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Casenotes: Evidence — Maryland Adopts the Present Sense Impression Exception to the Hearsay Rule. Booth v. State, 306 Md. 313, 508 A.2d 976 (1986)

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CASENOTES

EVIDENCE — MARYLAND ADOPTS THE PRESENT SENSE IMPRESSION EXCEPTION TO THE HEARSAY RULE. *Booth v. State*, 306 Md. 313, 508 A.2d 976 (1986).

A man was murdered in his home;[1] just prior to his death the man made two statements to another person over the telephone.[2] These statements were the most important evidence linking the defendant to the murder.[3] At the trial of the accused, a witness testified to the statements made by the decedent.[4] The trial judge admitted the statements, as testified to by the witness, under the present sense impression (PSI) exception to the hearsay rule.[5] The court of special appeals held that the PSI is a valid exception to the hearsay rule[6] and that the statements were correctly admitted into evidence under the exception.[7] The court of appeals affirmed and further held that corroboration by an equally percipient witness is not a requirement for admissibility.[8]

Hearsay is defined as an out-of-court statement which is offered in evidence to prove the truth of the matter asserted in the statement.[9] Hearsay statements are inadmissible as evidence because the declarant, the one who made the statement, was not subject to the credibility safeguards[10] of oath,[11] personal presence,[12] and cross-examination[13] at the

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1. Booth v. State, 62 Md. App. 26, 29, 488 A.2d 195, 197 (1985) *aff'd*, 306 Md. 313, 508 A.2d 976 (1986).
2. *Id.*
3. Brief for Appellee at 18-19, Booth v. State, 306 Md. 313, 508 A.2d 976 (1986) (No. 85-86).
4. *Id.* Regina Harrison, the witness, called Ross, the victim, between 5:30 and 6:00 p.m. on April 4, 1983. During their conversation Harrison heard a female voice in the background and asked who it was. Brief for Appellee at 2. Ross told Harrison it was a girl he knew named Brenda. *Id.* He said he was about to make dinner and that he was going to ask "Brenda" to leave. At one point in the conversation someone knocked on the decedent's front door. *Id.* at 3. Harrison asked Ross who was there and Ross replied that Brenda was talking to some guy on the front steps. *Id.* Harrison testified that she heard the knock at the door and voices in the background during the conversation. *Id.*
5. Booth v. State, 306 Md. 313, 316, 508 A.2d 976, 977 (1986).
6. Booth v. State, 62 Md. App. 26, 488 A.2d 195, *aff'd*, 306 Md. 313, 508 A.2d 976 (1986).
7. *Id.*
8. *Booth*, 306 Md. at 331, 508 A.2d at 985.
9. *See* FED. R. EVID. 801(c); C. MCCORMICK, MCCORMICK ON EVIDENCE § 246 (3d ed. 1984); *see also* L. MCLAIN, MARYLAND EVIDENCE § 801.1 (1987) (the declarant cannot testify to his own out-of-court statement unless an exception applies).
10. Credibility of testimony depends on four factors: perception, memory, narration and sincerity. Each of these can be tested by three safeguards: oath, personal presence and ability to cross-examine. *See* FED. R. EVID. 802; C. MCCORMICK, *supra* note 9, § 245.
11. C. MCCORMICK, *supra* note 9, § 245 (an oath may impress upon a witness an obligation to tell the truth and warn of the danger of criminal sanctions for perjury).
12. *Id.* (personal presence eliminates the danger of inaccuracy in reporting the out-of-court statement).
13. *Id.* (giving the opponent an opportunity to cross-examine the witness is the principle

time the statement was made.[14] The rule against hearsay, however, is subject to many exceptions all of which are justified by the circumstantial guarantees of credibility.[15]

One of the exceptions to the rule is the "spontaneous declaration" or "spontaneous statement."[16] There are four types of spontaneous statements: (1) statements of present bodily conditions, (2) statements of present mental states and emotions,[17] (3) excited utterances,[18] and (4) present sense impressions.[19] All of these exceptions were derived from the broad concept of the *res gestae* exception to the hearsay rule.[20]

James Bradley Thayer first formulated the PSI exception in 1881 in response to the English case of *Regina v. Bedingfield*.[21] The judge in *Bedingfield* refused to admit hearsay testimony of a witness because the statement was made after the event in question, thereby removing the statement from the *res gestae* exception.[22] Thayer disagreed with the court's ruling. He theorized that a hearsay exception based on contemporaneity of statements made by those present at an event and made at or near the time the event took place was warranted because these factors significantly increased the trustworthiness of the statements.[23] Thayer's formulation of the PSI has been accepted by the majority of commentators who have considered the viability and worth of the exception.[24]

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safeguard; it gives the opponent a chance to clarify points, ask questions, reconcile contradictions and remove ambiguities).

