“THE GUN’S NOT MINE!”: THE ADMISSIBILITY OF DEFENDANTS’ EXCULPATORY HEARSAY STATEMENTS UNDER FEDERAL RULES OF EVIDENCE 803(2) & (3)

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Exculpatory hearsay statements made by criminal defendants often warrant admission under the Federal Rules of Evidence (FRE) as excited utterances, under Rule 803(2), or as statements reflecting a then-existing state of mind, under Rule 803(3). Nevertheless, defendants often struggle to have their exculpatory statements admitted pursuant to these rules—even when those statements fulfill their categorical requirements.

This Comment surveys the different approaches courts take to determine whether exculpatory hearsay statements made by criminal defendants are admissible under Rules 803(2) and (3). It argues that courts too often misapply these rules to exclude defendants’ exculpatory statements. In particular, courts counteract the rules’ requirements and underlying purposes when using motive to fabricate as a barrier to admission. Further, courts sometimes construe their requirements in an unreasonably narrow manner.

This Comment concludes that courts should rely exclusively on the express, categorical requirements of Rules 803(2) and (3) when determining the admissibility of exculpatory hearsay statements. It cautions that courts should apply these requirements correctly and consistently with the drafters’ intentions—without interpreting them more narrowly than intended or barring admission based on sincerity concerns their categorical requirements do not contemplate. Additionally, this Comment posits that imposing a discretionary trustworthiness requirement would risk undue uncertainty and is not needed to deter the dangers posed by fabricated exculpatory statements. Rules 803(2) and (3) provide an objective framework to ensure that only hearsay statements that are sufficiently necessary and reliable are admitted into evidence. And they offer multiple avenues for judges to exclude unreliable evidence. Moreover, existing

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institutional safeguards adequately mitigate the risks associated with fabricated hearsay statements.

INTRODUCTION 101
I. HEARSAY, EXCITED UTTERANCES, AND STATEMENTS OF THEN-EXISTING STATE OF MIND 102
A. Rule 803(2): The Excited Utterance Exception 103
1. The Rule and Its Rationale 103
2. The Impact of Stress on the Ability to Lie 104
B. Rule 803(3): The Then-Existing State of Mind Exception 105
II. EVALUATING THE ADMISSIBILITY OF DEFENDANTS' EXCULPATORY STATEMENTS UNDER RULES 803(2) AND (3) 106
A. Inconsistent Applications of Rule 803(2) 106
1. Motive to Fabricate as a Barrier to Admission 107
2. Exclusion Based on Intervening Time Between Startling Event and Statement 109
3. A Narrowed Rendition of Rule 803(2)'s Relatedness Requirement 111
B. Inconsistent Applications of Rule 803(3) 112
1. A Heightened Rendition of Rule 803(3)'s Contemporaneity Requirement 112
2. Exclusion Based on the Inherent Untrustworthiness of Exculpatory Statements 115
III. A PATH TOWARD CONSISTENT APPLICATION OF RULES 803(2) AND (3) TO DEFENDANTS' EXCULPATORY STATEMENTS 117
A. The Methods Courts Currently Use to Exclude Defendants' Exculpatory Statements Counteract the Requirements and Policies of Rules 803(2) and (3) 117
1. The Misstep of Treating a Defendant's Motive to Fabricate as a Barrier to Admission 118
2. Misapplication of the Rules' Requirements 119
B. The Requirements of Rules 803(2) and (3) Alone Should Guide the Admissibility of a Defendant's Exculpatory Statement 120
1. The Rules Offer Sufficient Avenues to Exclude Exculpatory Statements 120
2. The Rules Appropriately Balance Reliability and Fairness 122

3. A Discretionary Trustworthiness Requirement Would Counteract Legislative Intent and Create Uncertainty 123
4. Institutional Safeguards Protect Against Fabricated Exculpatory Statements 125
CONCLUSION 126

INTRODUCTION

Justice Anthony M. Kennedy once explained that a "fundamental premise of our criminal trial system is that the 'jury is the lie detector.'"[1] The duty to determine the weight and credibility of witness testimony belongs to the jury, "presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."[2]

It is, however, a judge's duty to act as an evidentiary "gatekeeper."[3] Judges must "ensure that the jury, in carrying out its prescribed role, bases its determinations on relevant and reliable evidence."[4] Thus, although a criminal defendant must be given every meaningful opportunity to present a complete defense, he must do so in accordance with the evidentiary rules designed to facilitate the jury's search for the truth.[5]

Since 1975, the Federal Rules of Evidence (FRE) have governed the admission of evidence in federal courts.[6] In accordance with the common law, the rules bar the admission of hearsay—out-of-court statements offered to prove the truth of the matter asserted in those statements.[7] Yet, the rules include a number of exceptions to the general bar on hearsay.[8] And exculpatory statements that criminal defendants make outside of court often warrant admission under the hearsay exceptions.[9] On one hand, some courts are reluctant to admit such statements because of concerns regarding their reliability.[10] These courts presume that defendants have a motivation to fabricate exculpatory statements to aid in their defense.[11] On the other hand,

1. United States v. Scheffer, 523 U.S. 303, 313 (1998) (emphasis omitted) (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973).
2. *Id.*
3. United States v. Frazier, 387 F.3d 1244, 1272 (11th Cir. 2004).
4. *Id.*
5. *Id.*
6. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.
7. *See* FED. R. EVID. 801–02.
8. *See id.* 803–04.
9. *See, e.g.*, United States v. DiMaria, 727 F.2d 265, 271–72 (2d Cir. 1984) (reversing trial court's exclusion of defendant's exculpatory statement under Rule 803(3)); United States v. Smith, No. RDB-23-0126, 2024 WL 3606542, at *4 (D. Md. July 30, 2024) (admitting defendant's exculpatory statement pursuant to Rule 803(2)).
10. *See infra* Part II.
11. *See infra* Part II.

if the statements fulfill the exceptions' requisite requirements, they are admissible under the rules notwithstanding their apparent "unreliability."[12]

This Comment examines the approaches courts take in deciding whether to admit defendants' exculpatory hearsay statements under FRE 803(2) and 803(3). Part I outlines the rule against hearsay and explains the excited utterance and then-existing state of mind exceptions, along with the policies that underly them. Part II surveys the different ways in which courts apply Rules 803(2) and (3) in assessing the admissibility of defendants' out-of-court exculpatory statements. Part III concludes by observing that courts misapply Rules 803(2) and (3) when they exclude exculpatory statements, particularly by using motive to fabricate as a barrier to admission and narrowing these rules beyond their intended scope. Recognizing that these exceptions adequately balance reliability and fairness, Part III stresses the importance of adhering to their categorical requirements and highlights the existing safeguards that address fabricated hearsay statements. When a defendant's exculpatory hearsay statement qualifies for admission based on the rules' criteria, courts should, as Justice Kennedy suggests, allow the jury to act as the "lie detector."[13]

I. HEARSAY, EXCITED UTTERANCES, AND STATEMENTS OF THEN-EXISTING STATE OF MIND

The FRE prohibit the admission of hearsay unless an exception or exemption holds otherwise.[14] "Hearsay" refers to a statement (1) made by a declarant at a time other than while testifying at the trial or hearing where it is being offered, and (2) offered by a party to prove the truth of the matter asserted in the statement.[15]

The rule against hearsay is premised on the notion that out-of-court statements are tainted by issues of perception, memory, sincerity, and narration, as they are not subject to immediate cross-examination.[16] In the courtroom, testifying witnesses are subject to cross-examination and must make their statements under oath, reducing the likelihood of insincerity.[17] A witness's answers to questions on cross-examination may clarify ambiguities in their statements, highlight any potential motives to lie, and reveal errors in narration, memory, and perception.[18] By observing the demeanor of in-court witnesses, jurors are also better able to assess a witness's credibility.[19]

The FRE include a number of exceptions to the prohibition on hearsay.[20] In particular, the exceptions under Rule 803 assume that qualifying

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12. *See infra* Part II.
13. United States v. Scheffer, 523 U.S. 303, 313 (1998).
14. *See* FED. R. EVID. 802.
15. *Id.* 801.
16. *See* RONALD J. ALLEN, DAVID S. SCHWARTZ, MICHAEL S. PARDO & ALEX STEIN, AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS, AND CASES 380–81 (7th ed. 2021).
17. *See id.*
18. *See id.*
19. *See id.*
20. *See* FED. R. EVID. 801–04.

statements are either so necessary or so trustworthy that they outweigh the dangers inherent in hearsay.[21] These factors are deemed so substantial that the rules adopt no preference between live testimony by the declarant and their qualifying out-of-court statements.[22] Part I.A discusses Rule 803(2), and Part I.B discusses Rule 803(3).

