

## 8.29. Present Sense Impression

**A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition as it was unfolding or immediately thereafter is admissible, irrespective of whether the declarant is available to testify, provided that there is evidence, independent of the statement, that supports: (a) the accuracy of the contents of the statement and (b) that the statement was made contemporaneously with the event or immediately thereafter.**

### Note

This formulation of the present sense impression hearsay exception is primarily derived from *People v Brown* (80 NY2d 729, 734-735, 737 [1993]), wherein the Court of Appeals recognized the exception:

“[W]e hold that spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence. Further, such statements may be admitted even though the declarant is not a participant in the events and is an unidentified bystander . . .

“What corroboration is sufficient will depend on the particular circumstances of each case and must be left largely to the sound discretion of the trial court. But before present sense impression testimony is received there must be some evidence in addition to the statements themselves to assure the court that the statements sought to be admitted were made spontaneously and contemporaneously with the events described.”

(See *People v Cantave*, 21 NY3d 374, 382 [2013]). *Brown* requires that the present sense impression statement must be made while the declarant was observing the event as it was unfolding or “immediately thereafter.” The statements at issue in *Brown* were “contemporaneous reports of events then being observed by the [declarant]” (*People v Brown*, 80 NY2d at 732), and thus the Court had no occasion to discuss what it meant by “immediately thereafter.”

The Court had that opportunity in *People v Vasquez* (88 NY2d 561, 575 [1996]):

“The . . . language [‘or immediately thereafter’] . . . was meant to suggest only that the description and the event need not be precisely simultaneous, since it is virtually impossible to describe a rapidly unfolding series of events without some delay between the occurrence and the observer’s utterance. The language in question was certainly not intended to suggest that declarations can qualify as present sense impressions even when they are made after the event being described has concluded. Indeed, we noted in *Brown* that the description of events must be made ‘substantially contemporaneously’ with the observations (*id.*, at 734).

“Thus, although we recognize that there must be some room for a marginal time lag between the event and the declarant’s description of that event, that recognition does not obviate the basic need for a communication that reflects a *present* sense impression rather than a recalled or recast description of events that were observed in the recent past. Without satisfaction of this requirement, the essential assurance of reliability—the absence of time for reflection and the reduced likelihood of faulty recollection—is negated and there is then nothing to distinguish the declaration from any other postevent out-of-court statement that is offered for the truth of its contents.”

The Court then found that the 911 call by defendant was not admissible under the exception as it was “after the entire sequence of events had come to a final and fatal end and defendant had run from the crime scene. At that point, it could no longer be said that defendant’s statements were a description of his ‘present sense impressions’ as his observations were made” (*People v Vasquez*, 88 NY2d at 578), and a statement by a victim was not admissible as it was made “several minutes after the assault took place.” (*Id.* at 580.)

Consistent with this strict view of the contemporaneity element, the Appellate Divisions have indicated that a time lag of a few seconds after the event ended and the statement was made will satisfy the element of “immediately thereafter.” (*People v Haskins*, 121 AD3d 1181, 1184 [3d Dept 2014] [“right away,” but under the excited utterance exception]; *People v George*, 79 AD3d 1148, 1148 [2d Dept 2010] [the delay was insufficient to impair reliability]; *People v York*, 304 AD2d 681, 681 [2d Dept 2003] [same]; *People v White*, 297 AD2d 587, 587 [1st Dept 2002] [“substantially contemporaneous”].) A delay of seven minutes after the end, however, will not satisfy the element of “immediately thereafter.” (*People v Demand*, 268 AD2d 901, 902 [3d Dept 2000].)

With respect to the difference between the “excited utterance” exception

and its “close relative” the “present sense impression” exception, *People v Vasquez* (88 NY2d at 574-575) explained:

“ ‘Excited utterances’ are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. ‘Present sense impression’ declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of ‘excited utterances’ are their spontaneity and the declarant’s excited mental state, the key components of ‘present sense impressions’ are contemporaneity and corroboration” (citations omitted).

With respect to corroboration of the present sense impression statement, the Court also elaborated on that requirement in *People v Vasquez* (88 NY2d at 575-576), as follows:

“The general idea, as we stated in *Brown* . . . , is that there must be some independent verification of the declarant’s descriptions of the unfolding events. Although we stated in *People v Brown* . . . that ‘there must be some evidence . . . that the statements sought to be admitted were made spontaneously and contemporaneously with the events described,’ we did not mean by that language that such proof would suffice to satisfy the entirely separate requirement that the content of the communication be corroborated by independent proof. Rather, we merely intended to reiterate the basic foundational requirements for admitting an out-of-court declaration purporting to be a ‘*present* sense impression.’ Accordingly, contrary to appellants’ arguments here, the corroboration element cannot be established merely by showing that the declarant’s statements were unprompted and were made at or about the time of the reported event.

“The extent to which the content of the declaration must be corroborated by extrinsic proof is, as we have previously said, dependent on the particular circumstances of the individual case (*People v Brown*, 80 NY2d, at 737). Because

of the myriad of situations in which the problem may arise, it would not be productive to attempt to fashion a definitive template for general application. It is sufficient at this point to note that in all cases the critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content.”

The admissibility of a present sense impression is not conditioned on the declarant being unavailable to testify. (*People v Buie*, 86 NY2d 501, 506-507 [1995].) *Buie* did note, however, that the unavailability of the declarant “may be weighed by Trial Judges in assessing the traditional probativeness versus undue prejudice calculus for allowing evidence before a petit jury.” (*Id.* at 506.)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be “testimonial.” (*See People v Rodriguez*, 50 AD3d 476, 476 [1st Dept 2008] [declarants’ statements to 911 operators describing the victim’s pursuit of defendant and his accomplice were admissible under the present sense impression exception and they were not testimonial as the statements in the calls were primarily “to enable police assistance to meet an ongoing emergency”]; *People v Coleman*, 16 AD3d 254, 255 [1st Dept 2005] [information conveyed by the 911 caller was admissible under the present sense impression and excited utterance exceptions and was not testimonial as it was made for the “purpose of urgently seeking police intervention”].)