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Impeaching the Deceased Excited Utterance Declarant

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if the necessary diplomatic steps are taken, there should be no serious protests from other nations.

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IMPEACHING THE DECEASED EXCITED UTTERANCE DECLARANT

The victim, within fifteen minutes of the shooting, responded to questions asked by a witness and stated that the defendants and a third person had shot her. She also identified as one of her assailants a person against whom she had testified in connection with the slaying of her brother. The trial judge admitted these statements into evidence under the excited utterances exception to the hearsay rule. For impeachment purposes, the defendants requested the court to order the state to furnish them with any information it had concerning prior convictions of the victim.[1] The trial judge denied the request based on his belief that the out-of-court statement of the victim would not be susceptible to impeachment. The defendants also requested the court to order the prosecution to produce a police department press release issued to local newspapers which resulted in media reports that the victim, after being shown photographs, identified as one of her attackers a person then in the state penitentiary.[2] This information was also to be used to discredit the statements of the victim, but the trial court denied this request as well. The Louisiana Supreme Court *held* that because the excited utterance is effectively a testimonial statement, its introduction should render the declarant susceptible to impeachment in the same manner as other witnesses. *State v. Henderson,* 362 So. 2d 1358 (La. 1978).

One of the recognized exceptions to the hearsay rule is an

1. State v. Henderson, 362 So. 2d 1358, 1363 (La. 1978). Although it is not clear under what authority defense counsel made the request for information concerning possible prior conviction records of the victim, the court held that this was a specific and relevant request for evidence materially favorable to the accused which should have been complied with under *United States v. Agurs,* 427 U.S. 97 (1976); *State v. Harvey,* 358 So. 2d 1224 (La. 1978); and *State v. May,* 339 So. 2d 764 (La. 1976). 362 So. 2d at 1363.

2. The court again held this to be a specific and relevant request for evidence materially favorable to the accused. 362 So. 2d at 1364. See note 1, *supra.*

out-of-court statement made while the declarant is under the influence of an exciting event. Such an "excited utterance" is admissible where relevant to a material issue, on the theory that it is inherently trustworthy.[3] The special reliability of these statements has been attributed to the fact that the excitement of the event itself stills the reflective and fabricative thought processes of the declarant;[4] in effect the declarant becomes the vehicle through which the event speaks.[5]

In determining the admissibility of a hearsay statement as an excited utterance, a court must consider whether the declarant was still under the influence of the exciting event when he made the statement.[6] The elapsed time between the utterance and the startling event is a critical factor in making this determination.[7] Professor McCormick views the time element as the most decisive factor, stating that "as the time between the event and the statement increases, so does the reluctance to find the statement an excited utterance."[8] However, greater lapses of time between the event and the utterance are permitted in cases of injury and violent crime because pain and suffering are considered to prolong the influence of the event itself.[9]

Even when the excited utterance occurs almost contemporaneously with the exciting event, its trustworthiness has been questioned. Some legal writers argue that the stress and excitement of the moment may in fact distort the declarant's perception and simply render his statement inaccurate.[10] For

3. C. McCORMICK, EVIDENCE § 297, at 704 (E. Cleary ed. 1972); 6 J. WIGMORE, EVIDENCE § 1747, at 195 (J. Chadbourn rev. ed. 1970).

4. C. McCORMICK, *supra* note 3, § 297, at 704; 6 J. WIGMORE, *supra* note 3, § 1747, at 195.

5. *See* State v. Williams, 331 So. 2d 467, 470 (La. 1976); State v. Edwards, 287 So. 2d 518, 527 (La. 1973).

6. C. McCORMICK, *supra* note 3, § 297, at 705.

7. *Id.* at 706; Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661, 671 (1969).

8. C. McCORMICK, *supra* note 3, § 297, at 706.

9. Wetherbee v. Safety Cas. Co., 219 F.2d 274, 278 (5th Cir. 1955); Guthrie v. United States, 207 F.2d 19 (D.C. Cir. 1953).

10. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204 (1960). The author states: "Perception and accurate communication seems heightened in inverse proportion to the startling nature of the event." Quick, *supra*, at 210. *See* Stewart, *Perception, Memory, and Hearsay*, 1970 UTAH L. REV. 1, where the author states: "The most unreliable type of evidence

example, one experimenter induced a prearranged classroom battle in which he caused some students to experience more excitement than others, and then he asked each student to write down what had happened. Those students who were only slightly stimulated gave much more accurate accounts than the students who were most upset.[11] Psychologists have also observed that the "introduction of considerable excitement seems to militate against accurate observation."[12]

The reliability of excited utterances has also been subject to question because the nature and extent of an individual's response to a particular stimulus is uncertain.[13] One writer cites psychological studies which indicate that the time interval required to assure lack of conscious or unconscious falsification is measured in stopwatch time intervals rather than in minutes.[14] Another writer argues that the exception is based on expediency rather than on any sound psychological basis, because different minds vary materially in responding to exciting events.[15] For example, a blow to the head would conceivably induce different responses in a boxer and a bookkeeper.[16] The realization of this uncertainty appears implicitly in Professor Wigmore's statement that the guarantee of trustworthiness of the excited utterance lies in the consideration that "in the stress of nervous excitement the reflective faculties *may* be stilled and the utterance *may* become the unreflecting and

admitted under hearsay exceptions is the excited utterance . . . . [E]xcitement exaggerates, sometimes grossly, distortion in perception and memory . . . . The likelihood of inaccurate perception, the drawing of inferences to fill in memory gaps, and the reporting of nonfacts is high." Stewart, *supra*, at 28.

11. Hutchins and Slesinger, *Some Observations on the Law of Evidence, Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928). The authors also mention the instance of an emotionally upset man who "saw hundreds killed in an accident; their heads rolling from their bodies" when in reality only one man was killed and five injured. The authors conclude that "one need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation." *Id.* at 437.

12. H. BURTT, LEGAL PSYCHOLOGY 72 (1931); A. TRANKELL, RELIABILITY OF EVIDENCE 18 (1972).

13. Hutchins and Slesinger, *supra* note 11, at 434-35.

14. Quick, *supra* note 10, at 210.

15. D. MCCARTY, PSYCHOLOGY AND THE LAW 275-76 (1960). *See also* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 342 (1962).

16. Hutchins and Slesinger, *supra* note 11, at 433.

sincere expression of one's actual impressions and belief."[17] Thus even Professor Wigmore, who is credited with defining this hearsay exception and giving impetus to its widespread application,[18] seems to recognize there may be some whose reflective thought processes are not stilled by exciting events.

The few courts that have addressed the issue of impeachment of the absent declarant of an excited utterance have reached conflicting results. The Texas Court of Criminal Appeals has refused to permit impeachment of such a declarant on the grounds that the declarant, being merely the instrument through which the event itself speaks, is not actually a witness in the ordinary sense and thus is not subject to impeachment as an ordinary witness.[19] In *Williams v. State*[20] the Tennessee Court of Appeals distinguished impeachment of a dying declaration from impeachment of an excited utterance by determining that the purpose of the rule permitting impeachment of the former is to test the declarant's reliability. In the instance of the excited utterance, however, the spontaneity of the declaration assures its trustworthiness. Other courts, however, have

17. 6 J. WIGMORE, *supra* note 3, § 1749, at 199 (emphasis added).

18. E. MORGAN, *supra* note 15, at 342.

19. This reasoning was first exposited in dicta in the early case of *Jones v. State*, 111 Tex. Crim. 172, 11 S.W.2d 798, 799-800 (1928). Statements made by the decedent several minutes after he was shot were admitted as being part of the res gestae. The court, however, quoted Wigmore's description of the spontaneous utterance exception and referred to it as the rule on which admission was based. The *Jones* court then noted a distinction between a dying declaration and a res gestae statement in attempting to justify impeachment of the former but not the latter: in the former case a sense of impending death takes the place of an oath, and the law regards the declarant as testifying; while in the latter, it is the event itself which speaks. *Id.* at 799-800. In denying the state's motion for rehearing the court recognized the possibility that a res gestae statement could be admitted that "was so remotely connected with the main transaction and so immediately connected with the statement offered to impeach as to make the latter admissible." *Id.* at 802. The court concluded that the admissibility of an impeaching statement should be a fact consideration just as is the admissibility of the res gestae statement itself. *See* Williams v. State, 542 S.W.2d 827 (Tenn. App. 1976); Oldham v. State, 167 Tex. Crim. 644, 322 S.W.2d 616 (1959), partially overruled on other grounds by Ortega v. State, 500 S.W.2d 816, 818 (Tex. 1973). *See also* I F. WHARTON, WHARTON'S CRIMINAL EVIDENCE § 299, at 690 (12th ed. 1955), where it is stated that the "[r]easons underlying and permitting the admission of res gestae statements preclude the idea that they may be impeached by proof of contradictory statements of the declarant made at a time and under circumstances which render them hearsay."

