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Notes: Admissibility of an out-of-Court Confession: Inability to Make an in-Court Identification of the Defendant as the out-of-Court Confessor, despite Exactness of Names and Other Circumstantial Evidence of Identity, Goes to the Admissibility Rather Than to the Weight of the Confession. Woodson v. State, 325 Md. 251, 600 A.2d 420 (1992)

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NOTES

ADMISSIBILITY OF AN OUT-OF-COURT CONFESSION: INABILITY TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT AS THE OUT-OF-COURT CONFESSOR, DESPITE EXACTNESS OF NAMES AND OTHER CIRCUMSTANTIAL EVIDENCE OF IDENTITY, GOES TO THE ADMISSIBILITY RATHER THAN TO THE WEIGHT OF THE CONFESSION. *Woodson v. State*, 325 Md. 251, 600 A.2d 420 (1992).

I. INTRODUCTION

Maryland courts admit hearsay into evidence if it qualifies as an exception to the hearsay rule.[1] Prior to admitting hearsay evidence under a hearsay exception, the proponent of the evidence must lay a foundation to prove the identity of the out-of-court declarant.[2] Often, proponents of hearsay rely on circumstantial evidence to prove identity.[3] In many cases where only a name of the out-of-court declarant is known, the presumption that "identity of names gives rise to identity of person" (the identity presumption) is used to link the out-of-court declarant with another individual.[4]

Generally, a criminal confession is admissible if, by a preponderance of the evidence, it was made knowingly and voluntarily.[5] Courts have had little occasion to address the standard of proof required for admissibility of a hearsay confession when the identity of the confessor is in question. Jurisdictions which have addressed this issue generally follow the same procedure typically used to determine the admissibility of hearsay evidence; namely that circumstantial evidence is allowed to prove the identity of the out-of-court declarant.[6] Therefore, the identity presumption may be used as cir-

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1. *See infra* note 50 and accompanying text.
2. *See infra* notes 87-88 and accompanying text.
3. *See infra* notes 89-99 and accompanying text.
4. *See infra* notes 100-53 and accompanying text.
5. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (addressing the "knowing and voluntary" standard for admissibility of confessions); *see also* Clay v. State, 211 Md. 577, 585, 128 A.2d 634, 638 (1957) (referring to the "knowing and voluntary" standard).
6. *See infra* notes 89-90 and accompanying text.

cumstantial evidence to identify the out-of-court confessor.[7] After presenting all circumstantial evidence of identity, any remaining uncertainty as to the identity of the confessor affects only the weight given to the confession by the jury, not its admissibility.[8]

In *Woodson v. State*,[9] however, the Court of Appeals of Maryland rejected this approach. A witness' inability to make an in-court identification of the criminal defendant as the out-of-court confessor, even when the witness offered other circumstantial evidence to prove identity, resulted in the inadmissibility of the confession.[10] The *Woodson* court held that failure to provide sufficient evidence linking the out-of-court confessor and the defendant on trial affects the admissibility of the confession, not merely the weight that the jury would ultimately give the confession during deliberations.[11]

II. FACTS

On October 10, 1989, defendant Shawn Woodson, along with four other individuals, purchased heroin and proceeded to an apartment building where one of the individuals lived.[12] There, the group of five snorted the heroin.[13] Officer William J. Martin of the Baltimore City Police Department responded to a call regarding drug use in a stairwell.[14] As he arrived, the group of five, including the defendant, scattered.[15] Two of the five individuals entered one of the apartments.[16] Another individual, on his way out of the building, encountered Officer Martin, who frisked him and let him go.[17] Of the two individuals remaining, one was the defendant.[18] The other individual was named Taavon Hall.[19]

Two backup officers, Officer Herman Brooks and Officer Robin Johnson, responded shortly thereafter.[20] As they entered through the rear basement door, a shot was heard, followed by a pause and two

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7. *See infra* notes 100-53 and accompanying text.
8. *See infra* notes 100-53 and accompanying text.
9. 325 Md. 251, 600 A.2d 420 (1992).
10. *Id.* at 262-63, 600 A.2d at 425.
11. *Id.*
12. *Id.* at 253, 600 A.2d at 421.
13. *Id.*
14. *Id.* at 252-53, 600 A.2d at 420-21.
15. *Id.* at 253, 600 A.2d at 421.
16. *Id.* The two individuals who entered the apartment were identified as Tyrone McQueen and Dale Truly. Both individuals entered Truly's apartment. *Id.*
17. *Id.* The court identified this individual as Shawn Hawkins. *Id.*
18. *Id.* at 254, 600 A.2d at 421.
19. *Id.* at 253, 600 A.2d at 421.
20. *Id.* at 254, 600 A.2d at 421.

more shots.[21] Hall then ran out the front door, while defendant Woodson ran downstairs toward the rear door, where Officers Brooks and Johnson stood.[22] In an exchange of gunfire between Officer Brooks and defendant Woodson, Officer Brooks was shot in the hand and in the chest, and Woodson was shot in the mid-groin area.[23] Because of a bullet proof vest, Officer Brooks lived, but was knocked down.[24] As the defendant tried to escape, Officer Johnson tripped him and apprehended him.[25] Officer Martin was later found dead on a first floor landing with two bullets in his head.[26] A handgun was recovered near the rear door where defendant Woodson had tried to escape.[27] Bullets taken from both Officer Brooks and Officer Martin matched this weapon.[28]

At trial, the State produced a witness, Andre Spells,[29] who testified that while he was in a cell in Baltimore City thirteen days after the incident, a man who identified himself as Shawn Woodson confessed to the crime.[30] Spells indicated that he spent two nights and one day with this individual[31] and that this cellmate had a mid-body injury.[32] Moreover, this cellmate said that his nickname was "Buddy."[33] Defendant Woodson was also known as Buddy.[34] Spells also testified that his cellmate described the gun used as a .380[35] and

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21. *Id.* Officer Brooks testified as to these facts. *Id.* Officer Seibert, who responded to the call, likewise testified that he heard one distinct shot, and then saw Hall run from the apartment door. *Id.* The officer then heard "a couple more shots," followed by a "few more shots." *Id.* Likewise, Officer Pedrick, who also responded to the scene, testified that he heard a "loud bang" followed by a "volley of gunshots." *Id.* Officer Pedrick then saw Hall run from the front door. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 255, 600 A.2d at 422. Evidence was introduced at trial that Spells, who was being held on theft charges, phoned the police to offer evidence concerning the murder of Officer Martin. *Id.* at 264 n.2, 600 A.2d at 426 n.2. Spells admitted that he wanted to cooperate for his own benefit. Moreover, Spells said he asked Woodson questions because, "I thought maybe it could help me somewhere along the line." *Id.*
30. *Id.* at 255, 600 A.2d at 421.
31. *Id.* at 256, 600 A.2d at 422.
32. *Id.* at 258, 600 A.2d at 423.
33. *Id.*
34. *Id.* at 259, 600 A.2d at 424.
35. *Id.* at 259, 600 A.2d at 423. The police did recover a handgun by the rear door where Woodson tried to escape. *Id.* at 254, 600 A.2d at 421. The facts of the case, however, never identified the size of that handgun. Thus, it is not known whether Spells' description of the gun was accurate.

said that, if one wants to kill someone, the size of the gun is irrelevant if the person is shot in the head.[36] In addition, Spells testified that this cellmate said that the shooting occurred in a hallway.[37] Furthermore, it was noted that the conversation between Spells and the individual who identified himself as Shawn Woodson occurred approximately six and a half months prior to the trial.[38]

At trial, Spells could not positively identify the defendant as the same individual with whom he shared a jail cell some six and a half months earlier.[39] Defense counsel objected to the use of Spells' testimony on the ground that, because Spells could not identify the defendant as the speaker, anything to which Spells testified was hearsay evidence made outside the presence of the defendant, and was thus inadmissible.[40] The defendant did not take the stand to deny the identification.[41] The Circuit Court for Baltimore City admitted the confession, and Woodson was found guilty of the first degree murder of Officer Martin and sentenced to death.[42] The Court of Appeals of Maryland reversed and remanded the case for a new trial on the first degree murder charge.[43]

