495 F. Supp. 341, 344 (E.D. Mich. 1980) (excited utterance is reliable and long-established exception to hearsay rule); People v. Grover, 116 Ill. App. 3d 116, 121, 451 N.E.2d 587, 591 (1983) (excited utterance exception bears sufficient indicia of reliability).

35. 830 F.2d 1197 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988).

36. *Id.* at 1199.

37. Commonwealth v. Puleio, 394 Mass. 101, 102, 474 N.E.2d 1078, 1080 (1985).

38. *Id.*

39. *Puleio*, 830 F.2d at 1203.

40. *Id.*

41. Commonwealth v. Puleio, 394 Mass. at 104, 474 N.E.2d at 1081.

The Supreme Judicial Court of Massachusetts found that the trial judge had not abused his discretion in classifying the disputed out of court assertion as falling within the state's spontaneous utterance exception.[42] Agreeing with this ruling, the First Circuit additionally found that the admission of the statement had not violated the defendant's constitutional right to confrontation of witnesses.[43] In reaching this conclusion, the federal court specifically held the spontaneous exclamation exception to be firmly rooted.[44] The court based its conclusion on the "long and storied lineage of the exception."[45] The court noted English roots dating from the end of the 17th century and American origins that could be traced as far back as the latter-middle 1800s.[46]

As noted earlier in this Article, it is a mistake to equate firmly rooted with "long existing."[47] Though the spontaneous exclamation exception may have a "long and storied lineage," it cannot be said that it rests upon such solid foundations that admission of *virtually any* evidence within it comports with the "substance of the constitutional protection."[48] In order to understand the trustworthiness problems that can arise with respect to statements offered under the spontaneous exclamation exception, it is necessary to analyze the reliability of the exception's procedural safeguards.

IV. THE RELIABILITY OF SPONTANEOUS EXCLAMATIONS

Hearsay admitted under the spontaneous exclamation exception is believed to be credible for three reasons. First, such statements express an immediate perception unhampered by the potential blurrings and fadings of memory.[49] Second, the contemporaneous nature of the remarks provides insufficient time for fabrication.[50] Third, the declarant uttered the hearsay while in the throes of excitement caused by having witnessed a startling event.[51] As a result, the statement is said to accurately de-

42. *Id.* at 105, 474 N.E.2d at 1081.

43. *Puleio*, 830 F.2d at 1207.

44. *Id.* at 1206.

45. *Id.*

46. *Id.* The Court specifically cited *Bourjaily* in support of its use of this longevity analysis. *Id.* (citing Bourjaily v. United States, 483 U.S. 171, 182-83 (1987)).

47. *See supra* notes 11-26 and accompanying text.

48. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

49. J. WIGMORE, *supra* note 27, § 1705(b), at 202-03.

50. *Id. See also* Foster, *Present Sense Impressions: An Analysis and Proposal*, 10 LOY. U. CHI. L.J. 299, 317-18 (1979).

51. *See generally* C. MCCORMICK, *supra* note 2, § 297, at 855 (in order for the exception to apply "there must be an occurrence or event sufficiently startling to render inoperative the

scribe the observed event. However, upon closer examination these rationales appear to be based upon questionable psychological assumptions.

The first rationale is inherently flawed in that it depends completely on the assumption that descriptive accuracy is a natural consequence of immediate observation, and that this accurate observation is preserved by a contemporaneous statement.[52] In the absence of other reliability-insuring factors, nearness in time has never provided the sole basis for justifying the creation of an exception to the hearsay rule. Rather, it is the spontaneous or almost spontaneous reaction to the event described in the declarant's statement, that is said to give these statements reliability. Thus, the fact that the out of court statement was made nearer in time to the event than the witness' trial testimony is not the reason for the existence of this exception.[53] Even so, this assumption is rarely warranted. After considerable study, authorities in the field have found that the accuracy of an individual's perception of an event may vary widely as a result of an infinite number of potential variables.[54]

"The cognitive processes of the human organism are not the equivalent of a photographic process which renders and preserves an essentially accurate counterpart of some event."[55] Cognitive powers simply do not operate in a vacuum. When dealing with any description, "it is virtually impossible to ascertain whether the utterance is generated by the episode observed or by operation of the declarant's mental processes, even where the declaration is emitted virtually instantaneously upon cog-

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normal reflective thought processes"); J. WIGMORE, *supra* note 27, §§ 1747, 1749, at 195, 199 (" '[S]pecial trustworthiness' arises from the fact that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of [the witness'] actual impressions and belief.").