A. Rule 803(2): The Excited Utterance Exception

1. The Rule and Its Rationale

FRE 803(2) admits hearsay statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[23] The primary rationale underlying the exception is the diminished risk of a declarant's insincerity.[24] It assumes that the stress of a startling event stills a declarant's reflective faculties; the stress of excitement is said to preclude the conscious deliberation necessary to fabricate a statement and prevent "considerations of self-interest" from being "fully [brought] to bear by reasoned reflection."[25]

A declarant need not be completely incapable of engaging in conscious reflection at the time of his statement for the exception to apply.[26] Rather, he must be incapable of engaging in the "conscious reflection essential for fabrication."[27] If "the statement [is] made contemporaneously with the excitement resulting from the event," the rule assumes it is sufficiently free from conscious reflection.[28] In other words, a declarant's statement is deemed a spontaneous reaction to an exciting event, and sufficiently trustworthy for admission, if (1) a startling event occurred, (2) the declarant's statement relates to the startling event, (3) the declarant made the statement while under the stress of excitement, and (4) the declarant's stress was caused by the startling event.[29]

The language of Rule 803(2) does not include any time constraint. However, courts are more likely to conclude that a declarant did not make his statement under the stress of excitement as time passes between the startling event and the statement.[30] A temporal gap is not dispositive. Rather, courts use it to determine whether the declarant was still excited.[31]

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21. *See* Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 FORDHAM L. REV. 1485, 1486, 1489 (2016).

22. *See id.* at 1486.

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

24. *See* ALLEN ET AL., *supra* note 16, at 465–66.

25. 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747 (James H. Chadbourn rev. ed. 1976).

26. *See* JOSEPH W. COTCHETT & G. RICHARD POEHNER, FEDERAL COURTROOM EVIDENCE § 803.3.3, Lexis (database updated Dec. 2024).

27. *See id*.

28. *Id.*

29. *See* ALLEN ET AL., *supra* note 16, at 464.

30. *See* ROBERT P. MOSTELLER, KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED & D. H. KAYE, MCCORMICK ON EVIDENCE § 272 (8th ed. 2020).

31. *See* ALLEN ET AL., *supra* note 16, at 467.

If there is substantial time between the startling event and statement, courts will exclude the statement absent a showing that the declarant did not engage in reflective thought.[32]

In regard to a statement's timing, the Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee") dictates the standard of measurement as the duration of the state of excitement[33]—"the character of the transaction or event will largely determine the significance of the time factor."[34] Additionally, a "precise showing of the lapse of time" is not required.[35] Generally, "[t]estimony that the declarant still appeared nervous or distraught and that there was a reasonable basis for continuing [to be] emotional[ly] upset" will suffice.[36]

The exception's requirement that the statement relate to the startling event or condition demands a relationship between the startling event and the resulting statement.[37] However, the Advisory Committee clarifies that to "'relate' to" the startling event or condition, the statement need not describe or explain it.[38]

To articulate the significance of the exception's relatedness requirement, the Advisory Committee references *Murphy Auto Parts Co. v. Ball*.[39] The *Ball* court held that excited utterances may go beyond describing the startling event and "deal[] with past facts or with the future."[40] The statement at issue was an employee's assertion immediately after a vehicle accident that "he had to call on a customer and was in a bit of a hurry."[41] The plaintiff sought to admit the statement as an excited utterance against the employer regarding the employee-driver's agency.[42] Although the statement went "beyond a description of the occurrence," the court found it admissible because it was "truly a spontaneous, impulsive expression excited by the event" and therefore an admissible excited utterance.[43]

2. The Impact of Stress on the Ability to Lie

Although stress is said to impair the ability to construct a lie, it is less clear whether it impairs the decision of whether to lie.[44] Where there is no motivation to lie, humans are thought to have a default response to tell the

32. *See id.*
33. FED. R. EVID. 803(2) advisory committee's note.
34. *Id.*
35. *See* ALLEN ET AL., *supra* note 16, at 467 (quoting United States v. Davis, 577 F.3d 660, 669 (6th Cir. 2009)).
36. *Id.* (quoting *Davis*, 577 F.3d at 669 (alterations in original)).
37. *See* MOSTELLER ET AL., *supra* note 30, § 272.
38. *See* FED. R. EVID. 803(2) advisory committee's note.
39. 249 F.2d 508 (D.C. Cir. 1957).
40. *Id.* at 511.
41. *Id.* at 509.
42. *See id.* at 511.
43. *Id.* at 511–12.
44. *See* Timothy T. Lau, *Reliability of Excited Utterance Hearsay Evidence*, 87 MISS. L.J. 599, 613–16 (2018).

truth.[45] That default response changes, however, when individuals have a motive to lie; when such a motivation exists, the default response is to lie.[46] Additionally, "people lie more under time pressure, when confronted with a tempting situation in which lying may serve their self-interest."[47] Thus, Rule 803(2)'s guarantees of trustworthiness might falter "where there is a benefit to lie readily perceptible to the declarant."[48] To overcome the default response to lie in such situations, declarants might actually require the time and mental clarity to engage in exactly the conscious reflection the exception seeks to eliminate.[49]

Nevertheless, the Advisory Committee's rationale that "conscious fabrication" requires reflection finds some support in scientific literature.[50] "The construction of a lie is a mental step distinct from the decision to lie."[51] It "requires additional time and cognitive resources" which stress could impair or suppress.[52] Stress hinders the ability to complete cognitive tasks effectively[53] and can "chronically impair[] performance on explicit memory tasks that require complex, flexible reasoning."[54] Thus, the circumstances under which excited utterances are made still make it more difficult for declarants to *formulate* convincing lies, even if lying is their default response when it serves their self-interest.[55]

B. Rule 803(3): The Then-Existing State of Mind Exception

Under Rule 803(3), statements of a declarant's then-existing state of mind or condition are admissible notwithstanding the prohibition against hearsay.[56] Statements expressing a declarant's existing state of mind include those pertaining to motive, intent, or plan.[57] Alternatively, statements regarding the declarant's condition may include those describing emotional, sensory, or physical conditions, including mental feeling, pain, or bodily health.[58] Notably, to "avoid the virtual destruction of the hearsay rule,"[59] the exception prohibits statements of memory or belief to prove facts remembered or believed unless they relate to the terms of a declarant's will.[60]

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45. *See id.* at 613.
46. *See id.* at 615; Bruno Verschuere & Shaul Shalvi, *The Truth Comes Naturally! Does It?*, 33 J. LANGUAGE & SOC. PSYCHOL. 417, 419 (2014).
47. Verschuere & Shalvi, *supra* note 46, at 420.
48. *See* Lau, *supra* note 44, at 615.
49. *See id.*
50. *See id.* at 619.
51. *Id.* at 617.
52. *Id.*
53. *See* John E.B. Myers, Ingrid Cordon, Simona Ghetti & Gail S. Goodman, *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 L. & CONTEMP. PROBS. 3, 6 (2002).
54. Carmen Sandi, *Stress and Cognition*, 4 WIREs COGNITIVE SCI. 245, 255 (2013).
55. *See* Lau, *supra* note 44, at 617–19.
56. *See* FED. R. EVID. 803(3).
57. *See id.*
58. *Id.*
59. *Id.* 803(3) advisory committee's note.
60. *Id.* 803(3).

Rule 803(3) is premised on two primary rationales: (1) a lack of perception or memory dangers, and (2) necessity.[61] Unlike Rules 803(1) and (2), 803(3) "offers no purported safeguards against sincerity and narration dangers," and does not require spontaneity.[62] Instead, the rule is based on reliability only to the extent that there is a diminished risk of memory or perception issues when a declarant reports "a condition presently existing at the time of the statement."[63] In other words, the contemporaneity of the statement serves as an assurance of the declarant's memory and perception—a factor weighing heavily in favor of admissibility.[64]

Additionally, "'[n]ecessity' plays a large role in admission" under the exception.[65] There are only two ways to assess individuals' emotional or physical conditions and future plans: "One is to assess how they act, and the other is to assess what they say."[66] Although a declarant's actions can be used to prove state of mind, their contemporaneous statements are the only direct evidence of their internal mental state.[67] Thus, even with the option for cross-examination, the declarant's in-court testimony might not provide stronger evidence.[68] A testifying witness's "own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said."[69]

II. EVALUATING THE ADMISSIBILITY OF DEFENDANTS' EXCULPATORY STATEMENTS UNDER RULES 803(2) AND (3)

Courts often view defendants' exculpatory out-of-court statements with skepticism, even when such statements arguably qualify as excited utterances or reflect a then-existing state-of-mind. Part II.A. focuses on Rule 803(2) (excited utterances), highlighting instances in which courts exclude statements based on sincerity concerns, timing issues, or a narrowed application of the rule's relatedness requirement. Part II.B addresses Rule 803(3) (statements of then-existing state of mind), focusing on cases that have imposed a heightened contemporaneity standard or excluded exculpatory statements on sincerity grounds.