III. BACKGROUND

In order for evidence to be admissible, it must pass numerous legal tests, depending on the type of evidence in question.[44] When

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36. *Id.* at 258-59, 600 A.2d at 423.
37. *Id.*
38. *Id.* at 255 n.1, 600 A.2d at 422 n.1.
39. *Id.* at 255, 600 A.2d at 422.
40. *Id.* at 257, 600 A.2d at 423.
41. *Id.* at 264, 600 A.2d at 427. Woodson also argued for reversal of his conviction based on the prosecutor's comments during closing arguments referring to defendant's failure to testify, but the court did not address the matter. *Id.*
42. *Id.* at 253, 600 A.2d at 421. Woodson was also found guilty of attempted second-degree murder, two counts of use of a handgun in the commission of a crime of violence and two counts of carrying a handgun. *Id.* The trial court also sentenced Woodson to thirty years for the attempted second-degree murder of Officer Brooks, to be served consecutively with a twenty year sentence for each count of use of a handgun in the commission of a crime of violence. *Id.*
43. *Id.* at 267-68, 600 A.2d at 428. On January 29, 1993, Shawn Woodson was retried and convicted of second-degree murder and two handgun charges in the Baltimore City Circuit Court. Jay Apperson, *Woodson Guilty, Escapes Death Penalty*, Baltimore Sun, Jan. 30, 1993, at 2B. Baltimore City Circuit Judge John C. Themelis sentenced Woodson to 53 years, to be served consecutively to a 50-year term he was serving in the wounding of Officer Brooks. *Id.* A juror indicated after the trial that the jury didn't believe that the murder was premeditated, but instead Woodson "just reacted and tried to get out of the building." *Id.*
44. For example, all evidence must be relevant. *E.g.*, Dorsey v. State, 276 Md. 638, 643, 350 A.2d 665, 669 (1976). It is "'an elementary rule that evidence,

analyzing the admissibility of an oral hearsay confession, assuming its relevance, the test is two-fold: The confession must meet the admissibility requirements of an appropriate hearsay exception[45] and it must satisfy the burden of proof requirement governing the admissibility of confessions.[46]

A. Satisfying the Hearsay Requirements

An out-of-court statement offered to prove the truth of the matter asserted is hearsay.[47] Generally, testifying witnesses must be present at trial, administered an oath, and subjected to cross-examination.[48] The rule against hearsay was developed to assure compliance

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to be admissible, must be relevant to the issues and must tend either to establish or disprove them.'" *Id.* (quoting Kennedy v. Crouch, 191 Md. 580, 585, 62 A.2d 582, 585 (1948)). Moreover, the best-evidence rule requires a party to produce the original of a document instead of a duplicate or a copy. *See generally* Gray v. State, 181 Md. 439, 30 A.2d 744 (1943) (finding the rule inapplicable to the offering of testimony that is not documentary evidence). Secondary evidence may be received when no better evidence is obtainable. Marvil Package Co. v. Ginther, 154 Md. 213, 220, 140 A. 95, 98 (1928). Also, documents, in order to be admissible, must be authenticated. *See* Snyder v. Stouffer, 270 Md. 647, 651-52, 313 A.2d 497, 500 (1974) (ruling that a photostatic copy of the first page of a safe deposit "ledger contract," offered without testimonial predicate, was inadmissible for failure to "authenticate" and provide necessary "testimonial sponsorship"). Authentication requires that the proponent of the evidence establish the chain of custody. *See* Amos v. State, 42 Md. App. 365, 369-71, 400 A.2d 468, 471-72 (1979); 7 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2129 (James H. Chadbourn rev. 1978); *see also* Jacobs v. State, 45 Md. App. 634, 647, 415 A.2d 590, 597 (1980) ("Under the common law of evidence, the three critical questions for admissibility of any evidence are: 1) Is it material; 2) Is it relevant; and 3) Is it competent?").

45. *See* Foster v. State, 297 Md. 191, 210, 464 A.2d 986, 996 (1983); Vines v. State, 285 Md. 369, 381, 402 A.2d 900, 906 (1979); Bunn v. Warden, 242 Md. 399, 400, 219 A.2d 37, 38 (1966).

46. *See, e.g.*, Brittingham v. State, 63 Md. App. 164, 179, 492 A.2d 354, 361 (1985) (citing Lego v. Twomey, 440 U.S. 477, 489 (1972)).

47. Cassidy v. State, 74 Md. App. 1, 6, 536 A.2d 666, 668, *cert. denied*, 312 Md. 602, 541 A.2d 965 (1988) (paraphrasing CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 246, at 729-30 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter MCCORMICK 3D]); FED. R. EVID. 801(c). The Federal Rules of Evidence are in effect in about half the states, as well as in the federal courts. CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 246 (John Strong ed., 4th ed. 1992) [hereinafter MCCORMICK 4TH]. No state hearsay rule varies significantly from the federal rule. *Id.*

48. *See* John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 484-86 (1937). See also Chambers v. Mississippi, 410 U.S. 284 (1973), where the Court stated the following:

> Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under

with these criterion; the hearsay exclusionary rule is invoked when one of these "ideal conditions" is absent.[49]

Even if one of the conditions is absent, however, hearsay is nonetheless admissible as evidence if it meets the elements of one of the "diverse exceptions to the hearsay rule."[50] Furthermore, the hearsay evidence must be supported by sufficient indicia of reliability and trustworthiness to satisfy the Confrontation Clause of the Sixth Amendment to the Constitution of the United States[51] and the Twenty-First Article of the Maryland Declaration of Rights.[52] The burden lies on the proponent of hearsay evidence to prove both satisfaction of the hearsay elements[53] and trustworthiness of the

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> oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Id. at 298.

49. McCormick 4th, *supra* note 47, § 245.

50. Tibbs v. State, 72 Md. App. 239, 246, 528 A.2d 510, 513 (1986), *cert. denied*, 311 Md. 286, 533 A.2d 1308 (1987); *cf.* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (referring to "firmly rooted hearsay exception[s]"); *see also* Bailey v. State, 327 Md. 689, 612 A.2d 288 (1992) (analyzing whether a letter met the requirements of a business record and was therefore admissible as an exception to the hearsay rule); Hartless v. State, 327 Md. 558, 578, 611 A.2d 581, 590 (1992) (determining that if a proponent of hearsay evidence "offers no suggestion of exceptions to the hearsay rule," the evidence is properly excludable); Richardson v. State, 324 Md. 611, 624, 598 A.2d 180, 186 (1991) (stating that if one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order to be admissible).

Rule 802 of the Federal Rules of Evidence states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R. Evid. 802. While Rule 802 implies a general rule of exclusion with a few exceptions, it is sometimes viewed as a general rule allowing hearsay, coupled with a narrow exception excluding it. "In the sea of admitted hearsay, the rule excluding hearsay is a small and lonely island." Jack B. Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 347 (1961). *But see* Cassidy v. State, 74 Md. App. 1, 7, 536 A.2d 666, 669 (1988) ("Although subject to multitudinous exceptions, the [Hearsay] Rule, in its essence, is a rule of exclusion.").

51. The Confrontation Clause of the Sixth Amendment to the federal constitution requires "that in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This federal provision was not applied to the states until 1965 when the Supreme Court ruled that the Fourteenth Amendment made the federal confrontation clause applicable to the states. Pointer v. Texas, 380 U.S. 400, 403 (1965). Nearly every state has adopted a similar provision. *See* 5 Wigmore, *supra* note 44, § 1397. The requirement is applicable only to the accused in a criminal prosecution. *See* Jenkins v. McKeithen, 395 U.S. 411, 428-29 (1969).

52. *See* State v. Standifur, 310 Md. 3, 5-6, 526 A.2d 955, 956 (1987).