52. For a discussion of the psychological concept of the "logical completion mechanism," which results in unconsciously distorted perceptions, see A. TRANKELL, RELIABILITY: METHODS FOR ANALYZING AND ASSESSING WITNESS STATEMENTS 18 (1972). *See also generally* Buckhout, *Psychology and Eyewitness Identification*, 2 L. & PSYCHOLOGY REV. 75 (1976); Lezak, *Some Psychological Limitations on Witness Reliability*, 20 WAYNE L. REV. 117 (1973).

53. *See supra* note 51.

54. Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and The Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 21. Stewart concludes:

> The degree of correspondence between the testimony of an event and the reality it purports to represent may, therefore, vary widely according to the effect of numerous factors. The imperatives of successful adaptation do not require that the individual's cognitive process operate in all instances to provide information having the degree of objective accuracy necessary for accurate, after-the-fact reconstruction which is attempted by judicial fact determination.

Id.

55. *Id.*

nizance of the event. Yet it is speed which usually forms the crux of the spontaneity requirement."[56]

When an individual perceives an event, he or she is subjectively selective as to which external signals to process.[57] He or she then takes those signals and reorganizes them into a sequence that, though subjectively acceptable, may bear only "a tenuous relationship" to the actual event observed.[58] "Thus, even elimination of the hearsay risk of flawed memory provides scant assurance that the declarant's perceptual acuity operated at the time in question to produce anything more than an idiosyncratic image bearing only slight relationship to objective reality."[59] Though spontaneity may result in less opportunity for the declarant's memory to fade, that does not affect the possibility that the event in question may have been inaccurately observed.[60]

The second rationale, that the declarant has insufficient time to fabricate,[61] is subject to similar attack. Empirical psychological studies do confirm that the danger of fabrication is decreased where only a matter of seconds or fractions of seconds separate a particular event and an individual's description of that event.[62] However, once the number of seconds has increased even slightly, the reliability of the description is substantially reduced.[63] Thus, the hearsay statement would have to be spoken virtually simultaneously with the described event for even the slightest assurance of increased reliability.[64]

Furthermore, the second rationale has two inherent flaws. First, spontaneity is not easily measured after the fact. Commentators cite to psychological studies indicating that the interval which separates cognition from the onset of the capacity to fabricate is brief—often a matter of fractions of seconds—and impossible to gauge without the aid of instruments.[65] Second, despite these problems, courts nonetheless tend to be

56. Foster, *supra* note 50, at 325-26.

57. *Id.* at 328.

58. *Id.*

59. *Id.* at 329. *See* A. TRANKELL, *supra* note 52, at 18-20; Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197, 207-08 (1963).

60. As one author has noted, "even where the contemporaneity requirement is strictly applied, mere speed, as an aspect of spontaneity, at best renders the veracity of a response more likely, but not a certitude." Foster, *supra* note 50, at 326.

61. *Id.* at 325.

62. *Id.* at 315; *see also* Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 436-37 (1928). *See generally* Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204 (1960).

63. Hutchins & Slesinger, *supra* note 62, at 437-38 & nn.27-37.

64. *Id.* at 436-37.

65. *See id.* at 437; *see also* Stewart, *supra* note 54, at 8-22.

very lenient in the amount of time permitted to pass between the observation and the contemporaneous or spontaneous statement.[66] Commentators have observed that "[f]rom the point of view of subjective veracity, the speed the courts demand does not necessarily guarantee truth."[67] In some instances, spontaneous exclamations have been admitted even when made several minutes or several hours after the event described.[68]

If the empirical data is believed, the interval between event and description typically permitted by courts renders the reliability of statements admitted under the spontaneous exclamation exception dubious. Plainly,

> excitement exaggerates, sometimes grossly, distortion in perception and memory especially when the observer is a witness to a non-routine, episodic event such as occurs in automobile collision cases and crimes. The likelihood of inaccurate perception, the drawing of inferences to fill in memory gaps, and the reporting of nonfacts is high. . . . Yet in Wigmore's view an excited utterance is such a superior quality of evidence that the declarant need not testify even though available—"a proposition never disputed." In fact, the theory is merely an artifice for the admission of highly unreliable evidence which is often the only type of evidence available. No justification exists for foregoing cross-examination and admitting such evidence if the declarant is available.[69]

Finally, the trustworthiness of spontaneous exclamations is said to be bolstered by the fact that the declarant has uttered the hearsay statement while in the throes of excitement caused by having witnessed a star-