14. *See* L. MCLAIN, *supra* note 9.
15. The exceptions fall into two basic categories: (1) those that require the declarant to be unavailable, and (2) those that operate whether the declarant is available or not. *See* FED. R. EVID. 803-804.
16. *See* FED. R. EVID. 803(1)-(3); C. MCCORMICK, *supra* note 9, §§ 288-298.
17. C. MCCORMICK, *supra* note 9, §§ 288-296 (discusses present bodily conditions and present mental states and emotions).
18. *Id.* § 297.
19. *Id.* § 298.
20. *Id.* §§ 288, 298. The *res gestae* exception allows hearsay statements that are made spontaneously and concurrently with an event or condition to be admitted into evidence because the statements are inherently credible by their spontaneousness. BLACK'S LAW DICTIONARY 1173 (5th ed. 1979). *Res gestae* literally means "things done." *Id.*
21. Thayer, *Bedingfield's Case - Declarations as a Part of the Res Gestae* (pts. I-III), 14 AM. L. REV. 817 (1880) (pts. I, II), 15 AM. L. REV. 71 (1881) (pt. III). *Bedingfield* was not officially reported. *See* Thayer, *supra*, 14 AM. L. REV. at 817.
22. Thayer, *supra* note 21, 14 AM. L. REV. at 818.
23. Thayer, *supra* note 21, 15 AM. L. REV. at 83.
24. *See infra* notes 25, 37-38; *see also* United States v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979); Booth v. State, 306 Md. 313, 319-20, 508 A.2d 976, 979 (1986); Commonwealth v. Coleman, 458 Pa. 112, 116-20, 326 A.2d 387, 389-91 (1974); FED. R. EVID. 803(1) advisory committee note. *But see* 6 J. WIGMORE, EVIDENCE § 1747 (Chadbourn rev. 1976) (Wigmore believed that excited utterances were the only spontaneous statements which justified exception to the hearsay rule). One commentator whose work has gained widespread recognition is Professor Morgan. Morgan supports the exception for two reasons. First, the perceptions of the declarant are of events existing concurrently with the declarant's statements. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236-37 (1922). Second, the contemporaneity requirement usually insures that the

The leading American case recognizing the PSI exception is *Houston Oxygen Co. v. Davis*.[25] In *Houston Oxygen*, the driver of a car, immediately after another car passed by at a high rate of speed, said, "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up."[26] Shortly thereafter, the speeding car collided with a third car a few miles down the road.[27] In subsequent litigation, the victims of the accident attempted to admit the driver's statement into evidence through the testimony of two passengers in the car and the driver.[28] The trial court held that the statement was hearsay and therefore inadmissible.[29] On appeal, however, the Supreme Court of Texas held that the statement was admissible under the PSI exception to the hearsay rule.[30] The court stated three reasons that warranted the exception: (1) the contemporaneity between the statement and the event insures against defects in memory,[31] (2) the contemporaneity requirement leaves little or no time for the declarant to fabricate a statement,[32] and (3) the statement will usually be made to another who has an equal chance to observe the event.[33]

The authors of the Federal Rules of Evidence also recognized the logic of the admission of the PSI and made it an exception to the hearsay rule. Federal Rule 803(1) defines the PSI as "[a] statement describing an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[34] The advisory committee note to the rule helps to explain its justification.[35] The note states that the wit-

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event is open to the perception of the witness to the statement and the witness will be available for cross-examination on the existence of the event or condition and the content of the statement. These safeguards bolster the trustworthiness of the hearsay, and therefore the statements should be admitted into evidence. *See id.*

25. 139 Tex. 1, 161 S.W.2d 474 (1942); *see* C. MCCORMICK, *supra* note 9, § 298, at 861.
26. *Houston Oxygen*, 139 Tex. at 5, 161 S.W.2d at 476.
27. *Id.*
28. *Id.*
29. *Id.* at 6, 161 S.W.2d at 476.
30. *Id.*
31. *Id.* at 6, 161 S.W.2d at 477. It is arguable that the facts presented in *Houston Oxygen* also met the excited utterance criteria because an exciting event occurred. C. MCCORMICK, *supra* note 9, § 298, at 861 n.10.
32. *Houston Oxygen*, 139 Tex. at 6, 161 S.W.2d at 477.
33. *Id.*
34. FED. R. EVID. 803(1); *accord* MODEL CODE OF EVIDENCE RULE 512(a); UNIF. R. OF EVID. 803(1). A majority of the states have adopted similar statutes. ALASKA R. EVID. 803(1); ARIZ. R. EVID. 803(1); ARK. R. EVID. 803(1); CAL. EVID. CODE § 1241 (West 1965); COLO. R. EVID. 803(1); FLA. EVID. CODE § 90.803(1); IDAHO R. EVID. 803(1); IOWA R. EVID. 803(1); KAN. CIV. PROC. CODE ANN. § 60-460(d)(1) (Vernon 1983); ME. R. EVID. 803(1); MONT. R. EVID. 803(1); NEV. REV. STAT. § 51.085 (1971); N.H. R. EVID. 803(1); N.J. R. EVID. 63(4)(a); N.M. R. EVID. 803(1); N.C. GEN. STAT. § 8C-1, R.803(1) (1986); N.D. R. EVID. 803(1); OHIO R. EVID. 803(1); OKLA. STAT. ANN. tit. 12, § 2803(1) (1980); S.D. CODIFIED LAWS ANN. § 19-16-5 (1987); TEX. R. EVID. 803(1); UTAH R. EVID. 803(1); VT. R. EVID. 803(1); WASH. R. EVID. 803(1); W. VA. R. EVID. 803(1); WIS. R. EVID. 908.03(1); WYO. R. EVID. 803(1).
35. FED. R. EVID. 803(1) advisory committee note.

ness' availability for cross-examination as to the surrounding circumstances is an aid in evaluating the statement[36] and that the contemporaneity requirement[37] eliminates opportunities for declarants to fabricate statements.[38] The committee note further observes that the event and the statement do not have to be exactly contemporaneous if the time lapse is reasonable under the circumstances.[39]

The Federal Rule and the advisory committee note, however, do not address all of the potential problems courts encounter when applying the PSI exception.[40] In addressing the problems that have arisen from the application of the rule, courts have usually agreed on the resolutions.[41] One issue, however, whether corroboration of the event is a requirement for admissibility, is not settled.[42]