53. *See* Cassidy v. State, 74 Md. App. 1, 8, 536 A.2d 666, 669 (1988).

evidence.[54] "[T]he offeror of the hearsay statements [must] provide the foundation upon which he asserts admissibility."[55]

The admission procedure for hearsay evidence is as follows. After hearsay evidence is offered, the trial judge "ascertains and announces the rule of evidence law setting up the criterion of admission or exclusion."[56] Depending on the hearsay exception being used, the proponent of the hearsay evidence is allowed to bring forward evidence proving any preliminary facts required to be proved under that exception.[57] The opposing party offers any disputing evidence.[58] The trial judge then makes the final determination whether the proponent of the hearsay evidence has answered the preliminary factual questions which must be answered in order to apply the hearsay exception and admit the evidence.[59] If there is insufficient evidence to support the existence of the preliminary facts, the judge excludes the evidence.[60] If admitted, the "fact finder then gives the

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54. *Id.* "Hearsay will be *excluded*, unless the *proponent* demonstrates its probable *trustworthiness*." *Id.* (emphasis added).
55. *Id.* at 18, 536 A.2d at 674 (1988) (quoting Deloso v. State, 37 Md. App. 101, 106-07, 376 A.2d 873, 877 (1977)); *see also* Jacobs v. State, 45 Md. App. 634, 653, 415 A.2d 590, 601 (1980) ("When dealing with the common law of evidence, our predominant consideration is the accuracy of the proffered evidence.").
56. McCORMICK 4TH, *supra* note 47, § 53.
57. Kosmas v. State, 316 Md. 587, 601, 560 A.2d 1137, 1144 (1989) (citing McCORMICK 3D, *supra* note 47, § 53).
58. *Id.*
59. *Id.* at 601, 560 A.2d at 1144 (citing McCORMICK 3D, *supra* note 47, § 53). McCormick recognizes that while issues of fact are usually left to the jury, "preliminary questions of fact upon which depends the admissibility of an item of evidence that is objected to under an exclusionary rule of evidence" are more properly left with the judge:

> If the special question of fact were submitted to the jury when objection was made, cumbersome and awkward problems about unanimity would be raised. If the judge admitted the evidence . . . to the jury and directed them to disregard it unless they found that the disputed fact existed, the aim of the exclusionary rule would likely be frustrated, for two reasons. First, the jury would often not be able to erase the evidence from their minds, if they found that the conditioning fact did not exist. They could not if they would. Second, the average jury would not be interested in performing this intellectual gymnastic of "disregarding" the evidence. They are intent mainly on reaching their verdict in a case in accord with what they believe to be true, rather than in enforcing the long-term policies of evidence law.

McCORMICK 4TH, *supra* note 47, § 53.

60. *Kosmas*, 316 Md. at 601, 560 A.2d at 1144. Once one can assume the existence of a preliminary fact in question, if there is any contrary evidence, "it [is] incumbent upon the judge to determine whether there is any true controversy surrounding the preliminary fact," and if there is a controversy, the jury is allowed to resolve it. *Id.* (citing McCORMICK 3D, *supra* note 47, § 53); *see* LYNN McLAIN, MARYLAND EVIDENCE § 104.2 (1987).

evidence . . . whatever weight it deems appropriate in its prerogative."[61] Ultimately, however, the trial judge has the final decision with regard to admitting or excluding hearsay evidence.[62]

When attempting to admit into evidence an oral hearsay confession[63] allegedly obtained from a criminal defendant, two hearsay exceptions are arguably available: the declaration against interest exception[64] and the admission by a party-opponent exception.[65] Although judicial opinions often fail to distinguish declarations from admissions,[66] significant differences do exist between these two hearsay exceptions.

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61. Jacobs v. State, 45 Md. App. 634, 653, 415 A.2d 590, 600 (1980).
62. *Id.*
63. "[T]here is general agreement that the prosecution is entitled to introduce confessions." MCCORMICK 4TH, *supra* note 47, § 144. However, when the confession is an out-of-court statement offered to prove the truth of matters asserted therein, it is potentially subject to exclusion under the prohibition against hearsay. *Id.*
64. *See* FED. R. EVID. 804(b)(3). The rule defines a statement against interest as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Id. See also Donnelly v. United States, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) ("[The] exception to the hearsay rule in the case of declarations against interests is well known; no other statement is so much against interest as a confession of murder.").

65. *See* FED. R. EVID. 801(d)(2). The rule defines an admission by a party-opponent as:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency of employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Id. See also 3 WIGMORE, *supra* note 44, § 816 ("the ground for receiving admissions in general . . . suffices also for confessions"); JOHN M. MAGUIRE, EVIDENCE OF GUILT § 1.02 (1982) (characterizing confessions as "a specialized sort of admission"). Under the federal rules, an admission by a party opponent is treated as non-hearsay. FED. R. EVID. 801(d)(2). However, under Maryland law, admissions are treated as an exception to the hearsay rule. Aetna Casualty & Sur. Co. v. Kuhl, 296 Md. 446, 455, 463 A.2d 822, 827-28 (1983).

66. Courts mistakenly combine the two as "admissions against interest" in judicial

Declarations against interest include declarations against penal interest.[67] Admitting into evidence a declaration against interest as an exception to the hearsay rule is "founded on the assumption that a person is unlikely to fabricate a statement that is against his own interest."[68] Thus, the statement has inherent reliability. A declaration against interest need not be a confession, but must involve substantial exposure to criminal liability.[69] Furthermore, the out-of-court declarant must be unavailable in order to admit hearsay evidence under the declaration against interest exception.[70] The assertion of one's privilege not to testify renders the witness unavailable to the extent of the scope of the privilege.[71]

To be admissible, a declaration against penal interest must be trustworthy on its face[72] and there must be no evidence of collusion.[73]

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opinions. *See* Smith v. Branscome, 251 Md. 582, 589, 248 A.2d 455, 460 (1968) (citing Joppy v. Hopkins, 231 Md. 52, 57, 188 A.2d 545, 548 (1963)); Hynes v. Wilson, 147 Md. 360, 363, 128 A. 70, 71 (1925); Corbin v. Staton, 139 Md. 150, 153, 115 A. 23, 24 (1921); *but see* Kekua v. Kaiser Found. Hosp., 601 P.2d 364, 370 n.3 (Haw. 1979) ("The expression, 'admissions against interest,' is a misnomer."); Hofer v. Bituminous Casualty Corp., 148 N.W.2d 485, 487 (Iowa 1967) ("'admission against interest' as commonly used may often be misleading if not erroneous").

67. *Aetna Casualty & Sur. Co.*, 296 Md. 446, 463 A.2d 822. At common law, statements against the declarant's penal interest, e.g., statements exposing the declarant to criminal liability, did not fall within the declaration against interest exception. State v. Standifur, 310 Md. 3, 10 n.2, 526 A.2d 955, 958 n.2 (1987). Some states, including Maryland, have broadened the declaration against interest exception to include declarations against penal interest. For a thorough history of Maryland courts' acceptance of declarations against penal interest, see Jacobs v. State, 45 Md. App. 634, 651 n.4, 415 A.2d 590, 600 n.4 (1980) (noting that "no Maryland decision has ever overruled a trial verdict because a declaration against penal interest was received in evidence"). For articles addressing the declaration against penal interest exception, see Michael D. Bergeisen, Comment, *Federal Rules of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CAL. L. REV. 1189 (1978); Andrew R. Keller, Comment, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159 (1983); Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981).

68. Foster v. State, 297 Md. 191, 204, 464 A.2d 986, 993 (1983).

69. *Standifur*, 310 Md. at 13, 526 A.2d at 960; *see also* United States v. Barrett, 539 F.2d 244 (1st Cir. 1976); United States v. Bagley, 537 F.2d 162 (5th Cir. 1976).

70. *See* United States v. Zurosky, 614 F.2d 779 (1st Cir.), *cert. denied*, 446 U.S. 967 (1979); Phillips v. Wyrick, 558 F.2d 489 (8th Cir.), *cert. denied*, 434 U.S. 1088 (1977); FED. R. EVID. 804(a)(1); W.J. Dunn, Annotation, *Claim of Privilege by a Witness as Justifying the Use in Criminal Case of His Testimony Given at a Former Trial or Preliminary Examination*, 45 A.L.R.2D 1354 (1956).

71. *Zurosky*, 614 F.2d at 792.