20. 542 S.W.2d 827 (Tenn. App. 1976).

admitted evidence of the declarant's possible intoxication,[21] his use of "speed" prior to his making the excited utterance,[22] and his subsequent inconsistent statements[23] to impeach the out-of-court statements of an absent excited utterance declarant.

While there is little jurisprudence concerning impeachment of the declarant of an excited utterance, at least twenty jurisdictions[24] and the Federal Rules of Evidence[25] have obviated the need for judicial determination of the issue through statutes permitting impeachment of statements admitted

21. United States v. Glenn, 473 F.2d 191, 195 (D.C. Cir. 1972). In *Glenn,* thirty minutes after being stabbed in the chest and back, the victim made statements to the police identifying the defendant as her attacker. The victim died minutes later but her statements were admitted at defendant's trial under the excited utterances exception to the hearsay rule. The fact that a blood test revealed she had a .28 per cent alcohol count in her blood at the time the statements were made was held to be a factor to go to the weight of her testimony and not to its admissibility. The court stated: "Had she survived and been called as a witness, her testimony would have been received and its weight would have been for the jury. Likewise it was for the jury to assay the weight of her spontaneous declaration." *Id.* at 195.

22. State v. Greene, 15 Wash. App. 86, 546 P.2d 1234, 1236 (1976). The court admitted the evidence for the purpose of casting doubt on the declarant's ability to properly perceive the events that had taken place.

23. Hilyer v. Howat Concrete Co., Inc., 578 F.2d 422 (D.C. Cir. 1978). The witness had made an excited utterance exculpating the defendant within fifteen to twenty minutes after the defendant had purportedly run over witness's coworker. However, the witness's subsequent statement at police headquarters three hours after the accident indicated that he had not seen the accident. The court said the second statement should not preclude admission of the excited utterance but should be used by the jury in giving value and worth to the prior statement. The court in dictum observed that such a subsequent statement should not be any less admissible if the witness were absent.

24. ARIZ. R. EVID. 806; ARK. STAT. ANN. § 28:1001, rule 806; CAL. EVID. CODE § 1202; FLA. STAT. ANN. § 90.806; KAN. CODE CIV. P. 60-462; KY. R. CIV. P. 43.08; MAINE R. EVID. 806; MICH. R. EVID. 806; MINN. R. EVID. 806; MONT. R. EVID. 806; NEB. REV. STAT. § 27-806; NEV. REV. STAT. § 51.375; N.J.R. EVID. 65; N.M.R. EVID. 806; N.D.R. EVID. 806; UTAH R. EVID. 65; WIS. STAT. ANN. § 908.06; WY. R. EVID. 806; C.Z. CODE tit. 5, § 2964; V.I. CODE ANN. tit. 5, § 934.

25. FED. R. EVID. 806 provides:

> When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

under all hearsay exceptions. The passage of these statutes was apparently precipitated by a feeling that "the declarant of a hearsay statement which is admitted in evidence is in effect a witness . . . [whose] credibility should in fairness be subject to impeachment and support as though he had in fact testified"[26] and that "the trier of fact will be most likely to reach a just determination if all pertinent evidence is made available to him."[27] Wigmore also favors permitting impeachment of statements admitted under exceptions to the hearsay rule, because such statements are testimonial in nature.[28]

In *State v. Henderson* the Louisiana Supreme Court for the first time considered the impeachability of an absent declarant of an excited utterance. In deciding whether to permit such impeachment the court compared impeachment of an excited utterance to impeachment of a dying declaration. The court noted that it is well settled that the introduction of a dying declaration, because it is a testimonial statement, renders the declarant susceptible to impeachment and discrediting. Consequently, the court reasoned that "[b]ecause the excited utterance also is in effect a testimonial statement, its introduction likewise should make the declarant susceptible to impeachment and discrediting in the same way as other witnesses, so far as such a process is feasible."[29] Without further discussion the court concluded that the defendant could properly impeach the excited utterance with evidence showing prior convictions of the declarant[30] and with a press release revealing a subsequent misidentification.[31]

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26. 11 MOORE'S FEDERAL PRACTICE § 806.01 [5], at VIII-301 (2d ed. 1976).