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36. *Id.*
37. *Id.* (the requirement that the statement and the event be closely related in time).
38. *Id.*
39. *Id.* This factor has created few problems in the application of the present sense impression exception. *See* Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 879-80 (1981). Commentators and courts agree that the circumstances of each case must be considered to determine whether enough time between the event and statement elapsed to allow for a conscious misstatement. *See* United States v. Blakey, 607 F.2d 779 (7th Cir. 1979); United States v. Medico, 557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977); Commonwealth v. Peterkin, 511 Pa. 299, 312, 513 A.2d 373, 379 (1986) *cert. denied*, 107 S. Ct. 962 (1987); Reichman v. Wallach, 306 Pa. Super. 177, 452 A.2d 501 (1982); C. MCCORMICK, *supra* note 7, § 298, at 862; Waltz, *supra*, at 880. Two questionable decisions involving indefinite time periods are United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974) and Starr v. Morsette, 236 N.W.2d 183 (N.D. 1975). *See* Comment, *The Present Sense Impression Hearsay Exception: An Analysis of the Corroboration Requirements*, 71 NW. U.L. REV. 666 (1976).
40. *See* C. MCCORMICK, *supra* note 9; Waltz, *supra* note 39; Comment, *Spontaneous Exclamations in the Absence of a Startling Event*, 46 COLUM. L. REV. 430 (1940); Comment, *supra* note 39; Note, *The Need for a New Approach to the Present Sense Impression Hearsay Exception After State v. Flesher*, 67 IOWA L. REV. 179 (1981).
41. One issue is whether the declarant needs to be involved in the event or condition. Courts have ruled that he does not, but he must have firsthand knowledge of the event or condition. People v. Poland, 22 Ill. 2d 175, 183, 174 N.E.2d 804, 808 (1961); MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 301 (J. Weinstein 5th ed. 1976); Waltz, *supra* note 39, at 877-78. Another issue is whether the declarant's identity must be known. It is generally agreed that the identity of the declarant has no bearing on the admissibility of the hearsay. FED. R. EVID. 803(1); Waltz, *supra* note 39, at 878-79; Comment, *supra* note 39, at 676 (This commentator discusses Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939), in which the court held that PSI statements were inadmissible because the declarant did not have firsthand knowledge of the event. Firsthand knowledge is a competency requirement, not a corroboration requirement.). Present sense impressions also have been held not to be cumulative evidence. Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); Waltz, *supra* note 39, at 880-81. Finally, statements in the form of opinions have been held admissible because PSI's are not statements of reflective thought and therefore do not run afoul of the opinion rule. MORGAN, *supra* note 24, at 301; Waltz, *supra* note 39, at 881-82; *see* FED. R. EVID. 701; *see also* C. MCCORMICK, *supra* note 9, § 10 (expressions found to be made from conjecture are inadmissible).
42. *See, e.g., In Re* Japanese Elec. Prods., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub. nom.*, Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574

Corroboration of the event is a requirement that evidence, other than just the statement, be offered in court to verify the existence of the event and to counteract the possibility of the declarant making a "calculated misrepresentation" or a "simple misobservation" as to the event.[43] Courts that require corroboration of the event disagree as to the degree of corroboration that is required: corroboration by an equally percipient witness, or corroboration by some other evidence.[44]

An equally percipient witness is one who observes the same event from the same vantage point as the declarant.[45] The equally percipient witness requirement has been traced to the works of Thayer and Morgan and the *Houston Oxygen* case.[46] These authorities appear to justify this requirement because the witness will usually be in a position to perceive the event or condition in question along with the utterance made by the declarant.[47] Thus, the witness can verify the event the declarant perceived.

Many commentators have not supported the equally percipient witness requirement because they view it as an overly restrictive limitation on the PSI exception that does not boost trustworthiness significantly.[48] Some of these authorities, however, do require corroboration of the event, but allow any type of evidence to corroborate the event, including an equally percipient witness.[49] Allowing any type of evidence to corrob-

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(1986); United States v. Blakey, 607 F.2d 779 (7th Cir. 1979); United States v. Medico, 557 F.2d 309 (2d Cir. 1977), *cert. denied*, 434 U.S. 986 (1978); United States v. Obayagbona, 627 F. Supp. 329 (E.D.N.Y. 1985); Robinson v. Shapiro, 484 F. Supp. 91 (S.D.N.Y. 1980), *modified*, 646 F.2d 734 (2d Cir. 1981); State v. Flesher, 286 N.W.2d 215 (Iowa 1979); Jones v. State, 65 Md. App. 121, 499 A.2d 511 (1985), *rev'd*, 311 Md. 23, 532 A.2d 169 (1987); Booth v. State, 62 Md. App. 26, 488 A.2d 195 (1985), *aff'd*, 306 Md. 313, 508 A.2d 976 (1986); Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974).

Some courts have added confusion to the debate over corroboration of the event by referring to corroboration generically. The term "corroboration," however, is important in a number of contexts when determining the admissibility of PSI's. Corroboration may be necessary to verify any one of the following requirements for admissibility: (1) the declarant's firsthand knowledge, (2) the contemporaneity between the event and the declarant's statement, (3) that the event was not fabricated or misobserved by the declarant, or (4) that the witness is truthfully recounting the declarant's statement. Therefore, when a court uses the term "corroboration" in connection with PSI's it must clearly state to which requirement for admissibility the corroboration pertains. *See infra* cases cited in notes 49, 50.

43. Waltz, *supra* note 39, at 891.
44. *See* Note, *supra* note 40, at 199 (other witnesses' perceptions can be probative as to the occurrence of the event and such evidence can come from another witness or circumstantial evidence).
45. *Coleman*, 458 Pa. at 119, 326 A.2d at 390.
46. Waltz, *supra* note 39, at 883-84, 892-95.
47. Houston Oxygen Co. v. Davis, 139 Tex. 6, 161 S.W.2d 474, 477 (1942); Morgan, *supra* note 24, at 236; Thayer, *supra* note 21, 15 AM. L. REV. at 107.
48. *See* C. MCCORMICK, *supra* note 9, § 298, at 862-63; Comment, *supra* note 39, at 673-74; Note, *supra* note 42, at 67.
49. *In re* Japanese Elec. Prods., 723 F.2d 238, 303 (3rd Cir. 1983) *rev'd on other grounds sub. nom.*, Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986) ("the rule is generally understood to require that . . . there must be some corroborating

orate the event is the most desirable approach because it bolsters significantly the trustworthiness of the PSI without the harsh stricture of the equally percipient witness requirement.