72. Jacobs v. State, 45 Md. App. 634, 643, 415 A.2d 590, 595 (1980).

73. *Id.* at 650, 415 A.2d at 599.

The proponent of the evidence must offer sufficient evidence to fulfill all elements of a declaration against interest exception to the hearsay rule.[74] If the trial judge finds that the declaration against interest is trustworthy[75] and determines that all factual questions have been sufficiently supported, the hearsay evidence will be admitted regardless of whether the case is criminal or civil, whether the plaintiff or defendant proffers the declaration, or whether the statement is proffered for inculpatory or exculpatory purposes.[76]

The general rule regarding admission by a party-opponent is that an individual's words or acts may be offered against an individual as substantive evidence of the facts admitted.[77] In such a case, "the party cannot complain of an inability to cross-examine himself or herself."[78] An admission is admissible as evidence regardless of whether the out-of-court declarant is available to testify.[79] Moreover, the out-of-court declarant "is not even required to have had firsthand knowledge of the matter declared; the declaration may have been self-serving when it was made; and the declarant is probably sitting in the courtroom."[80] Nonetheless, "oral admissions of a party are 'universally deemed admissible' and legally sufficient to prove facts admitted."[81]

Proponents offering into evidence an admission of a party-opponent must lay the foundation for the evidence by satisfying three conditions.[82] First, the proponent must prove that a party to

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74. See *supra* note 67 for a definition and elements of a statement against interest.
75. The *Jacobs* court warned against failing to recognize the difference between trustworthiness of the declaration versus trustworthiness of the witness who is testifying as to the declaration:

> The trustworthiness in issue . . . is the trustworthiness of the declaration, assuming it to have been made and to have been made in the form recounted from the witness stand. The trustworthiness of the witness who serves as the mere conduit for the out-of-court declaration is, on the other hand, tested by other devices such as the oath and cross-examination at the trial itself. All too frequently, we allow our distrust of the witness on the stand to be transmuted into a mistrust of the out-of-court declaration, and this frequently subconscious transfer serves only to blur analysis.

Jacobs, 45 Md. App. at 643 n.2, 415 A.2d at 595 n.2.
76. *Id.* at 643, 415 A.2d at 595-96.
77. *E.g.*, Smith v. Branscome, 251 Md. 582, 248 A.2d 455 (1968); Terry v. O'Neal, 194 Md. 680, 72 A.2d 26 (1950).
78. McLain, *supra* note 60, § 801(4).2.
79. McCormick 4th, *supra* note 47, § 254.
80. *Id.*; *see also* Aetna Casualty & Sur. Co. v. Kuhl, 296 Md. 446, 455, 463 A.2d 822, 827 (1983).
81. *Branscome*, 251 Md. at 589, 248 A.2d at 460 (quoting Lambros v. Coolahan, 185 Md. 463, 468, 45 A.2d 96, 98 (1945)).
82. McLain, *supra* note 60, § 801(4).1.

the action made, adopted, or authorized the statement.[83] Second, the statement must be offered by the proponent against the speaking party.[84] Finally, the statement made must be relevant to a material fact in the case.[85] Typically, the party against whom the admission is being offered may rebut, contradict, explain, or deny the statement.[86]

Additionally, a party attempting to admit an admission of a party-opponent or a declaration against interest must lay a foundation to prove the identity of the out-of-court declarant.[87] "Knowledge of the identity of the declarant is essential to establish a proper foundation"[88] for admissibility of evidence under most of the hearsay exceptions.

1. Use of circumstantial evidence to prove identity of an out-of-court declarant

When a witness cannot identify an out-of-court declarant, courts in many jurisdictions, including Maryland, rely on circumstantial evidence to prove identity.[89] If sufficient circumstantial evidence of identity exists, the hearsay evidence will likely be admitted under an exception to the hearsay rule.[90]

The use of circumstantial evidence to prove identity is most widely used in the situation of identifying a party to a telephone conversation. Failure to adequately identify a party to a telephone conversation would render any statement made by that party during

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* (admission by party-opponent includes showing that the statement was made by the party).
88. United States v. Mouzin, 785 F.2d 682, 692 (9th Cir.), *cert. denied*, 479 U.S. 985 (1986) (denying admissibility of an out-of-court statement under Fed. R. Evid. 801(d)(2)(E), statement of a co-conspirator, because of failure to prove identity); *see also* United States v. Christopher, 923 F.2d 1545 (11th Cir. 1991) (finding statement of co-conspirator inadmissible as a hearsay exception under FED. R. EVID. 801(d)(2)(E) because of failure to prove identity).
89. *See* Bulluck v. State, 219 Md. 67, 73, 148 A.2d 433, 436 (1959); Merchant v. State, 217 Md. 61, 70, 141 A.2d 487, 492 (1958); Spies v. State, 8 Md. App. 160, 163, 258 A.2d 758, 759 (1969); *see also Christopher*, 923 F.2d at 1550-51 (finding hearsay evidence inadmissible under FED. R. EVID. 801(d)(2)(E), where identity of out-of-court declarant "barely rises above the level of guesswork"); United States v. Dynalectric Co., 859 F.2d 1559, 1582 (11th Cir. 1988) (finding statements of declarant admissible under FED. R. EVID. 801(d)(2)(E) where, although witness did not know precise identity of the declarant, identity was clear from testimony and context of out-of-court statements).
90. *See supra* note 89 and cases cited therein.

the conversation inadmissible.[91] To avoid exclusion of the evidence as hearsay, courts require that proponents of the evidence authenticate the conversation by adequately identifying the unknown party.[92] Predominantly, proponents rely on circumstantial evidence to authenticate the conversation and admit the contents of that conversation into evidence.

Authentication basically occurs in two forms: either the testifying witness will state that he recognized the voice of the caller or the witness can testify to other "sundry circumstances."[93] In Maryland, these sundry circumstances can include any circumstantial evidence

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91. *See* Mowen v. State, 11 Md. App. 522, 526, 275 A.2d 174, 176 (1971). In Maryland, "[t]he generally accepted rule of evidence . . . [is] that in order to render the evidence of a telephone conversation of a witness admissible, some preliminary testimony, either direct or *circumstantial*, must be presented to establish the identity of the other person to the conversation." White v. State, 204 Md. 442, 446, 104 A.2d 810, 811 (1954) (emphasis added) (citations omitted).

92. *See* FED. R. EVID. 901. The rule provides as follows:

> Requirement of Authentication or Identification
>
> (a) General Provisions. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: . . . .
>
> (6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone . . . .

Id.; *see also* Archer v. State, 145 Md. 128, 149, 125 A. 744, 752 (1924) (holding that in order to admit as evidence a witness' telephone conversation, some preliminary testimony, either direct or circumstantial, must be presented to establish the identity of the other person to the conversation).

But see Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 572, 69 A. 405, 411 (1908) (recognizing the exception to this rule in situations in which a witness may testify as to a telephone conversation with a person who "does not purport to be a *particular person*, but merely some member of the office staff authorized to make a contract or an admission").

93. 7 WIGMORE, *supra* note 44, § 2155; *see also* Knoedler v. State, 69 Md. App. 764, 773, 519 A.2d 811, 815 (1987) ("authentication can be found either from evidence that the witness was familiar with and recognized the voice of the alleged caller, or, in the absence of such recognition 'sundry circumstances' (including other admissions and the like) may suffice"); Ford v. State, 11 Md. App. 654, 657, 276 A.2d 423, 424 (1971) ("[t]he admissions contained in the conversation are sufficient 'sundry circumstances' to authenticate the conversation").

identifying the unknown party to the telephone conversation, such as the testifying witness having knowledge of facts that only the proposed speaker would know.[94] This rule is generally followed in other jurisdictions.[95]

Authenticating a telephone conversation, however, does not require a judge to determine preliminary issues of fact, as is required for hearsay testimony.[96] Instead, "if a prima facie showing is made, the . . . statement comes in, and the ultimate question of authenticity is left to the jury."[97] Moreover, the caller's identity does not need to be proven beyond a reasonable doubt.[98] Any conflicts in identity go to the weight of the evidence, and not to its admissibility.[99]

2. Use of the presumption that "identity of name gives rise to identity of person" as circumstantial evidence to prove identity of an individual

Courts often use the presumption that identity of name gives rise to identity of person as circumstantial evidence to prove the identity of an out-of-court declarant.[100] This presumption is a rebuttable presumption[101] which "helps the prosecution to make a prima facie case; once it has offered proof of the basic fact, the jury may, but is not required to, infer the 'presumed' fact."[102] In the absence of any proof by the defense rebutting the presumed fact, "such proof is sufficient to warrant the jury in finding" the presumed fact.[103]

Numerous factors will either strengthen or weaken the identity presumption.