66. *See, e.g.*, United States v. Golden, 671 F.2d 369, 371 (10th Cir.) (excited utterance statement made 15 minutes after assault held admissible), *cert. denied*, 456 U.S. 919 (1982); United States v. Blakey, 607 F.2d 779, 786 (7th Cir. 1979) (present sense impression held admissible when spoken after 23 minutes); Hilyer v. Howat Concrete Co., 578 F.2d 422, 426 n.7 (D.C. Cir. 1978) (excited utterance statement made 15 to 45 minutes after accident held admissible); McCurdy v. Greyhound Corp., 346 F.2d 224, 225-26 (3d Cir. 1965) (excited utterance statement made 15 minutes after accident held admissible); People v. Jones, 155 Cal. App. 3d 653, 661-62, 202 Cal. Rptr. 289, 294-95 (1984) (statement made 30 to 40 minutes after being severely burned admissible); State v. Stafford, 237 Iowa 780, 786-88, 23 N.W.2d 832, 836 (1946) (excited utterance statement made 14 hours after beating held admissible). *But see* Hamilton v. Missouri Petroleum Prods. Co., 438 S.W.2d 197, 200 (Mo. 1969) (excited utterance statement made 25 minutes after accident held inadmissible); Bowman v. Barnes, 168 W. Va. 111, 127-28, 282 S.E.2d 613, 622-23 (1981) (statement made 44 minutes after collision held inadmissable as excited utterance). *See also* Hutchins & Slesinger, *supra* note 62, at 432-33.

67. Hutchins & Slesinger, *supra* note 62, at 439.

68. *See supra* note 66.

69. Stewart, *supra* note 54, at 28-29 (quoting, in part, 6 J. WIGMORE, EVIDENCE § 1748 (3d ed. 1970)).

tling event.[70] Theoretically, the excitement eliminates the witness' capacity to reflect, thus precluding the ability to fabricate and ensuring an accurate, reliable description of the event perceived.[71] However, while 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.[72]

"One need not be a psychologist to distrust an observation made under emotional stress; everyone accepts such statements with mental reservation."[73] "What the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation."[74] Thus, the more startling the event, and the greater the emotional reaction, the less likely the declarant's observation will be accurate.

In their evaluation of this dilemma, Professors Hutchins and Slesinger concluded that the existence of this paradox left the spontaneous exclamation hearsay exception with no justification.[75] In fact, Hutchins and Slesinger concluded that "[o]n psychological grounds, the rule might very well read: Hearsay is inadmissible, especially (not except) if it be a spontaneous exclamation."[76]

On the other hand, it could be argued that this danger of inaccuracy or misperception is inevitable and irreducible, even if the declarant is required to testify to the event observed, because testimony of the actual event would incorporate the same perceptual errors which stem from the original observation. Furthermore, if the witness testifies to what he or she saw, there is the danger that the witness' memory may have faded since the event. Thus, a statement made at or soon after the event occurred may be just as reliable, or as unreliable, as the witness' present testimony.

This analysis, however, misses not only the very reason for the existence of the hearsay rule but also an arguable rationale for the confrontation clause. The rule was created out of a belief that the reliability risk inherent in all eyewitness testimony may be reduced through in-court cross-examination, wherein any errors of perception or fabrications can be revealed. No such cross-examination takes place when the trier of fact is allowed to consider the truth of an out of court assertion admitted

70. Hutchins & Slesinger, *supra* note 62, at 435-36.
71. *Id.*
72. *Id.* at 437-38.
73. *Id.* at 437.
74. *Id.* at 439.
75. *Id.*
76. *Id.*

under the spontaneous exclamation exception.[77]

In sum, the spontaneous exclamation exception fails to comply with the trustworthiness factors delineated in *Dutton v. Evans*[78] requiring that the out of court statement be based on an accurate recollection of the event and made under circumstances that ensure the declarant did not intentionally or unintentionally misrepresent the event.[79]

Contrary to the conclusion of lower courts in such cases as *Puleio v. Vose*,[80] the spontaneous exclamation exception should not qualify as firmly rooted. In light of the persistent flaws underlying the spontaneous exclamation exception, we may not conclude with reasonable assurance that virtually any hearsay admissible under the spontaneous exclamation exception has been made under circumstances which inherently guarantee the absence of intentional fabrication or distortion at the time of the initial observation or in the ability to recall the event as observed.

V. ONLY A REBUTTABLE PRESUMPTION OF CONSTITUTIONALITY IS CREATED BY CLASSIFYING A STATEMENT AS FALLING WITHIN A FIRMLY ROOTED EXCEPTION

An additional danger lurks in classifying exceptions, like the spontaneous exclamations exception, as firmly rooted. *Ohio v. Roberts*[81] created *two* presumptions concerning the constitutionally permissible use of hearsay against criminal defendants. The first presumption is one of constitutional *inadmissibility* when the out of court assertion does not fall

77. The potential for admitting unreliable spontaneous exclamations is best illustrated by the fact that the anonymity of the declarant is not a bar to admission under either exception. *See* FED. R. EVID. 803(1)-(2). The dangers presented by the admission of a hearsay statement of an anonymous declarant are described by Weinstein and Berger:

> [T]he remarks of a bystander and even of an unidentified bystander are admissible, provided the requirements of the exception are met. . . . If the declarant, though a bystander, is identified, it may be possible to place him at the scene so that a judge could find it reasonable to infer perception. If he is unidentified, his capacity to observe can neither be substantiated nor attacked . . . .
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> . . . [T]he court's suspicion of the witness' testimony may lead it to find that the declarant's perception was not established. On the other hand, it may conclude that since the witness can be cross-examined, the question of his credibility and the derived credibility of the declarant's statement, are matters which can safely be left to the jury. Much depends on the type of case, the availability of other evidence, the verifying details in the statement, and the setting in which the statement is made.

4 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 803(1)[01], at 803-77 to -79 (1989) (footnotes omitted).

78. 400 U.S. 74 (1970).

79. *Id.* at 88-89.

80. 830 F.2d 1197, 1205 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988).

81. 448 U.S. 56 (1980).

within a firmly rooted exception.[82] The United States Supreme Court has held that this presumption is rebutted when the prosecution is able to establish that the hearsay was spoken under circumstances with "particularized guarantees of trustworthiness."[83]

The second presumption is that the statement is constitutionally admissible when the hearsay falls within a firmly rooted exception.[84] Thus, classifying a hearsay statement as falling within a firmly rooted exception means that the statement presumptively satisfies the requirements of the Confrontation Clause.[85] Logic would seem to dictate that this second presumption should also be rebutted if the defendant establishes lack of an adequate opportunity to question the declarant, *and* that the particu-

82. *Id.* at 66 (prosecution can rebut this presumption if it can establish that statement was made under circumstances with "particularized guarantees of trustworthiness"). *See also* Goldman, *supra* note 4, at 7 n.27.

83. *Roberts*, 448 U.S. at 66. The rebuttable nature of this presumption was recently reaffirmed by the Supreme Court in Lee v. Illinois, 476 U.S. 530, 544 (1986).

84. Some lower courts have classified certain exceptions as firmly rooted but, nevertheless, have examined the trustworthiness of the particular statement at issue. Exceptions treated in this manner by courts include adoptive admissions, FED. R. EVID. 801(d)(2)(B); former testimony, FED. R. EVID. 804(b)(1); declarations against interest, FED. R. EVID. 804(b)(3); excited utterance, FED. R. EVID. 803(2); and present sense impressions, FED. R. EVID. 803(1).

For example, in *State v. Bauer*, the Wisconsin Supreme Court noted that while the inference in favor of the reliability of a firmly rooted exception is strong,

> evidence falling within a firmly rooted hearsay exception is not admissible per se. The trial court must still examine each case to determine whether there are unusual circumstances which may warrant exclusion of the evidence. If no such unusual circumstance exists, the evidence may properly be admitted. "Where unusual circumstances are apparent, the court may have reason to inquire into whether a meaningful confrontation was indeed afforded a defendant."

109 Wis. 2d 204, 215, 325 N.W.2d 857, 862 (1982) (quoting Nabbefeld v. State, 83 Wis. 2d 515, 527, 266 N.W.2d 292, 298 (1978)), *vacated on other grounds*, 127 Wis. 2d 125, 377 N.W.2d 175 (1985).

Similarly, in *State v. Buelow*, the court noted that "[w]hen the evidence fits within a firmly-rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. While the inference of reliability is strong, the court must still examine each case to determine whether there are unusual circumstances which warrant exclusion of the evidence." 122 Wis. 2d 465, 479, 363 N.W.2d 255, 263 (1984) (citing State v. Curbello-Rodriguez, 119 Wis. 2d 414, 430, 351 N.W.2d 758, 766 (1984)); *Bauer*, 109 Wis. 2d at 215, 325 N.W.2d at 863.

In *Brown v. Tard*, the hearsay offered by the prosecution qualified as a present sense impression, and the court concluded that, for Confrontation Clause purposes, its reliability could be inferred. 552 F. Supp. 1341, 1351 (D.N.J. 1982). In spite of this presumption, however, the court examined the statement itself to determine whether it bore sufficient "circumstantial guarantees of reliability" to satisfy the Confrontation Clause. *Id.*; *see also* Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984) (although statements of four-year-old molestation victim "fit squarely within the parameters of a well-recognized and firmly-rooted hearsay exception," court noted factors which guaranteed trustworthiness of statements); State v. Marshall, 113 Wis. 2d 643, 655-56, 335 N.W.2d 612, 617-18 (1983) (court examined indicia of reliability of adoptive admission in question, even though it qualified as firmly rooted hearsay exception).