Some courts, however, have not required any evidence to corroborate the event, but have allowed such evidence to bolster the credibility of the witness.[50] These courts have attempted to justify this position by relying on cases that discredit the equally percipient witness requirement.[51] This reliance is ill-founded because the thrust of the arguments are not against corroborative evidence *per se*, but against the strict requirement of the equally percipient witness.[52] For example, in *State v. Flesher*,[53] the Supreme Court of Iowa held that statements made to a witness over the phone were admissible as PSI's.[54] The court also held that the statements did not require corroboration of the event as a condition of admissibility.[55]

One commentator questions the result in *Flesher* and the court's treatment of the PSI exception.[56] The commentator suggests that the court's conclusion was based on the rejection of the equally percipient witness requirement, not on the rejection of the requirement of corrobo-

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testimony"); United States v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979) (the court held that witnesses need not be in an equal position to the declarant to corroborate the event); Robinson v. Shapiro, 484 F. Supp. 91, 95 (S.D.N.Y. 1980) (the court did not reject the corroboration factor); United States v. Narciso, 446 F. Supp. 252, 288 (E.D. Mich. 1977); State v. Savant, 146 Ariz. 306, 705 P.2d 1357 (1985) ("quick corroboration of statement reduced risk of falsification"); Jones v. State, 65 Md. App. 121, 126, 499 A.2d 511, 513 (1985), *rev'd*, 311 Md. 23, 532 A.2d 169 (1987); Booth v. State, 62 Md. App. 26, 36, 488 A.2d 195, 200, *aff'd*, 306 Md. 313, 508 A.2d 876 (1986) (hearing events through phone was sufficiently corroborating); State v. Perry, 95 N.M. 179, 179-81, 619 P.2d 855, 855-57 (1980); Commonwealth v. Coleman, 458 Pa. 112, 119, 326 A.2d 387, 390 (1974) (inability of witness to actually observe event does not make the exception inapplicable); Commonwealth v. Blackwell, 343 Pa. Super. 201, 219, 494 A.2d 426, 435 (1985) (interpreting and agreeing with *Coleman* that the witness' corroboration of the event is critical to the admission of a PSI); *see* Waltz, *supra* note 39, at 889-97; Comment, *supra* note 39, at 674; Comment, *supra* note 40, at 439-40.

50. *See* State v. Flesher, 286 N.W.2d 215, 218 (Iowa 1979) (corroboration of the event goes to the weight, not admissibility); *see also* United States v. Obayagbona, 627 F. Supp. 329, 339 (E.D.N.Y. 1985) (federal rules do not require corroboration for the PSI).
51. *See* State v. Flesher, 286 N.W.2d 218 (Iowa Ct. App. 1979). In *Flesher* the court held that no corroboration of the event was necessary for the admissibility of PSI's. *Id.* at 218. The *Flesher* court relied on a Pennsylvania case, Commonwealth v. Coleman, 458 Pa. 112, 114, 326 A.2d 387, 390 (1974), that held that "verification" was not a requirement for admissibility. There is a strong argument, however, that "verification" meant corroboration by an equally percipient witness. *Id.* (witness was able to give corroborating testimony as evidence of the event); *cf.* C. MCCORMICK, *supra* note 9, § 298, at 862-63 (indicating that McCormick would excise the equally percipient witness requirement, but not all corroborative evidence).
52. *See supra* note 49.
53. 286 N.W.2d 215 (Iowa 1979).
54. *Id.* at 218.
55. *Id.*
56. *See* Note, *supra* note 40.

ration of the event in question.[57] The commentator also theorizes that PSI's which are void of any corroborative evidence of the event offer no assurance that the declarants actually perceived anything.[58] Therefore, such statements are unacceptable as PSI's because there is no check against fabrication. Another criticism of *Flesher* is the court's reliance on Federal Rule of Evidence 803(1) as support for its holding. In *Flesher*, the court referred to the wording and underlying rationale of Rule 803(1) as support for holding that no corroboration of the event is required for the admission of PSI's.[59] Although the text of Federal Rule 803(1) does not mention corroboration,[60] the advisory committee note indicates that evidence of the event or condition is an important factor in evaluating the credibility of the PSI.[61]

Four years after the Supreme Court of Iowa decided *Flesher*, the United States Court of Appeals for the Third Circuit held, in *In re Japanese Electronic Products*,[62] that PSI's under Rule 803(1) require some evidence or testimony corroborating the event.[63] The court recognized that while the contemporaneity between the statement and the event does "provide some guarantee against misrepresentation and defective memory . . . this guarantee is not considered totally reliable. . . ."[64] Based on this reasoning, the court held that the documents in question, minutes of a meeting, were inadmissible evidence because the events described in the

57. *Id.* at 191.

58. *Id.*; *see also supra* note 49 and accompanying text.

59. *Flesher*, 286 N.W.2d at 218. In the court of appeals decision the court held that no corroboration was required for the admission of PSI's and the court relied on Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974), to support its holding. *Flesher*, 286 N.W.2d at 220.

60. *See* FED. R. EVID. 803(1) advisory committee note.