> This presumption is slight when the name is common and there are many persons having the same name. It increases

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94. *See* Earnhart v. State, 582 S.W.2d 444, 448-49 (Tex. Crim. App. 1979) (stating authentication can occur through a witness testifying as to "knowledge of facts that only the speaker would be likely to know").
95. *See Knoedler*, 69 Md. App. at 773-74, 519 A.2d at 815 and cases cited therein.
96. *See* McCORMICK 4TH, *supra* note 47, § 227.
97. *Id.*
98. *Id.*
99. *See* King v. State, 560 N.E.2d 491, 494-95 (Ind. 1990) (citing Ashley v. State, 493 N.E.2d 768 (Ind. 1986); Reed v. State, 491 N.E.2d 182 (Ind. 1986)).
100. *See* Bowers v. State, 298 Md. 115, 130-31, 468 A.2d 101, 109 (1983) (citing 1 WHARTON'S CRIMINAL EVIDENCE § 103 (Charles E. Torcia ed., 13th ed. 1972)); State v. Brown, 257 S.W.2d 796, 799 (Tex. Ct. App. 1953); State v. Scriver, 580 P.2d 265, 270-71 (Wash. Ct. App. 1978); York v. State, 173 N.W.2d 693, 698-99 (Wis. 1970); *see also* McLAIN, *supra* note 60, § 303.4; 1 WHARTON, *supra*, § 103; 9 WIGMORE, *supra* note 44, § 2529.
101. A rebuttable presumption is often referred to as merely a "permissible inference." McCORMICK 4TH, *supra* note 47, § 342.
102. McLAIN, *supra* note 60, § 303.2(a).
103. Wright v. State, 198 Md. 163, 171-73, 81 A.2d 602, 606-07 (1951).

> in strength with circumstances indicating the improbability of there being two persons of the same name at the same time and place, and where there is no evidence that there is any other person bearing that name. *Identity, then, can be presumed from the names coupled with other circumstances.*[104]

When analyzing an identity presumption, courts are likely to confront two issues, both of which were addressed by the *Woodson* court.[105] The court must first determine how much corroborating evidence of identity, if any, is required to sustain the presumption and to allow the proposed evidence to go to a jury.[106] Second, if enough corroborating evidence of identity is offered to sustain the presumption and to allow the admissibility of the evidence, but the presumption is rebutted by its opponent, then the court must determine whether the presumption is still allowed to go to the jury, or whether the presumption is nullified.[107]

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104. Sallie v. State, 24 Md. App. 468, 482, 332 A.2d 316, 324 (1975) (quoting 1 WHARTON, *supra* note 100, § 103).

105. *See infra* section IV and accompanying discussion.

106. *See, e.g.*, People v. Casey, 77 N.E.2d 812, 816-17 (Ill. 1948) (holding that identity of name alone is insufficient to overcome a presumption of innocence in a criminal case and establish guilt beyond a reasonable doubt); State v. Curtis, 338 So. 2d 662, 664 (La. 1976) (same); State v. Ransom, 500 S.W.2d 585, 588 (Mo. Ct. App. 1973) (same); State v. Livermore, 196 P. 977, 977-78 (Mont. 1921) (same); Bullard v. State, 533 S.W.2d 812, 816 (Tex. Crim. App. 1976) (same).

Compare State v. Shumate, 516 S.W.2d 297 (Mo. Ct. App. 1974) (holding that identity of name is sufficient to prove identity of person) *and* State v. Walls, 167 S.E.2d 547, 548 (N.C. Ct. App. 1969) (same) *and* State v. Kilmer, 153 N.W. 1089, 1091 (N.D. 1915) (same) *and* State v. Black, 42 P.2d 171, 174-77 (Or. 1935) (same) *and* Ex Parte Moore, 436 S.W.2d 901, 903 (Tex. Crim. App. 1968) (same) *with* Smith v. United States, 92 F.2d 460, 461 (9th Cir. 1937) (holding that identity of name together with confirmatory facts is sufficient to warrant an inference of identity of persons) *and* People v. Roy, 59 Cal. Rptr. 636, 639 (Cal. Ct. App. 1967) (same) *and* People v. Reese, 179 N.E. 305, 307 (N.Y. 1932) (same).

107. *See* Commonwealth v. Middleton, 4 A.2d 533, 536 (Pa. Super. Ct. 1939); *see also* State v. Mendibles, 428 P.2d 127, 129 (Ariz. Ct. App. 1967) (holding that when other evidence of identity conflicts with presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption to determine which, if any, preponderates); In re Estate of Nidever, 5 Cal. Rptr. 343 (Cal. Dist. Ct. App. 1960) (same); State v. Garrett, 574 P.2d 639, 641-42 (Or. 1978) (same).

Compare State v. Mitchner, 124 S.E.2d 831 (N.C. 1962) (holding that the presumption is weak and shaken by the slightest proof of facts or showing of circumstances which produce a doubt of identity) *with* Graham v. State, 224 U.S. 616, 630 (1912) (citing general rule that the question of identity is ordinarily one for the jury).

Maryland courts have not established a clear standard regarding the necessity of producing corroborating evidence to sustain an identity presumption. Likewise, even assuming additional evidence is needed to sustain the presumption, Maryland courts have not articulated a clear standard to be used in determining how much corroborating evidence is required. In some cases, Maryland courts have indicated that the presumption can stand alone without any corroborating evidence,[108] while in other cases, Maryland courts have indicated that additional corroborative evidence is needed to sustain the presumption.[109] In no case has the Court of Appeals of Maryland articulated a consistent standard to be used in determining the amount of additional evidence required to sustain the presumption.[110]

For example, in *Bowers v. State*,[111] the court of appeals affirmed a trial court ruling that allowed presumptive evidence of an individual's identity without any corroborating evidence to go to the jury.[112] The defendant did not provide specific rebuttal evidence, but merely denied the sufficiency of the presumption in proving identity.[113]

In *Bowers*, the defendant was arrested and charged with rape and murder.[114] During interrogation by the police, the defendant confessed that an accomplice by the name of Alexander Peterson, who was "on the run from Chicago," had been involved in the rape and murder and was the one who actually strangled the victim to death.[115] The State, in rebutting defendant's claim that another individual participated, offered evidence that someone named Alexander Peterson had been in an Illinois prison at the time of the crime.[116] The defendant claimed that, because there was no link between the State's Alexander Peterson and the Alexander Peterson in defendant's confession, the State's evidence should have been excluded.[117] The trial court allowed the evidence.[118]

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108. Bowers v. State, 298 Md. 115, 130-31, 468 A.2d 101, 109 (1983); *Sallie*, 24 Md. App. at 482, 332 A.2d at 324.
109. Murphy v. State, 47 Md. App. 387, 389-90, 422 A.2d 1297, 1298 (1980).
110. In *Murphy v. State*, discussed *infra* notes 124-35 and accompanying text, the court did articulate a standard, but this standard has never been applied in other cases discussing the identity presumption.
111. 298 Md. 115, 468 A.2d 101 (1983)
112. It should be noted that, unlike the *Woodson* court, the *Bowers* court was not addressing hearsay evidence. *See Bowers*, 298 Md. 115, 468 A.2d 101. The *Bowers* court did, however, address Maryland's treatment of the identity presumption within the context of a criminal confession. *See id.* Because of these similarities, *Bowers* is instructive.
113. *Id.* at 130-31, 468 A.2d at 109.
114. *Id.*
115. *Id.*
116. *Id.* at 131, 468 A.2d at 109.
117. *Id.* at 130, 468 A.2d at 109.
118. *Id.*