85. *Roberts*, 448 U.S. at 66.

lar hearsay offered against the defendant was spoken under untrustworthy circumstances.

Unfortunately, as a result of the Supreme Court's lack of clarity with respect to the rebuttable nature of this latter presumption, some lower courts have treated the presumptively constitutional status of hearsay offered under a firmly rooted exception as if it were conclusive.[86] Once these courts conclude that a hearsay statement falls within a firmly rooted exception, they deem it to have irrebuttably satisfied the demands of the Confrontation Clause and permit no constitutional challenge as to the lack of trustworthiness of the particular statement.[87] One sentence in the United States Supreme Court's opinion in *Bourjaily v. United States*[88] may arguably support this position.

In *Bourjaily*, the Supreme Court stated that "the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of [a firmly rooted exception]."[89] To the extent the Court intended this sentence to mean that all hearsay falling within such an exception conclusively satisfies the demands of confrontation, such a conclusion would be unwarranted and dangerous. Although other Supreme Court opinions have never explicitly stated that this second presumption is rebuttable, that conclusion extends logically from the Court's underlying call for reliability.[90]

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86. *See* United States v. Chindawongse, 771 F.2d 840, 846-47 (4th Cir. 1985) (holding that FED. R. EVID. 801(d)(2)(E) requirements are "identical to the requirements for admissibility under the confrontation clause"), *cert. denied*, 474 U.S. 1085 (1986); United States v. Lurz, 666 F.2d 69, 80-81 (4th Cir. 1981) (holding that FED. R. EVID. 801(d)(2)(E) allowed admission of statements by co-conspirator; hence Confrontation Clause was not violated), *cert. denied*, 459 U.S. 843 (1982); United States v. Peacock, 654 F.2d 339, 349-51 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983); Harrison v. United States, 435 A.2d 734, 736 (D.C. 1981); State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986). *See also* United States v. Papia, 560 F.2d 827, 836 n.3 (7th Cir. 1977) ("[T]he confrontation clause presents no bar to the use of extrajudicial statements of a co-conspirator . . . ."); Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972) (co-conspirators' statements admissible under recognized exception and satisfy requirements of Confrontation Clause), *cert. denied*, 409 U.S. 1128 (1973); People v. Maxwell, 209 Cal. App. 3d 635, 644, 257 Cal. Rptr. 439, 444 (1989), *review denied*, and ordered not to be officially published by the California Supreme Court, July 13, 1989.

87. *See Chindawongse*, 771 F.2d at 847; *Harrison*, 435 A.2d at 736; *Bawdon*, 386 N.W.2d at 487.

88. 483 U.S. 171 (1987).

89. *Id.* at 183-84.

90. Ohio v. Roberts, 448 U.S. 56, 66 (1980). Holding this latter presumption conclusive poses a significant constitutional danger: A conclusive presumption would forever preclude an accused from arguing that the hearsay admitted against him was made under circumstances so unreliable as to deny the right to confrontation of witnesses.

Not all statements admissible under a particular hearsay exception possess the same degree of trustworthiness and reliability. Two statements admissible under the same exception

The plurality opinion in *Roberts* illustrates the rebuttable nature of the presumption that a statement falling within a firmly rooted exception satisfies the Confrontation Clause. In spite of the plurality's opinion that the hearsay statement involved in *Roberts* was offered under a firmly rooted exception, the Justices nonetheless found it necessary to examine the particular circumstances in which the exception had been applied.[91] Thus, rather than being deemed conclusive, this presumption should be rebutted whenever it can be established that under the specific facts of a case the hearsay offered against the defendant was sufficiently untrustworthy so as to offend the degree of reliability demanded by the Confrontation Clause.[92]

In *Puleio v. Vose*,[93] for example, the First Circuit made it clear that the inquiry into the reliability of the out of court assertion used against a criminal defendant did not end simply because the statement technically satisfied the statutory requirements of a firmly rooted exception.[94]

> [We] stop short of holding that a federal court . . . need make *no* inquiry whatever into the dependability of excited utterance testimony. Plainly, the mere fact that a state court, in admitting evidence, tucks it into a pigeonhole which bears the label of a time-honored hearsay exception cannot be entirely dispositive. . . . Thus, the state court record must show a sufficient factual predicate rationally to support the affixation of the label.[95]

Thus, the First Circuit opined that the classification of firmly rooted creates a rebuttable presumption that such statements satisfy the constitutional requirements of confrontation. This presumption can be rebutted by a defense showing that the particular statement at issue, which technically falls within the definition of such an exception, may still not be reliable enough to satisfy the dictates of confrontation.