61. *See supra* notes 35-38 and accompanying text. The advisory committee note cites MORGAN, BASIC PROBLEMS OF EVIDENCE 340-41 (1962) on the underlying theory of the rule ("the witness . . . may be examined as to the circumstances as an aid in evaluating the statement"). FED. R. EVID. 803(1) advisory committee note. In the court of appeals decision, the court relied on the *Coleman* case. The *Coleman* case, however, does not stand for the proposition that corroboration is unnecessary, rather it holds that the heightened requirement of an equally percipient witness is not justified. *See supra* note 51 (referring to *Coleman*); *see also* Note, *supra* note 40, at 188-89.

62. 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub. nom.*, Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986); *see* People v. Watson, 100 A.D.2d 452, 474 N.Y.S.2d 978 (1984).

63. *In re* Japanese Elec. Prod., 723 F.2d at 303.

64. *Id. But cf.* United States v. Portsmouth Paving Corp., 694 F.2d 312, 322-23 (4th Cir. 1982) (court admitted witness' testimony as a PSI; declarant made statement to witness about a phone conversation that witness did not hear, but witness saw declarant hang up phone; court held that fabrication in this circumstance was unlikely). This case could be interpreted as not requiring "corroboration" of the event. The court, however, did not explicitly reject corroboration of the event. Furthermore, the fact that the witness saw the declarant on the phone is arguably evidence that the declarant was speaking to someone and thus there was some corroboration of the event.

documents were not corroborated.[65]

Until recently, Maryland courts have not addressed the viability of the PSI exception[66] because the courts have dealt with such spontaneous declarations by applying the *res gestae* exception to the hearsay rule.[67] The *res gestae* exception, however, proved to be an unreliable test for the admission of hearsay evidence.[68] The waning satisfaction with the *res*

65. *Japanese Elec. Prod.*, 723 F.2d at 303 (documents allegedly were minutes of a meeting).

66. Jones v. State, 65 Md. App. 121, 499 A.2d 511 (1985), *rev'd*, 311 Md. 23, 532 A.2d 169 (1987); Booth v. State, 62 Md. App. 26, 488 A.2d 195 (1985), *aff'd*, 306 Md. 313, 508 A.2d 976 (1986). The intermediate court in *Booth* recognized that the present sense impression exception has four factors justifying its admission: (1) a contemporaneous statement is safe from memory defects; (2) the contemporaneity requirement obviates concern of calculated misstatements; (3) the statement is usually made to another person in a position to perceive the same events and therefore provide corroboration; and (4) if the declarant is available to testify he can be cross-examined as to his credibility. *Booth*, 62 Md. App. at 35-36, 488 A.2d at 200. The court of special appeals affirmed the trial judge's ruling because it found that the contemporaneity and corroboration factors were satisfied. *Id.* at 36-37, 488 A.2d at 200-01. The *Jones* court followed the formulations delineated in the intermediate *Booth* case for the admission of present sense impressions. *Jones*, 65 Md. App. at 125-26, 499 A.2d at 513. *Jones* dealt with the testimony being offered by a state trooper as to the content of a citizens band conversation between two truck drivers. The court, applying the *Booth* factors, found that because the statements were not made to the trooper and neither driver was available to testify, the only area of examination was the trooper's memory of what he supposedly heard. This could not satisfy the third factor delineated in *Booth*, corroboration of the events the driver spoke of, and therefore the testimony was held inadmissible. *Id.*

After the court of appeals decided the *Booth* case, the court granted *certiorari* to hear the *Jones* case. In *Jones*, the court of appeals reversed the court of special appeals by holding that PSI's between two drivers, who were unidentified, were admissible through a state trooper who overheard the statements on a citizens band radio. The appellee in the case, Jones, argued that the PSI's were inadmissible because there was no corroboration showing that the *witness* was not fabricating the statements. *Jones*, 311 Md. at 31-32, 532 A.2d at 173. The court held that corroboration of the witness' testimony was unnecessary because the oath and cross examination is sufficient to "safeguard against lying." *Id.* The court also reaffirmed its holding in *Booth* that corroboration by an equally percipient witness is unnecessary for the admission of PSI's. *Id.* Finally, the court stated, in *dicta*, that "the inherent trustworthiness of a statement of perception given contemporaneously with the event being described is sufficient to outweigh [the concern of] the possibility of fabrication by unknown declarants." *Id.* The court's position is unclear, however, as to whether the court intended to say that "unknown" declarants do not hamper admissibility of PSI's because the justification for admitting PSI's is spontaneity, not the declarant's inherent credibility, or whether the court intended to say that the danger of fabrication by the declarant may be present because he is unknown, but that such was not sufficient to make the PSI inadmissible. Whichever the case, the court apparently did not close the book on the question of whether any corroboration of the event is necessary for the admission of a PSI. Furthermore, it would have been unnecessary to decide the issue in *Jones* because there was evidence to corroborate the statements and, moreover, it was not raised on appeal. *Id.* at 27, 31-32, 532 A.2d at 171, 173.

67. Wright v. State, 88 Md. 705, 41 A. 1060 (1898); *see* Mouzone v. State, 294 Md. 692, 452 A.2d 661 (1982).

68. L. MCLAIN, *supra* note 9, § 803(1).1; J. WIGMORE, *supra* note 24, § 1767, at 255;

gestae exception led to the gradual overhaul of this outdated mechanism for admitting "spontaneous" hearsay statements.[69] Consequently, more clearly defined divisions of spontaneous declarations, such as excited utterances and PSI's, were adopted to create more accurate classifications of admissible hearsay.[70]

In *Booth v. State*,[71] the Court of Appeals of Maryland adopted the PSI exception to the hearsay rule in the form that it appears in Federal Rule of Evidence 803(1).[72] After reviewing the authorities who have commented on the PSI, the court concluded that the PSI is an acceptable exception to the hearsay rule because such statements are trustworthy.[73] The court also reasoned that the similarities between PSI's and excited utterances, spontaneous statements already recognized as exceptions to hearsay in Maryland, further justified the adoption of the PSI exception.[74]

The court also discussed the practical problems that may arise from the application of the PSI exception.[75] The court acknowledged four such problems: (1) whether, and to what degree, the statement and the event must be contemporaneous,[76] (2) whether the declarant must have

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Thayer, *supra* note 21, 15 AM. L. REV. at 10 (a rule that collected some things that belonged and some that did not).