A. Inconsistent Applications of Rule 803(2)

This section explores the various ways courts apply Rule 803(2) to defendants' exculpatory statements. Part II.A.1 describes how concerns about sincerity can deter admission under the rule. Part II.A.2 discusses the

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61. *See* Saltzburg, *supra* note 21, at 1489; ALLEN ET AL., *supra* note 16, at 475–76.
62. *See* ALLEN ET AL., *supra* note 16, at 475.
63. *See* MOSTELLER ET AL., *supra* note 30, § 273.
64. *See* Edward J. Imwinkelried, *Importance of the Memory: Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 FLA. L. REV. 215, 234 (1989).
65. *See* MOSTELLER ET AL., *supra* note 30, § 273.
66. Saltzburg, *supra* note 21, at 1489.
67. *See* MOSTELLER ET AL., *supra* note 30, § 274.
68. *See id.*
69. *See id.*

impact of a statement's timing. Part II.A.3 addresses how courts apply the rule's relatedness requirement to exclude–or admit–defendants' exculpatory out-of-court statements.

1. Motive to Fabricate as a Barrier to Admission

Although exculpatory statements may take the form of excited utterances, some courts still deny their admission because of concerns about their sincerity rather than their failure to satisfy Rule 803(2)'s requirements.

In *United States v. Esparza*,[70] the U.S. Court of Appeals for the Eighth Circuit presumed the defendant capable of engaging in the conscious deliberation that Rule 803(2) seeks to eliminate because he possessed a potential motive to fabricate his exculpatory statement.[71] There, the defendant appealed his conviction for possessing cocaine with intent to distribute, arguing the trial court erred in excluding his statement to an officer who had discovered drugs in his semi-trailer.[72] When the drugs were found, the defendant exclaimed, "[I] didn't know that was in there."[73]

The Eighth Circuit upheld the exclusion of the defendant's statement from Rule 803(2) admission. It did not apply the actual requirements of Rule 803(2) and refused to consider whether the defendant was sufficiently excited by his confrontation with the police.[74] Instead, it determined that "when 'incriminating evidence is discovered in one's possession, it requires only the briefest of reflection to conclude that a denial and plea of ignorance is the best strategy.'"[75] In other words, it found the statement's self-serving nature necessarily indicated the declarant's ability to consciously deliberate, rendering the statement untrustworthy and inadmissible under Rule 803(2).[76] A number of state courts have similarly concluded that a statement's self-serving nature can indicate that it was the product of conscious deliberation.[77]

The U.S. Court of Appeals for Sixth Circuit also concluded that a defendant's motive to fabricate an exculpatory statement could preclude his statement's admission under Rule 803(2). In *United States v. Penney*,[78] a defendant convicted of attempted murder appealed his conviction, arguing that the trial court should have admitted a statement he made to an officer fifteen minutes after his arrest.[79] Following a confrontation with police, the

70. 291 F.3d 1052 (8th Cir. 2002).
71. *See id.* at 1055.
72. *See id.* at 1054.
73. *Id.*
74. *See id.* at 1055.
75. *Id.* (quoting United States v. Sewell, 90 F.3d 326, 327 (8th Cir. 1996)).
76. *See id.*
77. *See, e.g.*, State v. Pavlik, 268 P.3d 986, 991 (Wash. Ct. App. 2011) ("[S]elf-serving or exculpatory statements, even though uttered only a few minutes after an incident, show conscious reflection."); People v. Vanderpauye, 530 P.3d 1214, 1226 (Colo. 2023); State v. Burton, 772 P.2d 1248, 1250 (Idaho Ct. App. 1989); State v. Boggess, No. A-94-884, 1995 WL 300726, at *6 (Neb. Ct. App. May 16, 1995).
78. 576 F.3d 297 (6th Cir. 2009).
79. *See id.* at 313.

defendant told an officer, "[Y]ou guys don't understand, I thought I was being robbed."[80]

The Sixth Circuit upheld the trial court's decision to exclude the statement under Rule 803(2).[81] It endorsed the trial court's reasoning that the statement was "unreliable" because the defendant "knew what was at stake when he made the statement."[82] Like the Eighth Circuit in *Esparza*, the Sixth Circuit did not assess whether the defendant was still excited from his police encounter when he made his statement.[83] Instead, it relied on the trial court's conclusion that the defendant had a "motive to 'contrive and misrepresent'" his statement and time to do so.[84]

Some federal courts have challenged the view that a defendant's motive to fabricate an exculpatory statement should bar its admission under Rule 803(2). In *United States v. Hayes*,[85] a district court held that "the apparently self-serving nature of [a defendant's] statement may affect its weight as evidence, but does not preclude its admission" under Rule 803(2).[86] There, a defendant charged with assault in a federal prison sought to introduce a statement he made to a prison guard while being led away from the alleged assault—that he "had no choice."[87] In admitting his statement, the court only contemplated the standards proscribed by Rule 803(2).[88] It observed that the defendant made his statement immediately after the alleged assault while he was "tense and trembling."[89] The court rejected the prosecution's argument regarding the statement's self-serving nature, holding that such considerations were only relevant to the jury's assessment of its evidentiary weight, rather than its admissibility.[90]

More recently, *United States v. Smith*[91] held that "[d]oubts regarding the potential motives of the declarant do not vitiate [admission under Rule 803(2)]."[92] The defendant in *Smith* sought to introduce statements he made to officers upon his arrest for possessing a firearm, such as, "Yo, how did a gun get in here?" and, "I wake up, there's a . . . gun in the car."[93] In assessing

80. *Id.*
81. *See id.*
82. *Id.*
83. *See id.* Although the Sixth Circuit observed that time had elapsed between the defendant's confrontation with police and his statement, it did not consider whether the trial court found that his excitement had subsided by the time he made his statement. *See id.* Under Rule 803(2), the duration of time between a startling event and a declarant's statement is only relevant insofar as it affects the declarant's level of excitement. *See supra* notes 30–36 and accompanying text.
84. *Penney*, 576 F.3d at 313 (quoting United States v. Arnold, 486 F.3d 177, 184 (6th Cir. 2007) (en banc)).
85. 561 F. Supp. 3d 154 (D.N.H. 2019).
86. *Id.* at 160.
87. *Id.* at 157, 159.
88. *See id.* at 159–60.
89. *Id.* at 160.
90. *See id.*
91. No. RDB-23-0126, 2024 WL 3606542 (D. Md. July 30, 2024).
92. *Id.* at *4.
93. *Id.* at *2.

the admissibility of the statements, the court considered each of the requirements of Rule 803(2).[94] It found enough evidence to show the defendant was startled by "the police discovery of contraband" and their "rousing [him] from his sleep and immediately arresting him."[95] It observed that the defendant was likely still startled when he made his statements because "mere minutes passed between [his] awakening and arrest and the statements."[96] And it noted that the statements "relate[d] to the startling event because they concern[ed] the gun that was found in his car—the reason he was being arrested."[97]

The court observed that the defendant's statements were self-serving.[98] However, relying on *Hayes*, it held that because the statements met Rule 803(2)'s criteria for admission, "it [was] ultimately the province of the jury to evaluate [their] credibility."[99] Thus, the court in *Smith* concluded that, where a defendant's statement meets the requirements of 803(2), additional concerns regarding the statement's trustworthiness—including motive to fabricate—cannot serve as a basis for exclusion.[100]

2. Exclusion Based on Intervening Time Between Startling Event and Statement

Rule 803(2) contains no specific time constraint on its scope.[101] Intervening time between the startling event and the declarant's statement is not a dispositive factor and should only be used in determining whether the defendant was still excited by that event.[102] However, in cases where defendants' exculpatory statements are at issue, some courts tend to place significantly more weight on intervening time. These courts exclude defendants' exculpatory statements, relying not on whether their excitement has diminished, but on findings that the defendants had both a motive to fabricate and time to do so.