27. 4 WEINSTEIN'S EVIDENCE, § 806 [01], at 806-05. The author attempts an explanation of the theory behind FED. R. EVID. 806. Most of the jurisdictions listed in footnote 24 enacted their statutes subsequent to the adoption of FED. R. EVID. 806. See note 24, *supra*. Many use the same number as the applicable federal rule and most adopted the same or substantially similar language. Thus, it may logically be assumed that they were influenced by the same reasoning in adopting their statutes.

28. 3A J. WIGMORE, EVIDENCE § 884-87, at 651-52 (J. Chadbourn rev. ed. 1970). 6 J. WIGMORE, *supra* note 3, § 1751, at 224.

29. 362 So. 2d at 1363.

30. *Id.*

31. *Id.* at 1364. The court remanded the case to the trial court to determine: (1) if there was a suppression of the existence of conviction records of the victim or of a press release revealing a misidentification by the victim, and (2) if so, whether the

The court's decision to allow impeachment of the excited utterance declarant by analogizing excited utterances to dying declarations is subject to some question. Although both are in effect testimonial statements, the special trustworthiness of each of these hearsay exceptions is based on dissimilar considerations. The reliability of the dying declaration emerges from the declarant's consciousness of impending death with the supposed resultant cessation of any motive for telling a falsehood.[32] The dying declaration thus derives its trustworthiness from conscious, deliberate, and reflective thought, although that thought is presumably affected by the above considerations.[33] The excited utterance, however, is trustworthy because the declarant has simply lost the power to speak from reasoned and fabricated thought, not because he has *chosen* to speak the truth after conscious deliberation.[34]

When hearsay is admitted under the excited utterance exception, prior convictions of the declarant should be irrelevant. If the declarant's statements are really a spontaneous reaction to the event and not the result of reflective thought, he simply cannot collect his thoughts to fabricate a lie. Thus, any attempt to impeach the excited utterance declarant with a prior conviction would constitute an attempt to discredit him by showing a tendency he could not possibly have exercised.[35]

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material suppressed would, when considered with the entire record, create a reasonable doubt as to either of the defendants' guilt. Should the trial court conclude that such reasonable doubt exists, a new trial would be required; but, if no material was suppressed or if after any material suppressed is evaluated no reasonable doubt as to either defendant's guilt exists, the convictions and sentences will be affirmed, subject to review by the Louisiana Supreme Court on appeal. *Id.* at 1363-64.

32. 5 J. WIGMORE, EVIDENCE § 1438, at 289 (J. Chadbourn rev. ed. 1970).

33. Probably for this reason one writer has stated that "dying declarations are no more sacred against attack than is other testimony; the deceased is no more immune than a living witness from impeachment." Kliks, *Impeachment of Dying Declarations*, 19 OR. L. REV. 265, 266 (1940).

34. See text at note 5, *supra*.

35. Normally, prior convictions are relevant for impeachment purposes because one who has shown a disregard for societal rules and values is more likely to lie on the witness stand. 10 MOORE'S FEDERAL PRACTICE § 609.01 [1.-3], at VI-100 (2d ed. 1976) (Advisory Committees note to 1969 draft). Therefore, only when the declarant has had an opportunity to think about what he was saying should a tendency to lie be relevant.

Professor Wigmore seems to agree with this rationale in his treatise. In speaking of the disqualification of infancy to exclude an excited utterance he states that the declaration should not be excluded "because the principle of the present exception

Impeachment by showing bias, interest, corruption or poor reputation of the declarant should be treated in the same manner as impeachment by prior convictions. Each of these attacks on the declarant's credibility is directed at a conscious or deliberate effort on his part to falsify his declarations,[36] but conscious or deliberate declarations theoretically are not possible until the declarant's excitement has subsided.[37]