69. *See Mouzone*, 294 Md. 692, 452 A.2d 661; Grier v. Rosenberg, 213 Md. 248, 131 A.2d 737 (1957); Neusbaum v. State, 156 Md. 149, 143 A. 872 (1928); Gray v. State, 53 Md. App. 699, 456 A.2d 1290 (1983); Moore v. State, 26 Md. App. 556, 338 A.2d 344, *cert. denied*, 276 Md. 747 (1975); Hall v. State, 5 Md. App. 599, 249 A.2d 217 (1969). In *Mouzone*, *Grier*, *Neusbaum*, *Moore*, and *Hall* the courts firmly recognized the excited utterance exception as a division of the *res gestae* concept.
70. The four types of spontaneous declarations are: present bodily conditions, present mental states, excited utterances and present sense impressions. *See Booth*, 62 Md. App. at 32, 488 A.2d at 198-99; Morgan, *supra* note 24.
71. 306 Md. 313, 508 A.2d 976 (1986).
72. Booth v. State, 306 Md. at 324, 508 A.2d at 981.
73. *Id.* at 317-24, 508 A.2d at 977-81.
74. *Id.* at 324, 508 A.2d at 981 (underlying rationale of both exceptions is to "preserve the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate").
75. *Id.*
76. *Id.*; *see supra* note 39 and accompanying text. A problem with the *Booth* decision lies in the court's application of the PSI criteria. The first statement made by the declarant was in response to the witness' question of who was in the declarant's house with him. *See supra* note 4. The declarant responded that a girl, "Brenda" was in the house with him. This statement should not have been admitted under the PSI exception because it violates the contemporaneity requirement between the statement and event. *See supra* notes 23-24, 28-31 and accompanying text. In *Booth*, the declarant was responding to a question asked about a continuing condition that had existed for an indefinite period of time. For a decision holding that a PSI can be in response to a question see State v. Barnes, 124 Ariz. 586, 606 P.2d 802 (1980). Two decisions have held that the absence of a known time period in which to judge the possibility of a misstatement by the declarant will render the evidence inadmissible because the contemporaneity requirement is not satisfied. Commonwealth v. Peterkin, 511 Pa. 299, 313, 513 A.2d 373, 380 (1986), *cert. denied*, 107 S. Ct. 962 (1987); Reichman v. Wallach, 306 Pa. Super. 177, 194-95, 452 A.2d 501, 510 (1982). *Contra* United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974); Starr

personal knowledge of the event or condition,[77] (3) whether the declarant must be identified,[78] and (4) whether statements in the form of opinions are admissible.[79]

In addressing the contemporaneity issue, the court noted that some time lapse between the event and the statement is allowable as long as the circumstances do not give time for the declarant to speak from reflective thought.[80] The court also stated that the declarant must have firsthand knowledge of the event,[81] but that the identification of the declarant is not a condition of admissibility of the statement.[82] Additionally, the court stated that PSI's in the form of opinions are admissible because such statements are not reflective, and therefore do not violate the opinion rule.[83]

The *Booth* court also responded to the appellant's contention that, in order for PSI's to be admissible, the PSI must be corroborated by an equally percipient witness.[84] The court flatly rejected corroboration by an equally percipient witness as a requirement for admissibility.[85] While providing no direct reasoning,[86] the court apparently based its holding on two grounds. First, the court recognized that Rule 803(1) does not, on its face, require corroboration.[87] Second, the court made reference to the writings of Waltz and McCormick, two prominent evidence authorities,

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v. Morsette, 236 N.W.2d 183 (N.D. 1975). The facts in *Booth* make it impossible to know whether the declarant was responding to an event or condition at the time he first perceived it, or whether the event or condition had existed for a long period of time, thereby giving the declarant ample time to make a calculated misstatement. The lack of knowledge of the time lapse between the statement and event causes the statement to fail the contemporaneity factor of the exception. Even though strict contemporaneity is not required, the court must know the length of the time lapse and the nature of the surrounding circumstances in order to determine whether the declarant had time to fabricate his statement. *See Peterkin*, 511 Pa. at 313, 513 A.2d at 380; *Reichman*, 306 Pa. Super. at 194-95, 452 A.2d at 510. The first statement in *Booth*, therefore, falls outside the scope of the PSI exception because it fails to satisfy the contemporaneity requirement which destroys its trustworthiness. *See Booth*, 306 Md. at 324, 508 A.2d at 981; Waltz, *supra* note 39, at 880; Comment, *supra* note 39.

77. *Booth*, 306 Md. at 324-25, 508 A.2d at 981.
78. *Id.* at 325, 508 A.2d at 981-82.
79. *Id.* at 325-27, 508 A.2d at 982-83.
80. *Id.* at 324, 508 A.2d at 981.
81. *Id.* at 324-25, 508 A.2d at 981-82. Personal knowledge is a threshold requirement of admissibility because it concerns the competency of the declarant, not proof of the event.
82. *Id.* at 325, 508 A.2d at 981; *see* State v. Jones, 311 Md. 23, 532 A.2d 169 (1987) (PSI by unidentified declarants held admissible).
83. *Id.* at 325-27, 508 A.2d at 982-83 (citing MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE ch. 13, at 300 (5th ed. J. Weinstein 1976) and Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 881-82 (1981); *see supra* note 41 (opinion rule excludes statements made from conjecture).
84. *Booth*, 306 Md. at 317, 327-30, 508 A.2d at 977, 983-84.
85. *Id.* at 330, 508 A.2d at 984.
86. *Id.*
87. *Id.* at 327, 508 A.2d at 983.