The *Puleio* court found the standard of reliability "ha[d] been met in the case at bar," and that "[t]here was ample evidence before the trial

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can boast substantially different levels of trustworthiness depending on the self-serving nature of their content. For example, assume a jurisdiction labels spontaneous exclamations as firmly rooted. A spontaneous exclamation favorable to the interests of the declarant made moments after an automobile accident may not possess the same degree of reliability as an exclamation acknowledging the declarant's own liability.

91. *Roberts*, 448 U.S. at 67-68; *see also* C. WHITEBREAD & S. SLOBOGIN, CRIMINAL PROCEDURE 678 (2d ed. 1986).

92. *See* Goldman, *supra* note 4, at 47.

93. 830 F.2d 1197 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988).

94. *Id.* at 1207.

95. *Id.*

court to allow the admission of [the declarant's] statement . . . under the excited utterance exception to the hearsay rule."[96] Other courts, however, have seemingly concluded that no such additional inquiry will ever be needed once a statement has been held to fall within the spontaneous exclamation exception.[97]

The reliability of a statement is not guaranteed simply because it falls within a firmly rooted exception. The general standard created by the Supreme Court itself provides that "virtually any" statement offered under a firmly rooted exception will comport with the Confrontation Clause.[98] The use of the term "virtually any" would appear to acknowledge that some statements admissible under firmly rooted exceptions will not comport with constitutional requirements. Apparently, the *Roberts* Court did not intend to deny defendants the opportunity to establish that the particular hearsay statement offered against them was unreliable, even though it was offered under such an exception.

If this presumption of trustworthiness is conclusive, it forecloses defendants from meritoriously arguing a violation of their constitutional rights, for it prohibits them from demonstrating the untrustworthiness of the particular hearsay offered by the prosecution. Under these circumstances, some defendants will potentially be given no more than a ritualistic trial—a trial with the deck constitutionally stacked against them.[99] Given the possibility that courts may increasingly choose to categorize the constitutionality of a statement offered under a firmly rooted hearsay exception as an irrebuttable presumption, care in so classifying an exception becomes even more important; it points to yet another potential danger in classifying the spontaneous exclamation exception as firmly rooted.

VI. SPONTANEOUS EXCLAMATIONS IN THE CALIFORNIA COURTS

The confusion over categorizing the spontaneous exclamation exception as firmly rooted can be illustrated by the state of the law in Cali-

96. *Id.*

97. *See* People v. Maxwell, 209 Cal. App. 3d 635, 644, 257 Cal. Rptr. 439, 444 (1989); Harrison v. United States, 435 A.2d 734, 736 (D.C. 1981); State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986).

98. *Roberts*, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

99. The Due Process Clause guarantees more than just a ritualistic trial. *See* Jackson v. Virginia, 443 U.S. 307, 316-17 (1979). In *Jackson*, the Court concluded that the Due Process Clause of the Federal Constitution barred criminal conviction without proof beyond a reasonable doubt. *Id.* at 315. A conviction that is the result of a procedurally correct trial may nonetheless violate due process if the evidence used to support the conviction is unreliable. *See id.* at 317.

fornia. Only one published California opinion has discussed the spontaneous exclamation exception as firmly rooted. In a footnote in *In re Damon H.*,[100] a California Court of Appeal commented that although it was of the opinion that this exception satisfied the requirements set forth in *Ohio v. Roberts*[101] for classification as firmly rooted, the court would nevertheless analyze "the 'particularized guarantees of trustworthiness' which must be provided when no such exception is involved" when deciding whether appellant's constitutional rights had been violated.[102] Based on this analysis, the court found that the spontaneous exclamation admitted against the appellant at trial had not violated the Confrontation Clause.[103]

More recently, in *People v. Maxwell*,[104] a different California Court of Appeal was faced with appellant's argument that his trial counsel's failure to raise a Confrontation Clause objection to the admission of an incriminating spontaneous declaration had rendered trial counsel's performance constitutionally ineffective.[105]

Maxwell had been charged with several counts of sexual assault arising out of a brief incident outside of an apartment where he had been attending a party.[106] During the assault, the victim managed to sound the horn of her truck, which was parked near the site of the attack.[107] The assailant fled when two men, both of whom knew the appellant, emerged from their apartment in response to the sound of the horn.[108] Neither of these two men testified at trial. However, a third individual, who arrived at the scene after the assailant had fled, did testify.[109] Part of this third person's testimony was that she asked one of the two men what had happened and he excitedly responded that "he had chased him [appellant Jeff Maxwell] for two blocks," but that he could not catch him.[110]

At trial, appellant denied the attack, denied he had been chased by anyone and argued that the alleged out of court declarant did not like

100. 165 Cal. App. 3d 471, 211 Cal. Rptr. 623 (1985).

101. 448 U.S. 56 (1980).