A different result may obtain, however, when one attempts impeachment by showing contradictory statements or the lack of the declarant's capacity to perceive. With these modes of impeachment the declarant's consciousness of truth or falsehood is not at issue; instead, the issue is the inaccuracy of the declarant's perception of the event, which some writers contend is precipitated by an excited or stressful state.[38] Thus, a showing that the declarant was intoxicated, "high on drugs," or had poor eyesight might indicate that he did not have the capacity to experience the claimed perceptions and that his supposed observations were induced by his excited state. Likewise, a subsequent inconsistent statement by the declarant might well be illustrative of the same inaccurate perception.[39]

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obviates the usual source of untrustworthiness . . . in children's testimony." 6 J. WIGMORE, *supra* note 3, § 1751, at 223. In discussing the anachronistic testimonial disqualification of infamy by conviction of crime, he declares that in any instances where this type of disqualification still exists, it should not be a bar to admitting the excited utterance of a declarant who had been convicted of a crime because of the "peculiar nature of the present exception." *Id.* Wigmore is thus of the opinion that infancy and a tendency to lie are irrelevant when the trustworthiness of an evidentiary statement is guaranteed by the spontaneous reaction to an exciting event. This view is admittedly inconsistent with Wigmore's position favoring impeachment of all statements admitted under exceptions to the hearsay rule.

36. Professor McCormick cites the relevance of impeachment by showing bias, interest, or corruption as being the recognition of "the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case." C. MCCORMICK, *supra* note 3, § 40, at 78. *See also* 3A J. WIGMORE, *supra* note 28, § 948, at 783, § 956, at 803, and §§ 966-69 at 812-20. Impeachment by showing that the witness has a general reputation for untruthfulness or bad moral character is relevant as tending to show the witness is likely to lie. Revised Statutes 15:490 (1950) permits such an impeachment. However, a witness's emotions, feelings, or tendency to lie should be of no consequence where reflective thought is impossible.

37. See text at note 4, *supra*.

38. See text at notes 10-12, *supra*.

39. For example, suppose in the instant case the victim, while in the ambulance enroute to the hospital, had stated to the attendant that everything happened so fast

The court's decision to permit impeachment of an excited utterance by showing prior convictions of the defendant seems incompatible with the underlying nature of the exception. However, implicit in the court's decision lies the notion that, although the excited utterance is admitted into evidence because the event speaks through the declarant, impeachment is proper because one can never be certain that all reflective thought was stilled when the "excited" statements were made.[40] This amounts to an accommodation of the traditional basis for the excited utterance exception to the psychological realities mentioned earlier.

Although there is always a threat to the fairness of a trial in allowing any hearsay to be admitted while precluding an attack on its credibility, the danger in allowing excited utterances to remain immune from impeachment is exacerbated in a case such as *Henderson* where the defendants were convicted primarily on the strength of statements made by an unavailable victim.[41] To deny the defendants the right to impeach these statements would be to force them to stand defenseless before crucial accusations admitted under circumstances in which the statements' reliability was probable but not tested. Such a denial, especially in a case like the present one, could conceivably constitute a violation of the defendant's right to due process of law under *Chambers v. Mississippi*.[42]

While the supreme court in *Henderson* was faced only with the issue of impeachment of the deceased declarant of an excited utterance, the reasons underlying the decision suggest that the holding will not be restricted to the facts of the instant case. In permitting impeachment of the declarant "because the excited utterance also is in effect a testimonial statement,"[43] the court has effectively opened the door to the impeachment

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she didn't get a real good look at her assailants, although she thought that two of them looked like the Henderson brothers. Such a declaration might well indicate that her previous "excited utterances" were not based on accurate observations.

40. See text at notes 13-18, *supra*.

41. 362 So. 2d at 1361.

42. 410 U.S. 284 (1973). For a discussion of this due process argument, see Comment, *Impeaching the Credibility of a Hearsay Declarant: The Foundation Prerequisite*, 22 U.C.L.A. L. REV. 452, 473-82 (1974).