that denounce the equally percipient witness requirement.[88]

Although clearly rejecting corroboration by an equally percipient witness, the court was confusing in its discussion of corroboration in general:

> As we have noted, extrinsic evidence may sometimes be required to demonstrate the contemporaneity of the statement, or to show that it is the product of personal perception by the declarant. Accordingly, it may be correct in a particular case to say that "corroboration" is required, but this does not mean that corroboration is required in every instance, or that the corroboration must be that of an equally percipient witness. Even when not required for admissibility, corroboration (or the lack thereof) may be important in determining the weight to be given the statement.[89]

In conclusion, the court held that the statements in question were properly admitted under the PSI exception because both the firsthand knowledge and contemporaneity requirements were satisfied by the witness' perception of the event.[90]

The *Booth* decision makes great strides toward improving the functional law of evidence in Maryland courts by recognizing the PSI exception and by limiting the scope of the *res gestae* exception.[91] The court was warranted in giving guidance on the "practical problems" it realized would follow the acceptance of the exception.[92] In dealing with these considerations the court followed the relevant case law and the advice of the commentators.[93] The court was further warranted in rejecting the equally percipient witness requirement because it is an overly restrictive limitation on the admission of PSI's.[94]

Unfortunately, after the court rejected the equally percipient witness requirement, the court made an ambiguous statement regarding how corroboration in general applies to the PSI exception.[95] The court stated that "[i]t may be correct in a particular case to say that 'corroboration' is required, but this does not mean that corroboration is required in every instance. . . ."[96] This statement is ambiguous because it is unclear whether it applies to corroboration of the existence of the event or to corroboration of the firsthand knowledge and contemporaneity requirements.

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88. *Id.* at 328-30, 508 A.2d at 983-84.
89. *Id.* at 330, 508 A.2d at 984.
90. *Id.* at 331, 508 A.2d at 985. The court also indicated that a lack of evidence to the contrary was important. *Id.*
91. *See supra* notes 21-23, 67-69 and accompanying text.
92. *See supra* notes 40-49 and accompanying text.
93. *See supra* notes 39-48, 80-83 and accompanying text.
94. *See supra* note 48 and accompanying text.
95. *See supra* note 89 and accompanying text.
96. Booth v. State, 306 Md. 313, 330, 508 A.2d 976, 984 (1986).

This statement may be referring to corroboration of the event because the sentence preceding the ambiguous statement addresses corroboration by an equally percipient witness, which generally applies to corroboration of the event.[97] Furthermore, the court quoted an authority that indicated that corroboration of the event is an unnecessary requirement.[98] On the other hand, the statement may be referring only to corroboration of the firsthand knowledge and contemporaneity requirements. This interpretation is supported by three reasons. First, the court's statement about firsthand knowledge and contemporaneity directly precedes the statement.[99] Second, although the equally percipient witness requirement usually applies to corroboration of the event,[100] the court's failure to label specifically what the equally percipient witness' testimony in the first sentence was intended to corroborate implies that it pertains to the firsthand knowledge and contemporaneity requirements: the only requirements the court directly relates to corroboration.[101]

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97. *Id.*; *see supra* notes 44-46 and accompanying text.

98. *Booth*, 306 Md. at 329, 508 A.2d at 983-84 (citing C. MCCORMICK, MCCORMICK ON EVIDENCE § 298, at 862-63 (3d ed. 1984)). McCormick states that a requirement of corroboration of circumstances indicating the trustworthiness of PSI's is unnecessary for admissibility for two reasons. C. MCCORMICK, *supra* note 9, § 298. One reason is that only one hearsay exception specifically requires corroboration. *See* FED. R. EVID. 804(b)(3). The other reason is that although corroboration by the witness is usually present and is one of the justifications for the exceptions, that does not translate into a requirement for admissibility. C. MCCORMICK, *supra* note 9, § 298.

99. *Booth*, 306 Md. at 330, 508 A.2d at 984.

100. *See supra* notes 44-46 and accompanying text.

101. The court uses the term corroboration throughout its discussion on the equally percipient witness requirement but fails to adequately explain what is being corroborated. *Booth*, 306 Md. at 327-30, 508 A.2d 983-84; *see infra* note 102. The firsthand knowledge requirement is necessary to show that the witness is competent to testify. *See supra* note 10 (perception); *see also* Ramratton v. Burger King Corp., 656 F. Supp. 522, 528 (D. Md. 1987) ("[a]lthough corroboration is not required under 803(1), the fact that the declarant probably observed the event - or was in a position to do so - is advanced as one of the reasons present sense impressions are trustworthy"). The contemporaneity requirement removes the opportunity for the declarant to fabricate the story. *See supra* note 10 (sincerity).

The problems created by ignoring the corroboration factor entirely can best be illustrated by an example. Suppose two people are seated in a room with one window and person *A* has his back to the window while person *B* faces it. *B* is looking out the window while *A* is reading a book. *B* casually states to A: "Your girlfriend is driving by the house with another man in a red convertible." On the surface this appears to be a good PSI because it appears to meet the contemporaneity and firsthand knowledge requirements. There is, however, no information to corroborate the event. *B* may have simply made up the entire statement and yet it appears to satisfy the contemporaneity requirement. The difficulty with accepting this logic is that without any evidence that the event actually occurred, it is impossible to determine whether the declarant had firsthand knowledge of the event or to determine whether the statement was contemporaneous with the event. If, on the other hand, *A* heard a car going by at the time, or another person saw a red convertible going down the street at that time from another vantage point, the firsthand knowledge and contemporaneity factors become meaningful because we know *B* perceived an event about which he made his statement.