On appeal, the court of appeals affirmed. The court stated that once the State located Peterson incarcerated in Illinois, a presumption of identity of persons arose.[119] It then became the jury's role to examine the evidence and determine whether the two individuals were the same individual referred to by the defendant.[120] "[I]t is for the jury to pick and sift, to stress and ignore, to believe and disbelieve, to weigh and assess, and resolve the conflicts in reaching a final decision to acquit or convict."[121] In reaching its decision, the court considered the fact that the name Alexander Peterson was not a traditional name.[122] Furthermore, the court noted that the defendant was not denied the opportunity during trial or during closing to offer contrary evidence to disprove the prosecutor's assertion.[123]

In *Murphy v. State*,[124] the Court of Special Appeals of Maryland allowed presumptive evidence of identity to go to the jury, but implied that it did so because there was sufficient circumstantial evidence of identity to justify submission to the jury.[125] The court did not elaborate, however, on whether this circumstantial evidence of identity was necessary for submission or whether, like *Bowers*, the presumption could have stood alone.[126]

In *Murphy*, the defendant was stopped for operating a motor vehicle with a "loud exhaust."[127] The defendant was unable to produce a driver's license, and said his name was "Arvil Raymond Murphy."[128] A check of driving records with the Motor Vehicle Administration revealed that the defendant's name was Raymond Arvil Murphy, and that the State had revoked his operator's license almost three months earlier.[129] On the sole basis of this record, the defendant was convicted of driving while his license was suspended and revoked.[130]

On appeal, the defendant questioned the sufficiency of the driving record as evidence of his identity.[131] The court of special appeals affirmed the conviction, holding that the presumption of identity of name was sufficient to identify the defendant as the same

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119. *Id.*
120. *Id.*
121. *Id.* (quoting Thomas v. State, 32 Md. App. 465, 477, 361 A.2d 138, 146 (1976)).
122. *Id.* at 131, 468 A.2d at 109.
123. *Id.*
124. 47 Md. App. 387, 422 A.2d 1297 (1980).
125. *Id.* at 389-90, 422 A.2d at 1298.
126. *Id.*
127. *Id.* at 388, 422 A.2d at 1297.
128. *Id.*
129. *Id.*
130. *Id.* at 388-89, 422 A.2d at 1297.
131. *Id.* at 389, 422 A.2d at 1297.

individual named in the driving record.[132] The standard for allowing such evidence, the court stated, was that the evidence must "show directly, or support a rational inference of, the facts to be established, or the inference supported, beyond a reasonable doubt or to a moral certainty."[133] The court found that even though the State should have provided additional evidence linking the defendant with the driving record (such as date of birth and residence), the driving record contained additional information (height, weight, race, and sex) which supplied sufficient circumstantial evidence to make the connection[134] and meet the standard for admissibility.[135]

More recently, in *McDonald v. State*,[136] the Court of Appeals of Maryland addressed the use of the identity presumption and concluded that likeness of names alone is insufficient to prove identity.[137] In *McDonald*, defendant Kathleen McDonald was a participant in an Alternative Sentencing Program (ASP), which monitors the progress of individuals on probation.[138] Such monitoring included drug testing.[139] The State attempted to revoke the defendant's probation after alleging that the defendant's urine tested positive for cocaine.[140]

In attempting to prove that the defendant used cocaine, the State tried to introduce into evidence two positive laboratory urinalysis reports bearing the name Kathleen McDonald, reports which the defendant denied were applicable to her.[141] To prove that the samples came from the defendant, the State produced testimony from two witnesses. First, a witness from ASP spoke of her knowledge of ASP's records, which contained copies of the laboratory reports.[142] Second, a technician from Maryland Medical Laboratories, Inc. (MML), which performs analysis of ASP urine samples, testified as to the process used in identifying and testing samples.[143] The MML technician had not performed analysis on any of the samples in question.[144] The MML technician testified that MML employees collect the samples from ASP and deliver them to the MML laboratory,

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132. *Id.* at 389-90, 422 A.2d at 1298.
133. *Id.* at 389, 422 A.2d at 1298 (quoting Vincent v. State, 220 Md. 232, 237, 151 A.2d 898, 901 (1959)).
134. *Id.* at 389-90, 422 A.2d at 1298.
135. *Id.*
136. 314 Md. 271, 550 A.2d 696 (1988).
137. *Id.* at 281-82, 550 A.2d at 701.
138. *Id.* at 278, 550 A.2d at 699.
139. *Id.*
140. *Id.*
141. *Id.* at 278-79, 550 A.2d at 699-700.
142. *Id.*
143. *Id.* at 279, 550 A.2d at 699.
144. *Id.* at 278-79, 550 A.2d at 699.

where the sample is assigned an identification number consisting of six digits.[145] When a sample tests positive upon an initial screening,[146] the sample is then tested twice more using two more sophisticated procedures.[147] At each testing, technicians confirm the name on the sample.[148] The MML technician likewise testified that based on information contained in the worksheet, screening record and the final analysis report for the samples in question, "normal procedures were followed in each instance."[149]

The Circuit Court for Baltimore County ruled that the evidence was admissible, despite the fact that the State did not produce the lab technicians who tested the urine.[150] The Court of Appeals of Maryland reversed, holding that the State failed to establish a chain of custody[151] because it failed to offer evidence that a Kathleen McDonald ever gave urine samples to ASP, failed to explain how the samples were delivered to the MML courier, and failed to offer evidence on how ASP obtained, labeled, and stored the urine samples.[152] "We have nothing more than the delivery . . . of urine samples labelled with the not uncommon name of Kathleen McDonald and the subsequent processing of those samples. That is simply not enough to authenticate the urine samples with the requisite degree of certainty."[153]

B. Burden of Proof for Confessions

A confession to a crime is "a particular kind of admission, governed by special rules"[154] significantly different from the rules

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145. *Id.*
146. The initial screening procedure is called "Thin Layer Chromatography." *Id.* at 279, 550 A.2d at 700.
147. Positive results are "confirmed by the more specific Enzyme Multiple Immunoassay Technique and then by Gas Chromatography." *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 278, 550 A.2d at 699.
151. *Id.* at 281, 550 A.2d at 700. "[T]he State must establish the chain of custody—that is a basic step in authenticating the evidence prior to its admission. It failed to do so here." *Id.* (citations omitted).
152. *Id.* at 281, 550 A.2d at 701.
153. *Id.* (citing Unigard Ins. Co. v. Elmore, 224 S.E.2d 762, 763 (Ga. Ct. App. 1976) (holding that blood alcohol test results were inadmissible where there was no showing that a blood sample was ever taken from decedent); Priest v. McConnell, 363 N.W.2d 173, 178 (Neb. 1985) (holding that chemical analysis of urine samples was inadmissible where plaintiff failed to establish how or where the urine sample was taken from defendant); Newton v. City of Richmond, 96 S.E.2d 775, 778-80 (Va. 1957) (holding that results of blood alcohol tests were inadmissible where evidentiary foundation showed only that vial of blood tested bore accused's name)).
154. McCormick 4th, *supra* note 47, § 262.

governing the admissibility of admissions of a party-opponent. While an admission entails only acknowledging facts tending to prove guilt but failing to establish all essential elements of the crime,[155] a confession is a statement admitting all facts required to sustain a conviction of a particular crime.[156] Because a confession admits every element of a case and is ordinarily given overwhelming weight by the jury, courts necessarily take precautions to avoid the prejudicial effect of untrustworthy confessions.

One such precaution is embodied in the knowing and voluntary standard. Typically, a confession is admissible if, by a preponderance of the evidence, it was made knowingly and voluntarily.[157] The judge, not the jury, determines whether the confession meets this burden.[158]

Courts have had little occasion to address the admissibility of a criminal confession when doubt exists as to whether the confessor and the defendant are the same person; that is, when the identity of the confessor is in question at trial. The United States Supreme Court, however, has made clear that the heightened burden of proof in criminal cases (proof beyond a reasonable doubt) applies to the establishment of *facts* underlying the conviction, not to the *admissibility* of a confession offered to prove these facts.[159] "[T]he admis-

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155. *See* Stewart v. State, 232 Md. 318, 193 A.2d 40 (1963). In *Stewart*, the court stated that

> [a] confession is a species of admission, that is to say, an admission that says or necessarily implies that the matter confessed constitutes a crime. An admission which is not a confession is an acknowledgement of some fact or circumstance which, in itself, is insufficient to authorize a conviction but which tends to establish the ultimate fact of guilt.