43. 362 So. 2d at 1363.

of all hearsay declarants since all hearsay statements admitted at trial are testimonial. Likewise, if a hearsay declarant who theoretically lacks the capacity for reflective thought may be discredited, *a fortiori* all other hearsay declarants, none of whom are incapable of reflective and fabricative thought, should be subject to impeachment. The court did qualify its decision by limiting such impeachment to those instances where "such a[n] [impeachment] process is feasible."[44] The court, however, offered no hint as to when such a process may not be feasible. Perhaps this qualification was a reference to those methods of impeachment which require the laying of a foundation. Should this have been the court's intention, the author suggests that the better view is to waive the foundation requirement in the case of an unavailable hearsay declarant.[45]

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44. *Id.*

45. Louisiana Revised Statutes 15:493 (1950) requires that a party lay a proper foundation before impeaching the credibility of a witness by a contradictory statement of the witness. The Louisiana Supreme Court in *State v. Reed*, 290 So. 2d 835 (La. 1974), disallowed a waiver of this foundation requirement in the attempted impeachment of the testimony of a then deceased individual whose testimony at a preliminary hearing was admitted at defendant's trial under Code of Criminal Procedure article 295. At the preliminary hearing the witness testified favorably to the defendant, who was charged with rape, and strongly supported his defense of consent. At trial the state attempted to impeach this prior testimony by offering a tape recording of the witness's contrary statements to police on the morning of the alleged rape. The court, in reversing the defendant's conviction, held that the recording was not admissible and no exceptions existed that would allow a waiver of the foundation requirement. The court said the error was compounded by the fact that the statement was unsworn and also because it would deny the defendant's right to confrontation under the sixth and fourteenth amendments of the United States Constitution and article 1, section 9, of the Louisiana Constitution. Of additional significance was the court's concern that in the context of a rape trial, the admission of the recording would have been highly inflammatory.

The *Reed* decision has been criticized, *see The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 535 (1975), and more importantly perhaps, can be factually distinguished from the instant case. In *Henderson* impeachment was in defendants' favor and to deny that right would be to compound their confrontation problem. Also, the state in *Reed* had the opportunity to impeach the witness's credibility at the preliminary hearing but failed to do so, whereas in *Henderson* no opportunity ever existed to discredit the witness. Finally, the evidence sought to be admitted in *Henderson* would not be inflammatory to the state as it was to the defendant in *Reed*.

Traditionally, this foundation has been required (1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness obviates the need for extrinsic proof of the contradiction, and (3) to play fair with the witness by giving him

The Louisiana Supreme Court in *Henderson* was correct in holding that the deceased declarant of the excited utterance should be susceptible to impeachment and discrediting in the same manner as other witnesses, so far as such a process is feasible. However, impeachment should not be allowed simply because the excited utterance is "testimonial," if it is testimony of an entirely different character from traditional testimony. The true nature of the excited utterance compels its own justification for permitting impeachment. A defendant who has already lost the fundamental right to confront his accuser because of the accuser's death should not be further impositioned by being denied the opportunity to discredit that witness whose testimony is used against him.

Allen M. Posey, Jr.

ON WASHING DIRTY LINEN IN PUBLIC: PRIVACY AND THE FIRST AMENDMENT

The defendant erected a bulletin board in his washateria on which he posted pictures of the plaintiff taking money from a soft drink machine five months earlier with captions detailing the plaintiff's identity and subsequent conviction. About fifteen months later, the plaintiff brought suit alleging that the publicity constituted undue harassment which had caused him great humiliation and embarrassment. The trial court agreed, enjoined the defendant from giving further publicity to the incident in any manner, and awarded damages in the amount

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a chance to explain his inconsistencies. C. MCCORMICK, *supra* note 3, § 37, at 72. A strict adherence to the foundation requirement in the case of an absent hearsay declarant has been described as being tantamount to a sacrifice of "substance of proof to orderliness of procedure, and the rights of the living party to consideration of the deceased witness." Mattox v. United States, 156 U.S. 237, 260 (1895) (Shiras, J., dissenting). Professor Wigmore has voiced the concern that requiring a strict adherence to the foundation requirement in the case of an absent hearsay declarant would result in a simultaneous deprivation of the impeacher's two most potent modes of defense, those of cross examination and impeachment by prior inconsistent statements. 3A J. WIGMORE, *supra* note 28, § 1033, at 1037-38. He concludes that requiring a strict compliance in the case of an absent hearsay declarant would be pushing the rule too far. 3A J. WIGMORE, *supra* note 28, § 1033, at 1037-38. This appears to be the prevailing view in most jurisdictions today. C. MCCORMICK, *supra* note 3, § 37, at 74.