Third, the discussion of corroboration concluded with a reference to the equally percipient witness; when considered in conjunction with the first reason, this further implies that the court was addressing corroboration of firsthand knowledge and contemporaneity by an equally percipient witness.[102]

If the court intended the statement to apply to the corroboration of the event requirement, the court's position is ill-advised. The court offered no direct authority to support this conclusion,[103] and although reference is made to cases and commentaries that reject the equally percipient witness requirement,[104] these sources do not support a total rejection of the corroboration of the event requirement.[105] Moreover, the only authority mentioned by the court that specifically states that corroboration of the event is unnecessary, *State v. Flesher*,[106] was apparently cited only to support the rejection of the equally percipient witness requirement.[107]

The *Booth* court, as the *Flesher* court did, misinterpreted Rule 803(1) as it applies to the corroboration of the event requirement. Both opinions state that because Rule 803(1) does not directly require corroborative evidence, no such evidence is necessary for the admission of PSI's.[108] Reliance on this argument is weak, however, because the advisory committee note to the rule states that one of the justifications behind the admission of PSI's is that some evidence of the event will be available as a check against fabrication.[109] Furthermore, the *Booth* court failed to recognize the importance of two recent decisions that have held that PSI's are inadmissible without some kind of corroborative evidence.[110] One of the decisions, *In re Japanese Electronic Products*,[111] was a federal appellate court decision applying the federal rule on the PSI.[112] This

102. *Booth*, 306 Md. at 330, 508 A.2d at 984.
103. *See id.* The court does, however, make reference to the fact that the federal rules do not directly require corroboration of the event, but it is unclear whether the court was discussing all corroboration or just corroboration by an equally percipient witness. *See supra* note 61 and accompanying text.
104. *Booth*, 306 Md. at 327-29, 508 A.2d at 983-84.
105. The requirement of one type of corroboration does not necessarily make up for the failure to require corroboration of another type. Therefore, the conclusion that no corroboration of the event is required merely because the equally percipient witness requirement has been rejected has been criticized by commentators. *See* Note, *supra* note 40, at 189 (discussing *Coleman*).
106. 286 N.W.2d 215 (Iowa 1979); *see supra* notes 53-61 and accompanying text.
107. *Booth*, 306 Md. at 328, 508 A.2d at 983.
108. *See* State v. Flesher, 286 N.W.2d at 218; *Booth*, 306 Md. at 327, 508 A.2d at 983.
109. *See* L. MCLAIN, *supra* note 9, § 803(1).2, at 348-49; Waltz, *supra* note 39, at 890-92; Note, *supra* note 40, at 185-86.
110. *See In re* Japanese Elec. Prod., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub. nom.*, Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986); People v. Watson, 100 A.D.2d 452, 474 N.Y.S.2d 978 (1984); *see also supra* note 47 and accompanying text.
111. 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub. nom.*, Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986).
112. *Id.* at 303; *see supra* notes 61-64 and accompanying text.

decision is highly persuasive as to the corroboration of the event requirement because the *Booth* court adopted the PSI exception "in the form in which it appears in" Rule 803(1).[113]

Conversely, if the *Booth* court did not intend the statement to refer to the corroboration of the event requirement, the court must have intended that the statement only pertain to the firsthand knowledge and contemporaneity requirements. This interpretation presents the better view because it further clarifies the court's position on those requirements and leaves the issue of the corroboration of the event requirement an open question in Maryland.[114] When the issue is eventually brought before the court of appeals, the court should require that some corroboration of the event be offered for a PSI to be admitted into evidence. Such a holding would be consistent with the position of most courts and commentators, and the requirement will act as a safeguard against a declarant's misobservation or outright fabrication of the event.

In *Booth v. State*, the Court of Appeals of Maryland adopted the present sense impression exception to the hearsay rule as it now exists in Federal Rule of Evidence 803(1). The court further held that corroboration by equally percipient witnesses is not a requirement for admissibility. Unfortunately, the court also made an ambiguous statement that "corroboration" is not a requirement for a PSI to be admissible. This position, as applied to the corroboration of the event requirement, would be both unwarranted and unwise according to most courts and commentators because it does not provide adequate safeguards against a declarant's misobservation or outright fabrication of the event. It is more likely, however, that the court intended the statement to apply only to the firsthand knowledge and contemporaneity requirements. In the future, when the issue is raised, the court of appeals should require corroboration of the event for the admission of PSI's; thus, only trustworthy PSI's will be admissible as substantive evidence.

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113. Booth v. State, 306 Md. 313, 324, 508 A.2d 976, 981 (1986). Although the court cited both *Japanese Electronic Products* and *Watson* in its discussion on the equally percipient witness requirement, the *Booth* court only mentioned the refusal of those courts to admit PSI's without corroboration in passing. *See Id.*, 306 Md. at 328, 508 A.2d at 983.

114. The only other case from the court of appeals addressing the PSI exception was decided after *Booth*. Jones v. State, 311 Md. 23, 532 A.2d 169 (1987). Although the *Jones* court discussed "corroboration," the discussion was about yet another type of corroboration, corroboration showing that a *witness* is not fabricating the statements to which he is testifying. *Jones*, 311 Md. at 31-32, 532 A.2d at 173. The *Jones* court held that this type of corroboration is unnecessary. *Id.* The *Jones* decision supports the interpretation that *Booth* applies only to the firsthand knowledge and contemporaneity requirements because *Jones* mentions *Booth* only in that capacity. *Id.* Moreover, *Jones* specifically applies only to the corroboration of the witness requirement and, therefore, it is logical that the *Booth* court would have limited its discussion on corroboration to the firsthand knowledge and contemporaneity requirements. *Id.*