In *United States v. Rice*,[103] the reviewing court upheld the trial court's exclusion of a defendant's exculpatory statements because of the lapse in time between the statements and the alleged startling event.[104] There, the defendant, convicted of sexual assault, argued that he was drugged at a party when he committed the assault.[105] At trial, the defendant sought to introduce statements he made the morning after the assault revealing that he had no

94. *See id.* at *4.
95. *Id.* at *4.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *See id.*
101. *See supra* notes 30–36 and accompanying text.
102. *See supra* notes 30–36 and accompanying text.
103. No. ACM 39071, 2017 WL 6014870 (A.F. Ct. Crim. App. Nov. 21, 2017), *rev'd in part on other grounds*, 77 M.J. 365 (C.A.A.F. 2018). The excited utterance exception of the Military Rules of Evidence mirrors the federal rule. *See* MIL. R. EVID. 803(2).
104. *Rice*, 2017 WL 6014870, at *3.
105. *Id.* at *1.

memory of the previous night.[106] To support their admission as an excited utterance, the defendant argued he made the statements in response to the startling event of waking up without a memory.[107] Furthermore, he called a witness to testify that he appeared "confused," "agitated," and "panicky" when making the statements.[108]

On appeal, the court upheld the trial court's exclusion of the statements on the basis that fifteen minutes had passed between the defendant waking up without memory (the startling event) and the statements.[109] The appellate court agreed with the trial court that the intervening time provided the defendant with an "opportunity for reflection such that his statements . . . lacked the spontaneity required for an excited utterance."[110] It excluded the statement notwithstanding the fact that the trial court "did not make any conclusions as to whether [his] confusion and agitation . . . qualified as the stress of excitement caused by a startling event."[111] Because the defendant had time to fabricate a statement, the court excluded it under Rule 803(2) even though he presented evidence of continuing excitement at the time of the statement.[112]

Some state courts have similarly held that where a defendant seeks to admit their exculpatory statement under the excited utterance exception, "there must be no time for reflection or fabrication."[113] In *Hancock v. State*,[114] the defendant appealed his conviction for murder on the basis that the trial court improperly excluded a statement he made after killing the victim—that "a man tried to put him in a cage, he got the gun away from him and shot him."[115] A witness testified that the defendant made the statement shortly after the shooting, "carrying a gun" with "blood on his hands," appearing "upset," "nervous," "scared," and claiming "his side was hurt."[116]

The appellate court upheld the exclusion of the statement, observing that it was inadmissible as an excited utterance even though the defendant appeared excited and his statement "relate[d] to the night of the shootings," as it was not made "under circumstances that 'exclude[d] the possibility of premeditation and fabrication.'"[117] Because the statement was not "one

106. *See id.* at *2.
107. *Id.* at *3.
108. *Id.* at *2.
109. *Id.* at *3.
110. *Id.*
111. *Id.*
112. *See id.* at *2–3.
113. Hancock v. State, 155 P.3d 796 (Okla. Crim. App. 2007), *overruled on other grounds by* Williamson v. State, 422 P.3d 752 (Okla. Crim. App. 2018); *see also* Williams v. State, 915 P.2d 371, 378 (Okla. Crim. App. 1996); People v. Vanderpauye, 530 P.3d 1214, 1226 (Colo. 2023).
114. 155 P.3d 796 (Okla. Crim. App. 2007), *overruled on other grounds by* Williamson v. State, 422 P.3d 752 (Okla. Crim. App. 2018).
115. *Id.* at 815. Oklahoma's excited utterance exception tracks the language of Rule 803(2). *See* OKLA STAT. tit. 12, § 2803 (2024).
116. *Hancock*, 155 P.3d at 816.
117. *Id.* (quoting Bishop v. State, 581 P.2d 45, 48 (Okla. 1978)).

continuing transaction with the event," it was more likely a product of "deliberate and conscious misrepresentation."[118]

Numerous courts have challenged the view that elapsed time is a dispositive factor in the 803(2) analysis of defendants' exculpatory statements.[119] Recently, in *State v. Caballero*,[120] the Vermont Supreme Court concluded that although timing is relevant to determining admission under the excited utterance exception, it is not necessarily determinative.[121] The court held that the trial court erred in excluding the defendant's statement merely because it was made hours after the startling event.[122] It ruled that courts must consider whether defendants were "still gripped by the exciting event," notwithstanding the intervening time.[123]

3. A Narrowed Rendition of Rule 803(2)'s Relatedness Requirement

Only "statement[s] *relating* to a startling event . . . made while the declarant was under the stress of excitement that it caused" are admissible as excited utterances.[124] However, the Advisory Committee is clear that for a statement to "relate" to a startling event, it need not describe it.[125] Rather, it may deal with "past facts or with the future."[126] Despite this direction, some courts apply a narrower rendition of Rule 803(2)'s relatedness requirement to exclude defendants' exculpatory out-of-court statements.

The U.S. Court of Appeals for the Ninth Circuit has held that when a defendant's exculpatory statement does not describe any incident occurring at the time of the startling event, it does not relate to it for Rule 803(2) purposes and should be excluded. In *United States v. Alarcon-Simi*,[127] the defendant appealed the trial court's exclusion of an exculpatory statement he made to a federal agent mid-arrest.[128] According to the defendant, the arrest served as a startling event sufficient to trigger admission of the statement as an excited utterance.[129] Although the Ninth Circuit was not privy to the substance of his statement, the parties agreed it would have tended to exculpate him of having participated in a fraudulent check-cashing

118. *Id.*
119. *See, e.g.*, Brisbon v. United States, 894 A.2d 1121, 1129 (D.C. 2006); Guerra v. State, 942 S.W.2d 28, 31 (Tex. App. 1996); State v. Caballero, 279 A.3d 676, 686 (Vt. 2022).
120. 279 A.3d 676 (Vt. 2022).
121. *See id.* at 686.
122. *See id.*
123. *Id.*
124. FED. R. EVID. 803(2) (emphasis added).
125. *See supra* notes 38–43 and accompanying text.
126. Murphy Auto Parts Co. v. Ball, 249 F.2d 508 (D.C. Cir. 1957). The Advisory Committee cites *Ball* to describe the relatedness requirement. *See* FED. R. EVID. 803(2) advisory committee's note.
127. 300 F.3d 1172 (9th Cir. 2002).
128. *See id.* at 1174.
129. *See id.* at 1175.

scheme.[130] The court consequently assumed its substance must have referred to events that occurred before the arrest.[131]

Because the statement did not describe anything that occurred during the arrest, the Ninth Circuit upheld the exclusion of the statement from admission under Rule 803(2).[132] It rendered this conclusion without questioning whether the defendant was under significant stress from the arrest when making his statement. Confronted with similar facts, other courts have applied reasoning that parallels *Alarcon-Simi*.[133]

Some courts have rejected such a narrow application of the relatedness requirement and have admitted defendants' statements even though they describe past events. Like the defendant in *Alarcon-Simi*, the defendant in *United States v. Smith* sought admission of his exculpatory excited utterances made in response to the startling event of being confronted by police.[134] Yet unlike A*larcon-Simi*, the *Smith* court held that the defendant's statements—denying ownership of the gun found in his possession—sufficiently related to the startling event because they "concern[ed] . . . the reason he was being arrested."[135]

B. Inconsistent Applications of Rule 803(3)

Criminal defendants also face challenges when attempting to admit their out-of-court exculpatory statements pursuant to Rule 803(3), even when they serve as contemporary descriptions of their states of mind. As Professor Eleanor Swift observed, "In published case law, criminal defendants' post-crime hearsay statements of state of mind are virtually always excluded under FRE 803(3)."[136] The cases discussed below highlight this trend and showcase how courts regard issues of sincerity when defendants seek admission of exculpatory statements under Rule 803(3).

1. A Heightened Rendition of Rule 803(3)'s Contemporaneity Requirement

Professor Swift observed that some courts have adopted a heightened contemporaneity requirement when assessing whether to admit a defendant's exculpatory statement pursuant to Rule 803(3).[137] These courts require that

130. *See id.* at 1174.
131. *See id.* at 1176.
132. *See id.*
133. *See, e.g.*, United States v. Vargas, No. 08 CR 630, 2011 WL 116826, at *1–2 (N.D. Ill. Jan. 6, 2011) (holding that defendant's statements explaining his attendance at the drug meeting at which he was arrested did not relate to the startling event—his arrest—because they related to earlier events); State v. Conn, 669 P.2d 585, 587 (Ariz. Ct. App. 1982); State v. Esdaile, No. A-2072-12T4, 2014 WL 537492, at *4 (N.J. Super. Ct. App. Div. Feb. 12, 2014); Commonwealth v. Wholaver, 989 A.2d 883, 907 (Pa. 2010); State v. Kelly, 2770 A.2d 908, 936 (Conn. 2001).
134. *See* No. RDB-23-0126, 2024 WL 3606542, at *2 (D. Md. July 30, 2024).
135. *Id.* at *4.
136. Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 991 (2008).
137. *See id.* at 991–92.

a declarant have no time to reflect and possibly fabricate their thoughts between the time of the crime and the exculpatory statement expressing their then-existing state of mind or condition.[138] In other words, they "require[] contemporaneity among the defendant's alleged crime, the defendant's state of mind, and the defendant's statement."[139] These courts are unwilling to permit inferences that statements of then-existing state of mind can reflect an earlier state of mind when there is a motive to fabricate.