102. *Damon H.*, 165 Cal. App. 3d at 478 n.8, 211 Cal. Rptr. at 627 n.8.

103. *Id.* at 478, 211 Cal. Rptr. at 628.

104. 209 Cal. App. 3d 635, 257 Cal. Rptr. 439 (1989), *review denied*, and ordered not to be officially published by the California Supreme Court, July 13, 1989.

105. *Id.* at 641, 257 Cal. Rptr. at 442.

106. *Id.* at 638, 257 Cal. Rptr. at 440.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 638-39, 257 Cal. Rptr. at 440-41.

him.[111] Trial counsel's failure to object on Confrontation Clause grounds to the admission of the alleged spontaneous exclamation became the basis of the appeal. The state court of appeal concluded that the failure to object to use of the statement did not constitute ineffective assistance of counsel because such an objection would have been futile since the statement did satisfy the requirements of confrontation.[112]

In dicta, the court went on to state that any statement admitted under the spontaneous exclamation exception automatically satisfies the demands of confrontation.[113] The court reasoned that the exception could be described as firmly rooted, and therefore did not mandate inquiry into the statement's reliability to satisfy the constitutional demands of the Confrontation Clause.[114]

The lower appellate court's decision in *Maxwell*[115] cited the First Circuit decision in *Puleio v. Vose* as support for its conclusions.[116] However, the *Maxwell* decision was based on a flawed interpretation of the firmly rooted exception, since the California court made the same error as the *Puleio* court in equating longevity with the concept of firmly rooted.[117]

Additionally, and inconsistent with *Puleio* and *Damon H.*, the California Court of Appeal in *Maxwell* concluded that "[a] court only needs to satisfy itself" that a hearsay statement falls within the definition of a firmly rooted exception in order to satisfy the requirements of confrontation.[118] Thus, the court seems to have reached the conclusion that the presumption in favor of the constitutionality of all statements falling within a firmly rooted exception is conclusive.

The California Supreme Court denied the defendant's petition to overturn the lower appellate court opinion.[119] However, the supreme court, following a practice all but unique to California, ordered the lower appellate court opinion removed from the official reporter system.[120]

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111. *Id.* at 639, 257 Cal. Rptr. at 441.

112. *Id.* at 645, 257 Cal. Rptr. at 445.

113. *Id.* at 643, 257 Cal. Rptr. at 444.

114. *Id.*

115. 209 Cal. App. 3d 635, 257 Cal. Rptr. 439 (1989).

116. *Id.* at 643-44, 257 Cal. Rptr. at 444 (citing Puleio v. Vose, 830 F.2d 1197, 1204-06 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988)).

117. Puleio v. Vose, 830 F.2d 1197, 1204-06 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988); *Maxwell*, 209 Cal. App. 3d at 644, 257 Cal. Rptr. at 444.

118. *Maxwell*, 209 Cal. App. 3d at 644, 257 Cal. Rptr. at 444.

119. *Maxwell*, 209 Cal. App. 3d 635, 257 Cal. Rptr. 439 (1989), *review denied*, and ordered not to be officially published by the California Supreme Court, July 13, 1989.

120. *Id.* The rules of several of the federal courts of appeals expressly preclude citation to unpublished opinions as precedent. *See* 7TH CIR. R. 35(b)(2)(iv); 9TH CIR. R. 21(c); 10TH

This process is known as "depublication."[121]

"Depublication is a procedure by which the high court simply erases an opinion of the Court of Appeal from the books, with no explanation. The result remains the same for the parties, but the case cannot be cited as precedent in future cases."[122] Former California Chief Justice Donald Wright has commented that depublication is typically reserved for those lower court opinions "in which the correct result has been reached by the court of appeal but the opinion contains language which is an erroneous statement of the law . . . ."[123]

For purposes of analysis and interpretation of the law, the *Maxwell* court's use of this procedure is, at best, an ambiguous statement. Since

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CIR. R. 36.3; FED. CIR. R. 18(a). The Oklahoma Supreme Court is given the power to designate which lower court opinions are to be published; in Colorado, Delaware and New Jersey, committees make similar decisions. *See* Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIB. J. 362, 367-74 (1974). For a discussion of the weight to be accorded unpublished opinions, see Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988). For a discussion of the California depublication procedure, see Biggs, *Censoring the Law in California: Decertification Revisited*, 30 HASTINGS L.J. 1577, 1579 n.7 (1979); Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 387 (1973); Note, *Decertification of Appellate Opinion: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. CAL. L. REV. 1181 (1977). Under the California Rules of Court, the courts of appeal decide whether to publish a decision subject to the supreme court's decision to depublish. CAL. R. CT. 976(c)(1)-(2).