Id. at 323, 193 A.2d at 43; *see also* Merchant v. State, 217 Md. 61, 69, 141 A.2d 487, 491 (1958) (labelling the difference between a confession and an admission a "clear distinction"); State v. Hallam, 575 P.2d 55, 62 (Mont. 1978) ("an 'admission' concerns only some specific fact which, in turn, tends to establish guilt or some element of the offense").

156. *See Stewart*, 232 Md. at 323, 193 A.2d at 43; *see also* State v. Schomaker, 303 N.W.2d 129, 130 (Iowa 1981) ("confession is an acknowledgment in express terms by a party in a criminal case of his guilt of the crime charged"); *Hallam*, 575 P.2d at 62 ("A 'confession' is an admission of crime itself.").

157. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 479 (1966).

158. Jackson v. Denno, 378 U.S. 368 (1963).

159. Lego v. Twomey, 404 U.S. 477 (1972). In *Lego*, the Court stated that the heightened burden of proof in criminal cases, that is proof beyond a reasonable doubt, applies to the establishment of facts underlying the conviction, not to the admissibility of specific pieces of evidence offered to prove these facts. *Id.* at 486-87. The Court allowed a confession to be admissible even though its voluntariness was only proved by a preponderance of the evidence. *Id.* at 487. The Court held that a reasonable doubt standard was not offended "because the admissibility of a confession is determined by a less stringent standard." *Id.*

sibility of a confession is determined by a less stringent standard."[160] Although not addressing confessions specifically, the Court of Special Appeals of Maryland, in *Woodell v. State*,[161] held that "evidence need not be positively connected with the accused" to be admissible, but instead, evidence is admissible when "there is a probability of its connection with the accused for the crime, the lack of positive identification affecting the weight of the evidence, rather than its admissibility."[162]

When specifically addressing the admissibility of confessions not positively linked to the defendant, courts outside Maryland have typically permitted the admissibility of the evidence. When there is a probability of a connection with the defendant, the confession is admitted and any uncertainty of identity goes to the weight the jury should place on the confession, and not to its admissibility.

For example, in *State v. Scriver*,[163] the Court of Appeals of Washington held that uncertainty as to the identity of the out-of-court confessor goes to the weight of the evidence, not its admissibility.[164] In *Scriver*, the defendant was arrested for shoplifting and possession of a controlled substance.[165] The store detective identified the defendant and gave the police officer her name: Carla Jean Engeseth.[166] Thereafter, the defendant, who was arrested as Carla Jean Engeseth, visited the office of her attorney for the purpose of making and signing a confession.[167] A notary public and legal secretary of the defendant's attorney listened to and typed the confession, which the defendant then signed as "Carla J. Scriver."[168] Prior to trial, all drugs found in defendant's purse on the day of her arrest had been erroneously destroyed.[169]

At trial, neither the store detective, the arresting officer, nor the notary public could positively identify the defendant as the same individual who was arrested or who made and signed a confession.[170] The notary public who typed and notarized the confession testified that the person who filled out the confession signed the confession as "Carla J. Scriver" and responded to "Ms. Scriver."[171] The defendant objected to the admission of the confession as hearsay

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160. *Id.* at 487.
161. 2 Md. App. 433, 234 A.2d 890 (1967).
162. *Id.* at 436, 234 A.2d at 892.
163. 580 P.2d 265 (Wash. Ct. App. 1978).
164. *Id.* at 271 (citing State v. Spadoni, 243 P. 854, 857 (Wash. 1926)).
165. *Id.* at 266.
166. *Id.*
167. *Id.*
168. *Id.* at 267.
169. *Id.*
170. *Id.*
171. *Id.* at 270.

evidence[172] and denied any connection between her and the confession.[173] The trial court admitted the confession.

On appeal, the Court of Appeals of Washington affirmed, holding that uncertainty as to the defendant's identity goes only to the weight of the evidence, not its admissibility.[174]

> [C]ertainly [the confession] has some bearing on the question whether the accused was guilty of the crime to show that the person committing it was of his general appearance, or to show that a person of his general appearance was seen in the vicinity of the place of the crime immediately prior to its commission.[175]

The court held that the existence of the confession and the statements therein were proof of the elements of the crime and were properly admitted.[176]

Similarly, in *Fischer v. State*,[177] the Court of Criminal Appeals of Texas held admissible a confession made to a police officer, despite the fact that the police officer could not identify the defendant at trial as the same individual who made the confession.[178] In *Fischer*, the defendant was convicted of sending an anonymous letter.[179] Although the police officer who took the defendant's confession was unable to identify defendant at trial, the police officer did indicate that the one who confessed was named Estil Harlan Fischer, which matched the defendant's name.[180] The defendant objected to the admission of the confession.[181] The trial court admitted the confession and the appeals court affirmed.[182] The appeals court stated that the other evidence, establishing that it was the defendant who was taken to the police officer's office on the night of his arrest, was sufficient to establish that it was the defendant who confessed to the officer.[183]

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172. *Id.* at 268. Defendant also claimed, because the drugs had been destroyed, that there was no showing of relevancy of the confession. *Id.*
173. *Id.* at 269-70.
174. *Id.* at 271 (citing State v. Spadoni, 243 P. 854, 857 (Wash. 1926)).
175. *Id.* (quoting *Spadoni*, 243 P. at 857).
176. *Id.* at 271.
177. 361 S.W.2d 395 (Tx. Crim. App. 1962).
178. *Id.* at 398. The *Fischer* court did not address the identity of names presumption. However, even if the court had done so, it is likely the court would have reached the same result. Because the defendant in *Fischer* did not testify or offer any evidence in his defense, he did nothing to rebut the presumption. *See id.* at 397.
179. *Id.* at 396.
180. *Id.* at 398.
181. *Id.* at 397.
182. *Id.* at 397-98.
183. *Id.* at 398.

Finally, in *York v. State*,[184] the Supreme Court of Wisconsin likewise affirmed a trial court's admission of a confession when only circumstantial and presumptive evidence linked the identity of the confessor with the defendant.[185] In *York*, the defendant was convicted of burglary.[186] A detective testified that a man with the same name as the defendant confessed to him at 10 a.m., on March 22, 1968, but the detective was unable to identify the defendant at trial as the same individual who confessed.[187] The defendant objected to the admission of the confession, claiming it was "hearsay and self-serving."[188] The trial court admitted the confession and the Wisconsin Supreme Court affirmed.[189] In finding the confession admissible, Wisconsin's highest court looked to circumstantial evidence of the confessor's identity that linked him to the defendant.[190] For example, the State offered corroborating testimony by another detective, confirming that he had seen the police officer who took the confession questioning the defendant at 10 a.m., on March 22, 1968.[191]

IV. THE INSTANT CASE

The court in *Woodson* began its analysis by stating that, prior to admitting a confession, there must be sufficient indicia that the confession was made by the defendant.[192] The State bears this burden of proving identity.[193] In *Woodson*, the court found that the State failed to meet this burden primarily because the State failed to produce any records to establish that Woodson and Spells were ever held in the same cell.[194] Such evidence could have come in the form of jail records or testimony from guards or other individuals who may have seen Woodson and Spells in jail together.[195]

The court recognized that the State produced some corroborating evidence, such as the fact that Spells knew Woodson's nickname and that Woodson had a mid-body injury, but that evidence alone was not sufficient to establish identity.[196] The court distinguished both