The Eighth Circuit has used this approach repeatedly. For example, in *United States v. Naiden*,[140] the defendant appealed his conviction for attempting to entice a child to engage in unlawful sexual activity on evidentiary grounds.[141] At trial, the defendant sought to introduce under Rule 803(3) a statement he made to his friend that "he had met someone online who said that she was fourteen, but that he did not believe she really was fourteen."[142]

The Eighth Circuit upheld the trial court's exclusion of the statement because it was not "substantially contemporaneous" with his conversation with the victim.[143] Because "the passage of time may prompt someone to make a deliberate misrepresentation of a former state of mind," the court found the statement inadmissible.[144] The Eighth Circuit failed to consider whether the defendant made his statement contemporaneously to his then-existing belief that the victim was not fourteen.[145] It did not permit the inference that his then-existing state of mind could reflect his earlier state of mind because of concerns regarding his sincerity, rather than his memory or perception—as the exception requires.[146] The Sixth Circuit used the same approach in *United States v. LeMaster*,[147] holding a "declarant must not have had an opportunity to reflect and possibly fabricate or misrepresent his thoughts" for his statement to be admissible under 803(3).[148]

In *United States v. Dierks*,[149] the Eighth Circuit again applied a heightened contemporaneity requirement, but in different form.[150] Specifically, it affirmed the trial court's decision to exclude the statement because it was made *before* the criminal conduct took place.[151] In *Dierks*, the defendant was charged for making threatening tweets against a senator.[152] Police checked on the defendant after he made a tweet to request he "tone down" his

138. *See id.*
139. *Id.* at 992.
140. 424 F.3d 718 (8th Cir. 2005).
141. *See id.* at 719.
142. *Id.* at 721–22.
143. *Id.* at 722.
144. *Id.* at 722–23.
145. *See id.*
146. *See id.*
147. 54 F.3d 1224 (6th Cir. 1995).
148. *Id.* at 1231.
149. 978 F.3d 585 (8th Cir. 2020).
150. *See id.* at 593.
151. *See id.*
152. *See id.* at 589.

rhetoric.[153] The following day, the defendant made additional threatening tweets that ultimately gave rise to his arrest and indictment.[154] The trial court excluded a tweet the defendant sought to introduce that was posted after the police's initial visit but before the tweets that led to the charges, which read: "So the cops came by asking about Twitter. I share videos and make comedic comments. Nothing to be Afraid of. LMAO."[155]

The Eighth Circuit upheld the trial court's decision.[156] It observed that the defendant's statement occurred before he committed his crime and reasoned that the defendant "had 'time to reflect' on his situation before making the statement."[157] According to the court, a "[s]ubstantial contemporaneity of event and statement" is necessary for a statement's admission under Rule 803(3) in order to "negate the likelihood of . . . misrepresentation."[158] Notably, the Eighth Circuit reached this decision even though the tweets otherwise satisfied the criteria for admissibility under Rule 803(3); they reflected the defendant's contemporaneous state of mind, were forward-looking rather than backward-looking, and were relevant because they demonstrated the declarant intended his tweets as jokes rather than threats.

Recently, in *United States v. Born*,[159] another court applied the heightened contemporaneity requirement to exclude a defendant's statement under Rule 803(3) that he made shortly following his crime.[160] The defendant, charged with premeditated murder for killing his fellow inmate, rhetorically asked an officer soon after the incident, "[W]hat[']s the worse [sic] they can do charge [me] w[ith] Assault [and] Battery, maybe Aggravated."[161] The defendant moved to admit the statement under Rule 803(3) because it demonstrated his intent and state of mind, potentially negating the requisite mental state for premeditated murder.[162] However, the court excluded it, finding that "enough time elapsed between the charged conduct and Defendant's statement that Defendant had the chance to reflect upon and perhaps misrepresent his situation."[163] This court's rationale underscores how the heightened contemporaneity requirement is shaped by concerns about fabrication, rather than adherence to the rule's intended focus—whether the statement was contemporaneous with the defendant's then-existing state of mind and free of memory or perception issues. The *Born* court was unwilling to allow an inference that the defendant's state of mind shortly after his arrest could reflect his earlier state of mind because of concerns regarding his motive to fabricate.

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153. *Id.*
154. *See id.*
155. *Id.* at 593.
156. *See id.*
157. *Id.* (quoting United States v. Naiden, 424 F.3d 718, 722 (8th Cir. 2005)).
158. *Id.* (quoting *Naiden*, 424 F.3d at 722).
159. 603 F. Supp. 3d 1086 (E.D. Okla. 2022).
160. *See id.* at 1090.
161. *Id.* at 1088 (second and fifth alterations in original).
162. *See id.* at 1090.
163. *Id.* at 1091.

On the other end of the spectrum is the U.S. Court of Appeals for the Seventh Circuit, which refused to impose a heightened contemporaneity requirement on Rule 803(3) in *United States v. Giles*.[164] The defendant in *Giles* appealed his conviction for obtaining cash bribes from a government employee and extorting company wealth.[165] At trial, the government presented a number of taped conversations between the defendant and an informant, but omitted a tape which included the defendant's exculpatory statements.[166] Despite the defendant's argument for its admissibility, the trial court found the exculpatory tape inadmissible under Rule 803(3); it held that the defendant had "too much time for reflection and fabrication" because the tape was created three weeks after the crime was completed.[167] The Seventh Circuit rejected this reasoning, observing that "[t]he government's argument that the tape was a product of [the defendant's] reflection—an attempt to cover his tracks in case he got caught—should have been made to the jury, not the judge."[168] The reversal rejected the requirement that there be contemporaneity between a defendant's alleged crime, state of mind, and statement.

2. Exclusion Based on the Inherent Untrustworthiness of Exculpatory Statements

Rather than relying on heightened contemporaneity as a pretext for exclusion, some courts openly reject defendants' exculpatory statements under Rule 803(3), asserting that their self-serving nature renders them inherently untrustworthy.

For example, in *United States v. Bishop*,[169] the U.S. Court of Appeals for the Fifth Circuit held that a defendant's exculpatory statements were inadmissible under Rule 803(3) because of their self-serving nature.[170] At trial, the defendant, charged with tax evasion, sought to introduce statements he made to a lawyer he hired to assist in a civil tax audit prior to his arrest.[171] That lawyer testified that the defendant told him he did not expect the scope of the matter to be great or to face any criminal charges.[172] The Fifth Circuit upheld the trial court's decision that Rule 803(3) could not be used to admit the statements because they "were self-serving assertions that he did not have the requisite intent for the crime now charged."[173] The court did not evaluate whether the statements were made contemporaneously with the defendant's then-existing state of mind. Furthermore, it gave no weight to the fact that

164. 246 F.3d 966 (7th Cir. 2001).
165. *See id.* at 968.
166. *See id.* at 974.
167. *Id.*
168. *Id.*
169. 264 F.3d 535 (5th Cir. 2001).
170. *See id.* at 548–49.
171. *See id.*
172. *See id.* at 549.
173. *See id.*

the statements reflected his state of mind around the time of his alleged crime—namely, that he lacked any knowledge of committing wrongdoing.[174]

The Ninth Circuit has consistently rejected defendants' attempts under Rule 803(3) to admit statements purportedly showing what they understood or intended during the commission of their crimes.[175] In *United States v. Brown*,[176] the defendant appealed her conviction of mail and wire fraud for her role as a salesperson in a fraudulent investment scheme.[177] The defendant sought to introduce testimony from investors that she made statements indicating her honest belief that the investments were good products.[178] According to the defendant, the statements would show the jury she had no intention to mislead and that she honestly believed what she was telling the investors.[179]

On appeal, the Ninth Circuit upheld the trial court's decision. It concluded that the defendant's "attempt to introduce . . . statements of her belief (that she was not violating the law) to prove the fact believed (that she was acting in good-faith) [was] improper."[180] The court excluded the evidence over the defendant's argument that she made her statements during the relevant time period of the charged conspiracy and her defense was that she lacked criminal intent.[181] Notably, it did not find any issues of memory or perception.

However, this view is not consistent across all circuits. In *United States v. DiMaria*,[182] the U.S. Court of Appeals for the Second Circuit repudiated the significance of a statement's apparent truth or falsity when assessing admissibility under Rule 803(3).[183] There, the defendant appealed a conviction for possessing stolen cigarettes.[184] As FBI agents approached the defendant to arrest him, he stated, "I thought you guys were just investigating white collar crime; what are you doing here? I only came here to get some cigarettes real cheap."[185] The defendant argued for the statement's admission under Rule 803(3) on the basis that it represented his then-existing state of mind—that he thought he was possessing bootleg cigarettes, rather than stolen cigarettes.[186]

174. The First Circuit matched this analysis in United States v. Cianci, 378 F.3d 71, 106 (1st Cir. 2004).

175. *See, e.g.*, United States v. Brown, 680 F. App'x 583, 585 (9th Cir. 2017); United States v. Sayakhom, 186 F.3d 928, 937 (9th Cir. 1999), *amended by* 197 F.3d 959 (mem.) (excluding a secret recording of the defendant's conversation with government agents, including statements suggesting she believed she was acting lawfully).

176. 680 F. App'x 583, 585 (9th Cir. 2017).

177. *See id.* at 584–85.

178. *See id.* at 585.

179. *See id.*

180. *Id.* (quoting *Sayakhom*, 186 F.3d at 937) (second alteration in original).

181. *See* Appellant's Opening Brief at 68, *Brown*, 680 F. App'x 583 (Nos. 15-50077, 15-50186).