The "California Constitution has provided for publication of such opinions of the supreme court and the courts of appeal 'as the Supreme Court may deem expedient' since 1904." Gerstein, *"Law by elimination:" depublication in the California Supreme Court*, 67 JUDICATURE 293, 295 (1984).

121. "From 1909 until 1963, however, a statutory requirement that all opinions be published was honored." Gerstein, *supra* note 120, at 295. In 1972, the California Supreme Court modified Rule 976, shifting the presumption from publication to non-publication. *Id. See also* Seligson & Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37, 44 (1972).

122. Uelmen, *The Lucas Court is Suffocating; Worthy Cases are Lost in Crush of Death-Penalty Reviews*, L.A. Times, May 9, 1988, § B, at 7, col. 1.

123. *See* Note, *supra* note 120, at 1185 n.20.

Some have suggested that the reason for depublication is that when "the workload gets too heavy, depublication is a shortcut that lets the court prune from case law what it perceives to be the wrong reasons for the right decision." Cox, *Inaction in Action in California*, Nat'l L.J., July 11, 1988, at 1, col. 1, cont'd at 24, col. 2. As noted by former California Supreme Court Justice Joseph Grodin: " 'Depublication is most frequently used when the court considers the result to be correct, but regards a portion of the reasoning to be wrong and misleading.' " Uelmen, *Depublication: The Court Makes Un-Cases*, L.A. Times, Sept. 12, 1989, § B, at 7, col. 1 (quoting former California Supreme Court Justice Joseph Grodin). *See also* Morain, *High Court Tactic: Depublished Cases Stir A Controversy*, L.A. Times, Jan. 18, 1985, § B, at 1, col. 1.

In 1971, the California Supreme Court depublished three cases. In 1987, the court depublished 126 cases. This was a 43% increase over the previous year. Currently, 57% of the criminal cases now depublished favor the defense. *See* Uelmen, *supra* note 122.

such orders never set forth any grounds for the court's action, depublication provides no guidance as to what, if any, reasoning was unsound. As a result, lawyers and courts may continue to make the same mistake, or other mistakes, by misinterpreting the basis for the high court's depublication.

Unfortunately, there are several plausible interpretations for the depublication of *Maxwell*. First, the court may have believed that the prosecution's use of the spontaneous exclamation was error, but harmless to the outcome of the trial. Second, the court may have believed that spontaneous exclamations should not be classified as firmly rooted, but that the hearsay in this particular case was made under circumstances of particularized guarantees of trustworthiness. Third, the court may have believed that spontaneous exclamations should be classified as firmly rooted, but that this conclusion should be based upon a reliability, rather than longevity, rationale. Fourth, the court may have believed that spontaneous exclamations should be classified as firmly rooted, but that the presumption created by such classification should be rebuttable. Fifth, the court may have believed that spontaneous exclamations should be classified as firmly rooted, but that this conclusion should be based upon a reliability, rather than longevity, rationale, and that the presumption created by such classification should not be conclusive.

Thus, the depublication of the *Maxwell* decision leaves open the question of whether the California Supreme Court agreed or disagreed that the spontaneous exclamation exception should be classified as firmly rooted. Why the court depublished the opinion, and whether this act supplies any clue as to how the court will choose to rule when next faced with the issue, is uncertain.

VII. CONCLUSION

Time should supply the answer to this riddle. However, before any court reaches a conclusion as to the classification of spontaneous exclamations, it should first carefully consider that when the prosecution submits hearsay statements of an absent witness, the defendant is unable to question that declarant. When all statements falling within a state-created hearsay exception are classified as presumptively constitutional, the defendant may not be in a position to effectively challenge the accusations. The lack of an opportunity to question hearsay witnesses will not violate that defendant's constitutional rights in every case. However, there are situations in which this inability may result in a denial of confrontation.

Additionally, the presumptively constitutional nature of all state-

ments falling within firmly rooted exceptions should be rebuttable. If the presumption in favor of constitutionality is conclusive, then the defendant may be prevented from constitutionally attacking an actual denial of the right to confrontation.

Irrespective of whether the presumption is conclusive or not, exceptions should only be classified as firmly rooted with the greatest of care. The elements which qualify a hearsay statement as a spontaneous exclamation fail to guarantee that virtually all such statements will be based on personal knowledge and are not the product of either faulty recollection, or intentional or unintentional misrepresentation.[124] Thus, the requirements for admission of a hearsay statement under this exception do not realistically assure a substantial likelihood that virtually any statement offered under the exception will be reliable enough to comport with the constitutional mandates of the Confrontation Clause. The inherent flaws in the rationale underlying the spontaneous exclamation exception and the unreliability of spontaneous statements dictate that the exception should not be classified as firmly rooted.

124. *See supra* notes 25-26 and accompanying text.