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184. 173 N.W.2d 693 (Wis. 1970).
185. *Id.* at 695.
186. *Id.*
187. *Id.* at 698-99.
188. *Id.* at 699.
189. *Id.*
190. *Id.* at 698-99.
191. *Id.* at 699.
192. Woodson v. State, 325 Md. 251, 260-61, 600 A.2d 420, 424 (1992).
193. *Id.* at 262, 600 A.2d at 424.
194. *Id.* at 262, 600 A.2d at 425.
195. *Id.*
196. *Id.* at 263, 600 A.2d at 425. The court stated that

> [i]n this *capital* prosecution, Spells's [sic] testimony concerning Wood-

York v. State[197] and *Fischer v. State*,[198] on grounds that the proponents of those confessions introduced sufficient evidence to establish the identity of the defendant as the individual who confessed.[199]

In addressing the presumption that "identity of name gives rise to identity of person," the court stated that, even if the use of Woodson's name by Spells' cellmate raised a rebuttable presumption, that presumption was nullified when Spells failed to identify the defendant at trial as the same individual.[200] In effect, the inability of the witness to identify the defendant as being the out-of-court declarant goes to the admissibility of the evidence and not to the weight that it should be given by the jury. The confession would only be admissible if the State made a prima facie showing that Spells' cellmate was Woodson, which the State failed to do.[201]

V. ANALYSIS

The court's ruling in *Woodson* puts Maryland in the minority of jurisdictions that have ruled on this issue. The opinion, however, seems to emphasize the persuasive effect that confessions have on juries and places a much greater burden on the State when attempting to admit a hearsay confession when the identity of the confessor is uncertain.

The court's analysis, however, is not without criticism, most notably in its dissenting opinion.[202] The dissent criticized the height-

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> son's confession, if admitted and believed . . . [would make] Woodson . . . eligible for the imposition of the *death penalty* . . . . In these circumstances, we think an evidentiary foundation beyond Spells's [sic] knowledge of Woodson's name was essential to show a linkage between the two men and the purported confession.

Id. at 262, 600 A.2d at 425 (emphasis added). The court leaves one begging the question whether the fact that this was a death penalty proceeding heightened the evidentiary requirements, or whether, had the case been only a misdemeanor, more relaxed indicia of identity would have been sufficient. Interestingly, the majority opinion in *Woodson* did not distinguish either Murphy v. State, 47 Md. App. 387, 422 A.2d 1297 (1980) or Sallie v. State, 24 Md. App. 468, 332 A.2d 316 (1975), in which the Court of Special Appeals of Maryland allowed evidence of identity based on the identity presumption and other circumstantial evidence, to be submitted to the jury. *See supra* notes 124-35 and accompanying text for a discussion of *Murphy*.

197. 173 N.W.2d 693 (Wis. 1970).

198. 361 S.W.2d 395 (Tx. Crim. App. 1962).

199. *Woodson*, 325 Md. at 261-62, 600 A.2d at 425. The court recognized the possibility that the State decided not to produce more evidence linking Spells and Woodson only after the trial court announced its decision to admit the confession. *Id.* at 262, 600 A.2d at 425.

200. *Id.* at 263-64, 600 A.2d at 426.

201. *Id.* at 264, 600 A.2d at 426.

202. *Id.* at 268, 600 A.2d at 428 (Karwacki, J., dissenting).

ened standard the majority placed on the admissibility of confessions. Because the standard of proof for the admissibility of evidence is one of preponderance of the evidence, not proof beyond a reasonable doubt, the proper test for admissibility of the confession is "whether the evidence was sufficient to allow the jury to conclude that it was more likely than not that the defendant was the man who spoke to Spells on those occasions."[203] According to the dissent, the circumstantial evidence of identity provided "a sufficient basis for the admission of those oral admissions despite Spells' inability to identify Woodson at trial."[204]

Moreover, the majority opinion appears to remove from the jury what was once within their purview. Traditionally, once the identity presumption arose, it was the jury's duty "to pick and sift, to stress and ignore, to believe and disbelieve, to weigh and assess, and resolve the conflicts in reaching a final decision."[205] The dissent noted that the identity presumption was sufficiently supported by circumstantial evidence when considering that the name "Shawn Woodson" is not common, that Spells knew Woodson's nickname, and that Spells knew Woodson had a mid-body injury.[206] As such, "it was for the jury to determine the weight to be accorded that inference."[207]

Likewise, the majority opinion did not address the significance of the defendant's failure to present any evidence to rebut the identity presumption, which Woodson could have done during the trial or during closing arguments. In *Bowers*, for example, the court allowed an identity presumption to go to the jury partly because the defendant "was not denied the opportunity to offer contrary evidence to disprove the State's assertion."[208] Other than the fact that Spells could not identify Woodson as the same man as his cellmate, the fact that the defendant did not actively present evidence rebutting the State's assertion did not appear to be a factor in the *Woodson* analysis.

Moreover, it is unclear whether the court's obvious concern with the fact that *Woodson* was a death penalty case changed the analysis for admitting hearsay confessions.[209] Although the Court of Special Appeals of Maryland has allowed an identity presumption to go to the jury for less severe offenses,[210] the *Woodson* court neither addressed nor distinguished those cases.

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203. *Id.* at 269, 600 A.2d at 428.
204. *Id.* at 269, 600 A.2d at 428-29.
205. *Id.* at 270, 600 A.2d at 429 (quoting Thomas v. State, 32 Md. App. 465, 477, 361 A.2d 138, 146 (1976)).
206. *Id.* at 271, 600 A.2d at 429-30.
207. *Id.* at 271, 600 A.2d at 430.
208. Bowers v. State, 298 Md. 115, 131, 468 A.2d 101, 109 (1983).
209. *See supra* note 196.
210. *See* Murphy v. State, 47 Md. App. 387, 422 A.2d 1297 (1980); Sallie v. State, 24 Md. App. 468, 332 A.2d 316 (1975).

Finally, the *Woodson* court specifically noted that sufficient proof is required to link the defendant with the confessor before a hearsay confession is admissible, but it failed to elaborate on the quantity of evidence required to sufficiently establish identity. The court only stated that because the State failed to offer evidence that Spells and Woodson were cellmates, it did not meet its burden of establishing identity. Only a prima facie showing of identity would have been sufficient.[211] The court in *Woodson* leaves open the question of whether, had the State offered evidence confirming that Spells and Woodson were cellmates, the presumption would still be nullified by Spells' inability to identify Woodson.

VI. IMPACT/RAMIFICATION

The holding in *Woodson* is very narrow, specifically limited to cases involving both identity presumptions and oral hearsay confessions. It is unlikely that the court's treatment of the identity presumption in *Woodson* will apply to those factual situations not involving confessions. However, the holding in *Woodson* undoubtedly places a greater burden on the State in introducing hearsay confessions. This burden is magnified when the delay between the giving of the confession and the trial is great enough such that memories fade and those who heard the confession are no longer able to recognize the defendant as the confessor.

It is likely that, had the State in *Woodson* offered evidence that Spells and Woodson were cellmates, the fact that Spells could not identify Woodson as the out-of-court confessor would not have nullified the presumption. The same would probably hold true if Spells had made an in-court identification of Woodson, even if the State had not offered evidence that the two were cellmates. What the *Woodson* decision requires, therefore, at least when dealing with confessions and identity presumptions, is not so much sufficient *circumstantial* evidence of the identity of the out-of-court confessor, but some evidence *connecting* the testifying witness with the out-of-court confessor. This evidence must be independent of the testimony provided by the testifying witness.

VII. CONCLUSION

Maryland is in the minority of jurisdictions in holding that the inability to make an in-court identification of the defendant as an out-of-court confessor, despite exactness of names and other circumstantial evidence of identity, goes to the admissibility rather than to the weight of the evidence. Although it is probable that Maryland

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211. *Woodson*, 325 Md. at 264, 600 A.2d at 426.

courts would allow the admissibility of a confession despite an inability to make an in-court identification as long as sufficient circumstantial evidence of identity exists, it is not clear exactly what constitutes sufficient circumstantial evidence of identity. Whereas identity of those involved in only minor offenses can be established by the identity presumption corroborated by circumstantial evidence, it is not clear whether increased evidence of identity is required in death penalty cases. No clear test has been articulated in the cases addressing these issues, making the issues ripe for decision.

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