182. 727 F.2d 265 (2d Cir. 1984).

183. *See id.* at 271.

184. *See id.* at 267.

185. *Id.* at 270.

186. *See id.* at 271.

The Second Circuit reversed the trial court's decision, finding the statement admissible under Rule 803(3) as it reflected "what [the defendant] was thinking in the present."[187] Although the statement may have been false, the court observed that "if it fell within Rule 803(3) . . . its truth or falsity was for the jury to determine."[188] According to the court, the self-serving nature of a declaration affects only its weight as evidence, rather than its admissibility.[189] It reasoned that the FRE address the credibility of hearsay statements through categorical exceptions—if a declaration falls within a defined exception, it is admissible without a preliminary finding of probable credibility.[190] The court deemed this categorical approach "preferable to requiring preliminary determinations of the judge with respect to trustworthiness," which risk delay, prejudgment, and encroachment on the jury's role.[191]

III. A PATH TOWARD CONSISTENT APPLICATION OF RULES 803(2) AND (3) TO DEFENDANTS' EXCULPATORY STATEMENTS

Building on the cases described in the preceding part, this part argues that courts too often misapply Rules 803(2) and (3) when confronted with exculpatory statements and cautions that courts must remain mindful of the rules' categorical requirements. Part III.A contends that courts should not treat a defendant's motive to fabricate as a barrier to admission under these rules or construe the rules more narrowly than intended. Part III.B underscores the importance of adhering to the explicit requirements of Rules 803(2) and (3), emphasizing that they strike a careful balance between reliability and fairness and warning that a discretionary approach to hearsay admission is not preferable. Additionally, Part III.B highlights that ample tools that are available for courts to exclude unreliable exculpatory statements and the institutional safeguards that protect against fabricated excited utterances and statements of then-existing state of mind.

A. The Methods Courts Currently Use to Exclude Defendants' Exculpatory Statements Counteract the Requirements and Policies of Rules 803(2) and (3)

A defendant's motive to fabricate is not a proper basis to exclude their exculpatory statement from admission under Rules 803(2) or (3). Furthermore, courts err when they apply an unduly narrow interpretation of Rule 803(2)'s relatedness requirement or impose overly stringent contemporaneity standards under Rule 803(3). Part III.A.1 addresses the improper exclusion of exculpatory statements based on a motive to fabricate. Part III.A.2 examines courts' misapplications of Rule 803(2) and (3)'s requirements when defendants' exculpatory statements are at issue.

187. *Id.*
188. *Id.*
189. *See id.*
190. *See id.* at 272.
191. *Id.*

1. The Misstep of Treating a Defendant's Motive to Fabricate as a Barrier to Admission

When courts deny defendants' exculpatory statements from admission under Rules 803(2) and (3) because of concerns regarding a defendant's motive to fabricate, they counteract the requirements and underlying purposes behind those exceptions.

Courts that exclude exculpatory statements from Rule 803(2) admission due to fabrication concerns[192] overlook the core premise of the excited utterance exception. The exception rests on the principle that under the stress of excitement, considerations of self-interest cannot be fully brought to bear by reasoned reflection.[193] Courts that center their 803(2) analysis on a defendant's motive to fabricate fail to offer any principled basis for concluding that a motive to fabricate necessarily overrides the excitement-induced disruption of a defendant's capacity to engage in reasoned reflection. Although lying might sometimes be a person's automatic response when it serves their self-interest, *constructing* a falsehood still requires cognitive effort and conscious deliberation.[194] Declarants with motives to fabricate may remain so overwhelmed by a startling event that their capacity for conscious thought—and by extension, fabrication—is diminished, satisfying the requirements of Rule 803(2).[195] This diminished capacity for reflection reduces the risk that defendants will construct a thoughtful and persuasive lie that is likely to fool the jury.

Intervening time, coupled with a motive to fabricate, is likewise not always a proper basis to exclude a statement from 803(2) admission. The excited utterance exception does not include a specific time constraint; instead, the duration of time between a startling event and a declarant's statement is only relevant insofar as it affects the declarant's level of excitement.[196] Courts have excluded exculpatory statements from admission under Rule 803(2) based on their assumption that intervening time provided defendants an opportunity to fabricate their statements.[197] However, they disregard a key inquiry: whether the defendant's excitement subsided during that intervening time.[198] Although time may elapse, a statement can still qualify as spontaneous and free from conscious reflection if the defendant remains in a heightened state of excitement at the time they make their statement.[199]

Courts that deny defendant statements under Rule 803(3) based on sincerity concerns[200] misconstrue that exception's purpose entirely. Rule 803(3) is primarily premised on necessity, as evidence of a declarant's

192. *See supra* Part II.A.1.
193. *See* WIGMORE, *supra* note 25, § 1747.
194. *See supra* Part I.A.2.
195. *See supra* Part I.A.2.
196. *See supra* notes 30–36 and accompanying text.
197. *See supra* Part II.A.2; *see also, e.g.*, United States v. Penney, 576 F.3d 297, 313 (6th Cir. 2009).
198. *See supra* Part II.A.2; *Penney*, 576 F.3d at 313.
199. *See supra* notes 30–36 and accompanying text.
200. *See supra* Part II.B.

internal mental state is limited, and it offers no purported safeguards against insincerity.[201] The rule is only based on reliability insofar as statements describing a present state of mind or condition pose less of a risk of memory or perception issues.[202] Accordingly, if a defendant makes a statement representing his purported then-existing state of mind, it is admissible under Rule 803(3) notwithstanding concerns about opportunities or motives to fabricate. Such a statement is sufficiently (1) reliable because it represents a present state of mind and is presumptively free of memory and perception issues, and (2) probative because it is the only direct evidence of the defendant's internal mental state.[203]

2. Misapplication of the Rules' Requirements

In determining the admissibility of defendants' exculpatory statements, courts tend to apply the requirements of Rules 803(2) and (3) more narrowly than the drafters intended or than the categorical exceptions justify.

Courts narrowly apply Rule 803(2)'s requirement that a declarant's statement *relate* to a startling event by excluding defendants' statements that do not describe occurrences that happened during the startling event.[204] Yet such holdings deviate from the text and purpose of the requirement. The Advisory Committee explains that for admission under the rule, a declarant's statements need not describe a matter that occurred concurrently with the alleged startling event or condition nor describe the startling event or condition itself.[205] Excited utterances may "deal[] with past facts or with the future."[206]

Returning to *United States v. Alarcon-Simi*, the Ninth Circuit upheld the exclusion of a defendant's exculpatory statement because it did not sufficiently relate the startling event—his arrest.[207] However, the statement *plainly* related to his arrest. It exculpated him of the crime for which he was accused.[208] Although the statement did not describe the arrest itself, it should have been admitted pursuant to 803(2) if it was uttered while the defendant was excited and less likely consciously able to fabricate a believable excuse. Rather than applying an erroneous rendition of the relatedness requirement, the Ninth Circuit should have assessed whether the defendant's confrontation with the police created a state of excitement that temporarily diminished his capacity for conscious fabrication. In evaluating the admission of exculpatory statements under Rule 803(2), courts must act cautiously so as

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201. *See supra* notes 62–64 and accompanying text.
202. *See supra* notes 62–64 and accompanying text.
203. *See supra* Part II.B.
204. *See supra* Part II.A.3.
205. *See supra* notes 37–43 and accompanying text.
206. Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 511 (D.C. Cir. 1957); *see also supra* note 126.
207. 300 F.3d 1172, 1176 (9th Cir. 2002).
208. *See id.* at 1174. The Ninth Circuit held that that the defendant's statement did *not* "relate to any incident that occurred at the time of his arrest." *Id.* at 1176 (emphasis omitted).

to apply the rule correctly and not in a manner that requires more than the drafters intended.

Many courts also misapply Rule 803(3)'s contemporaneity requirement when dealing with exculpatory statements,[209] requiring contemporaneity between the defendant's statement, alleged crime, and state of mind.[210] That is not, however, what Rule 803(3) requires—the exception only commands contemporaneity between a defendant's statement and the state of mind or condition it purports to describe.[211] The reasoning behind the rule's contemporaneity requirement is twofold: (1) to prohibit backward-looking statements of memory or belief and avoid the virtual destruction of the hearsay rule, and (2) to assure the declarant's memory and perception.[212] Courts that require contemporaneity among defendants' statements, state of mind, and the charged crimes, err in that they ground their reasoning in concerns about sincerity; they intend to ensure that defendants do not have "an opportunity to reflect and possibly fabricate or misrepresent [their] thoughts."[213] Because the rule offers no safeguards against a declarant's insincerity or improper narration, such a heightened requirement does not align with the rule. Courts should therefore discard this heightened requirement altogether.

B. The Requirements of Rules 803(2) and (3) Alone Should Guide the Admissibility of a Defendant's Exculpatory Statement

Courts should avoid misapplying Rules 803(2) and (3) in their efforts to protect against potentially fabricated exculpatory statements. Part III.B.1 explains that these rules already offer courts ample avenues to exclude fabricated exculpatory statements. Part III.B.2 highlights how these rules appropriately balance reliability and fairness. Part III.B.3 contends that adopting a more discretionary approach to hearsay admission would undermine the foundational policies behind the FRE and introduce undue uncertainty. Finally, Part III.B.4 asserts that sufficient institutional safeguards exist to mitigate the risks posed by admitting potentially fabricated statements into evidence.

1. The Rules Offer Sufficient Avenues to Exclude Exculpatory Statements

Rules 803(2) and (3) both provide ample avenues for courts to exclude "unreliable" exculpatory statements from admission. Courts need not exclude such statements from admission due to sincerity concerns or through erroneous application of the rules' requirements, especially in light of the existing safeguards against unreliability.

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209. *See supra* Part II.B.1.
210. *See* Swift, *supra* note 136, at 992.
211. *See supra* notes 59–60, 63–64 and accompanying text.
212. *See supra* notes 59–60, 63–64 and accompanying text.
213. United States v. LeMaster, 54 F.3d 1224, 1231 (6th Cir. 1995); *see also* Swift, *supra* note 136, at 992.

For instance, a court may exclude a defendant's self-serving statement under the excited utterance exception if it finds insufficient signs of stress or excitement.[214] Rule 104(a) provides judges with great discretion in making such fact-based assessments.[215] Judges can make their own credibility determinations. They need only find by a preponderance that a defendant is feigning excitement or that the statement was not made under conditions of excitement sufficient to suspend powers of reflection as necessary under Rule 803(2).

Meanwhile, Rule 803(3) already permits courts to exclude backward-looking statements of memory or belief.[216] Thus, in determining the admissibility of exculpatory defendant statements, courts may consider whether statements seemingly describing present conditions are in reality backward-looking. If circumstances reveal that a defendant's statement, made in the present-tense, is actually describing a previous state of mind, a court may exclude it under Rule 803(3). In such findings, however, courts must not consider defendants' motives to falsify. Instead, they should pay homage to the principles underlying Rule 803(3) and assess only whether the statements are tainted by memory or perception issues when describing past conditions. And where a defendant's statement reflects "what [the defendant] was thinking in the present," courts must remember that its "truth or falsity [is] for the jury to determine."[217]

If a court finds that a statement properly falls under Rule 803(3)—that is, it describes a defendant's present-existing state of mind—it may also still exclude the statement under Rule 403.[218] For example, assume that a defendant intends to use their exculpatory post-arrest statement of then-existing state of mind to support an inference that they possessed that same innocent state of mind during the crime's commission. On the probative side of the 403 balancing test is the strength of the inference that the state of mind at the time the declarant described it (post-arrest) was the same as her state of mind during the relevant time period (the commission of her crime). Its probative strength depends on the likelihood that the relevant state of mind continued over time. On the prejudice side of the test is the likelihood a jury, unaware that the post-arrest statement should be considered only as a description of a then-existing state of mind from which the relevant state of mind may be determined, will consider it as a direct description of the relevant state of mind. In other words, although the rule does not forgive memory or perception risks, there is a risk that the jury might ignore them. And the less likely the state of mind persisted, the more likely that the jury, if it uses the statement at all, will use it improperly as a direct description of the relevant mental state.

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214. *See* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1901 (2016).
215. *See* FED. R. EVID. 104(a).
216. *See id.* 803(3).
217. United States v. DiMaria, 727 F.2d 265, 271 (2d Cir. 1984).
218. *See* FED R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . misleading the jury.").

Weighing those factors, judges should exclude statements only if the potential for prejudice substantially outweighs their probative value. Judges may also consider a jury instruction to limit the jury's consideration of the statement as evidence of the declarant's state of mind at the relevant time.[219] The instruction may tip the scale in favor of admissibility by increasing the likelihood that the jury will not impermissibly consider the statement under Rule 803(3). Although these decisions are not always easy, Rule 803(3) clarifies that the declarant's potential motive to fabricate is not a factor the judge should consider, much less a deciding factor. The motive exists with respect to any exculpatory statement, whether made before, during, or after committing a crime. Rule 803(3) forgives this sincerity risk but not perception or memory risks.[220] As the likelihood of continuity in the declarant's state of mind decreases, the risks of perception and memory increase—that should be the court's exclusive focus.[221]

2. The Rules Appropriately Balance Reliability and Fairness

Rules 803(2) and (3) properly balance reliability and fairness concerns and require no further judicial gloss.

Even though a defendant's excited utterance might be fabricated, it is less likely that such a statement will be convincing, and that a jury will give it undue weight. Although individuals can have a default response to lie in stressful situations, the circumstances under which excited utterances are generated still make it more difficult to *formulate* persuasive lies.[222] The construction and convincing delivery of lies requires significant cognitive resources and effort that stress can impair.[223] Under the stress of excitement, declarants may struggle to think through lies or keep their stories straight—declarants may lack the cognitive resources needed to process facts as they observe them, adjust lies accordingly, regulate behavior, and monitor the behavior of surrounding people.[224]

Fabricated testimony is arguably more dangerous than a fabricated excited utterance.[225] By the time a declarant takes the stand, they have had ample time to create a substantial lie, as they will have greater familiarity with the charges against them, their theory of the case, and the consequences of his statements. By contrast, a statement made under excitement shortly following a startling event is shaped by immediate circumstances, leaving little opportunity for reflection or the cognitive bandwidth to fabricate a convincing falsehood.

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219. *See id.* 105.
220. *See supra* notes 62–69 and accompanying text.
221. The author thanks Professor James Kainen for his contributions and guidance in this section.
222. *See supra* notes 44–55 and accompanying text.
223. *See supra* notes 51–54 and accompanying text.
224. *See* Lau, *supra* note 44, at 617–19.
225. *See* MOSTELLER ET AL., *supra* note 30, § 272.

For its part, Rule 803(3) also provides a satisfactory balance between hearsay dangers and necessity. Although state of mind may sometimes be proved by a declarant's actions, statements are the only direct evidence of internal mental state.[226] The lack of any safeguards against sincerity or narration dangers in Rule 803(3) indicates that the need for such evidence to elucidate the truth outweighs the dangers of potential fabrication. Furthermore, even with the option for cross-examination, using only the declarant's in-court testimony might not provide stronger evidence.[227] A testifying witness's "own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said."[228] A criminal defendant's statement of his then-existing state of mind uttered a few moments after the crime is less likely to suffer from issues of misremembering or misperception than his statement on the witness stand a year later.

3. A Discretionary Trustworthiness Requirement Would Counteract Legislative Intent and Create Uncertainty

Some jurists argue that the categorical limits on the exclusion of hearsay should give way to a more flexible process that imports greater discretion and consideration of a statement's trustworthiness.[229] Nevertheless, the addition of an *implicit* discretionary "trustworthiness" requirement to Rules 803(2) and (3) would counteract legislative intent. If added as an *explicit* requirement to these rules, such a discretionary standard would cause courts to employ an unpredictable ad hoc approach to hearsay admission and increase the probability of discrimination against criminal defendants.

The main problem with adding an *implicit* trustworthiness requirement to Rules 803(2) and (3) would be its defiance of legislative intent.[230] The FRE are categorical; if a statement fits within the categorical generalizations of a specific exception, it must be admitted over a hearsay exception notwithstanding any concerns regarding its reliability.[231] Only two exceptions in the rules include a case-by-case "trustworthiness" inquiry: Rules 803(6) and (8).[232] Otherwise, courts must admit statements that fulfill the requirements of an exception, regardless of doubts regarding declarant sincerity, perception, memory, or narration.[233]

226. *See id.* § 273.
227. *See id.*
228. *Id.*
229. *See, e.g.*, United States v. Boyce, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring) (expressing profound doubt over the policies underlying Rules 803(1) and (2) and proposing a discretionary approach to hearsay admission); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338–39 (1961) (proposing a case-by-case approach to determining hearsay admissibility that considers probative value).
230. *See* MOSTELLER ET AL., *supra* note 30, § 270.
231. *See* ALLEN ET AL., *supra* note 16, at 417.
232. *See id.*
233. *See id.*

The Advisory Committee drafted Rules 803(2) and (3) under the assumption that statements fulfilling their requirements were supported by necessity and guarantees of trustworthiness so substantial as to not adopt a preference between live testimony by the declarant and admission of their qualifying out-of-court statements.[234] Those exceptions give no authorization for additional review into a qualifying statement's "trustworthiness." And the fact that the Advisory Committee ultimately omitted the requirement found in the original Uniform Rules of Evidence—that statements cannot be made in "bad faith"—suggests contrary legislative intent.[235] That other Rule 803 exceptions *do* include a statement's untrustworthiness as a criterion for exclusion suggests the same.

Some state evidence rules include a trustworthiness requirement in their excited utterance and then-existing state of mind exceptions.[236] However, this approach is unwise. "Reliability is an amorphous, if not entirely subjective, concept."[237] Both Rules 803(2) and (3) provide concrete criteria for determining admission of a statement, and including an explicit "trustworthiness" requirement to those exceptions risks "unbridled flexibility" in judicial decision-making regarding the admissibility of declarants' statements.[238]

As the Second Circuit in *DiMaria* observed, the categorical approach is "preferable to requiring preliminary determinations of . . . trustworthiness," which risk delay, prejudgment, and encroachment on the jury's role.[239] Such a flexible standard risks greater inconsistency in courts' admissibility decisions, and litigants' fortunes could ultimately turn on the assignment of a particular trial judge.[240] Litigants would be deprived of crucial information essential to evaluate the likelihood of success at trial and would need to expend even more resources to ascertain the value of their particular case.[241]

The import of a "trustworthiness" requirement to Rules 803(2) and (3) would also do little to curb concerns with their underpinnings in "folk psychology."[242] Ultimately, judges would make decisions based on their own perceptions of human nature and psychology.[243] One judge may find that defendants' out-of-court exculpatory excited utterances or statements of then-existing state of mind are *always* inadmissible because of the motive to

234. *See* Saltzburg, *supra* note 21, at 1486, 1489.
235. *See* MOSTELLER ET AL., *supra* note 30, § 270.
236. *See, e.g.*, CA. EVID. CODE § 1252 (requiring that for admission as a statement of then-existing state of mind, a statement must not be "made under circumstances such as to indicate its lack of trustworthiness"); N.J. R. EVID. 803(c)(2) (stipulating that for admission as an excited utterance, a statement must be made "without opportunity to deliberate or fabricate").
237. Richter, *supra* note 214, at 1890 (quoting Crawford v. Washington, 541 U.S. 36, 63 (2004)).
238. *Id.* at 1886.
239. United States v. DiMaria, 727 F.2d 265, 272 (2d Cir. 1984).
240. *See* Richter, *supra* note 214, at 1886.
241. *See id.* at 1886, 1893–94.
242. *See* United States v. Boyce, 742 F.3d 792 (7th Cir. 2014) (Posner, J., concurring) (criticizing the excited utterance and present-sense impression exceptions as being rooted in "folk psychology").
243. *See* Richter *supra* note 214, at 1892–93.

fabricate. Another judge in the same courthouse, however, might agree with the "folk psychology" of the FRE and conclude that where a defendant's statement qualifies for admission under Rule 803(2) or (3), it is sufficiently trustworthy notwithstanding potential motives to fabricate. Rules 803(2) and (3) are written to curb such inconsistencies and leave such concerns about a statement's "credibility" for the jury.

Finally, the categorical nature of the rules protects the rights of criminal defendants to a fair trial. Their structure is intended to protect against "judicial bias" or "favoritism."[244] Too much "judicial discretion" could lead to bias against criminal defendants.[245] The addition of a discretionary standard to Rules 803(2) and (3) could in effect remove defendants' exculpatory statements from admission under those exceptions entirely.[246] With such a standard, a judge could find the self-serving nature of defendants' exculpatory statements renders them inherently untrustworthy and therefore never subject to admission under either exception. This approach would deprive the jury of probative evidence that it could evaluate in light of the motive to fabricate.

4. Institutional Safeguards Protect Against Fabricated Exculpatory Statements

The dangers of admitting a defendant's lie under the excited utterance exception or the then-existing state of mind exception are outweighed by institutional safeguards. Defendants' exculpatory statements will always be self-serving, and it is ultimately the province of the jury to evaluate their credibility.[247] It is not lost on the jury that a defendant's own exculpatory statement may be fabricated—factfinders can assess the reliability of risky declarants.[248] Where a statement is otherwise within an exception and sufficiently trustworthy, there seems little reason for withholding it from the jury merely because it is self-serving.[249] Under the structure of the FRE, credibility judgments should generally be left to the jury rather than preempted by a judicial determination.[250] Leaving the issue to the jury is particularly appropriate when it can readily appreciate the credibility issue, as is generally the case when the reason to question credibility rests upon a self-serving motivation.[251]

244. *See* Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 484 (1992).

245. *See id.* at 483.

246. *See* Swift, *supra* note 136 at 993–94.

247. *See* United States v. Smith, No. RDB-23-0126, 2024 WL 3606542, at *4 (D. Md. July 30, 2024).

248. *See* MOSTELLER ET AL., *supra* note 30, § 270.

249. *See* John M. Price, *Evidence-Hearsay-Exclusion of Self-Serving Declarations*, 61 MICH. L. REV. 1306, 1319 (1963).

250. *See* MOSTELLER ET AL., *supra* note 30, § 270.

251. *See id.*

Additionally, concerns that defendants' lies will go unchecked in the absence of cross-examination[252] are exaggerated. Prosecutors can inform the jury about a defendant's statement's untrustworthiness since such statements are subject to impeachment once admitted. Under Rule 806, the credibility of a hearsay statement may be attacked by any evidence that would be admissible for the purpose of impeaching the declarant if he were to testify as a witness.[253]

Accordingly, if a defendant's exculpatory statement is admitted pursuant to Rules 803(2) or (3), their "inconsistent statements, bias against one of the parties, or untruthful character may be shown through the testimony of other witnesses or exhibits."[254] Under such circumstances, prosecutors may impeach a nontestifying criminal defendant with prior convictions regardless of whether he has done anything to put his credibility in issue, besides offering his hearsay statement.[255] Such a defendant would not be able to protect himself from introduction of his previous convictions by choosing not to testify.[256]

Some courts have also held that Rule 806 modifies Rule 608(b)'s prohibition on producing extrinsic evidence to prove specific instances of conduct when attacking a witness's character for truthfulness.[257] Because "Rule 806 applies . . . when the declarant has not testified . . . resort to extrinsic evidence may be the only means of presenting such evidence to the jury."[258] Rule 608 has a low bar—one false statement alone is sufficient to suggest untruthful character. Thus, prosecutors may utilize unfavorable evidence against defendants that they would not otherwise be at liberty to introduce when a defendant admits their own out-of-court exculpatory statement.

CONCLUSION

In our criminal justice system, the responsibility for determining evidentiary weight and credibility belongs to the jury. Although judges serve as evidentiary gatekeepers, they are constrained by the FRE. Thus, judgments on whether hearsay evidence is sufficiently reliable for jury consideration must adhere to the rules' criteria. Any further credibility assessments remain squarely within the jury's purview.

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252. *See, e.g.*, State v. Brown, No. A-3854-04T4, 2006 WL 3007380, at *4 (N.J. Super. App. Div. Oct. 24, 2006) ("[I]f the defendant were to testify and testify as to what happened when he was arrested and what he said, that's a different story, but to get it before the jury and not have the defendant subject to . . . cross-examin[ation], it's a classic hearsay[,] self-serving exculpatory statement, and then to try to say that it is [an] excited utterance is merely trying to get into the back door what you can't get in through the front door." (alterations in original)).

253. *See* FED R. EVID. 806.

254. *See* ALLEN ET AL., *supra* note 16, at 380.

255. *See* Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 501, 525 (1995).

256. *See id.* at 511–12.

257. *See id.* at 522 n.87 (collecting cases).

258. *Id.* (quoting United States v. Friedman, 854 F.2d 535, 570 n.8 (2d Cir. 1988)).

As this Comment illustrates, courts often deviate from these principles when assessing the admissibility of defendants' exculpatory statements under Rules 803(2) and (3). Rather than applying the requirements of the exceptions, some courts improperly exclude such statements based on subjective concerns about sincerity that they do not contemplate. Others misconstrue the exceptions' criteria, applying them in ways that counteract their intended purposes.

Courts must proceed with caution when evaluating the admissibility of defendants' statements. They must apply the requirements of the FRE in alignment with their underlying policies. Under Rule 803(2), this means assessing whether the evidence shows that the defendant made his statement under the excitement of a startling event or condition. For Rule 803(3) decisions, courts should only consider whether a statement representing a then-existing state of mind or condition is made contemporaneously with that state of mind or condition. The rules provide an objective framework to ensure that only hearsay statements that are sufficiently necessary and reliable are admitted into evidence. And they offer multiple avenues for judges to exclude unreliable evidence.

Although the categorical approach of the FRE is imperfect, it is nevertheless preferable to discretionary judicial determinations of credibility. Including a discretionary trustworthiness standard to Rules 803(2) and (3) would risk jury encroachment, prejudice against defendants, and inconsistent application of the law. Moreover, the risks associated with potentially fabricated statements are mitigated by institutional safeguards, such as forms of impeachment and the jury's ability to appropriately assess a statement's voracity. In determining the admissibility of defendants' exculpatory statements, judges must carefully apply the FRE to guide their roles as "evidentiary gatekeepers." They must remember the fundamental premise of our justice system—that the jury is the "lie detector."