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State v. Jones: Maryland's Flexible Present Sense Impression Exception

Judith Lynn Schlossberg

STATE V. JONES: MARYLAND'S FLEXIBLE PRESENT SENSE IMPRESSION EXCEPTION

In *State v. Jones*[1] the Court of Appeals ruled that testimony by a state police officer as to contents of a conversation overheard on the citizens band (CB) radio was admissible under the present sense exception to the hearsay rule.[2] The court found that the transmissions overheard by the witness police officer possessed the characteristics of spontaneous observations of an event occurring contemporaneously with the transmissions.[3] It ruled that the evidence was sufficiently reliable to be admitted,[4] even though the identities of the transmitters were unknown, the transmitters were not speaking directly to the state trooper, and the officer could not personally corroborate the observation. In so holding, the court reaffirmed its intention to give broad scope to the present sense impression exception.

I. THE CASE

Jeffrey Douglas Jones (Jones), a state police officer, was convicted in the Circuit Court for Harford County of a third degree sexual offense, assault and battery, and two counts of misconduct in the office of state trooper.[5] The incident in question originated with a late night traffic stop on Interstate 95 (I-95). Jones stopped a motorist because he was unable to determine whether her vehicle displayed a rear license plate due to a short circuit in the vehicle's rear tag light. What happened thereafter was "sharply in dispute" at trial.[6]

The woman claimed that she complied with the trooper's instruction to enter the police car while her male friend remained in the car she had been driving.[7] The woman further claimed that after Jones said he would have to search her, he handcuffed and proceeded to assault her.[8] She said that when she protested, the

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1. 311 Md. 23, 532 A.2d 169 (1987).
2. *Id.* at 35, 532 A.2d at 175.
3. *Id.* at 30, 532 A.2d at 172.
4. *Id.* at 32, 532 A.2d at 173.
5. *Id.* at 27, 532 A.2d at 171. Jones received a sentence of 2 years in jail, all but 90 days of which were suspended. *Id.*
6. *Id.* at 25, 532 A.2d at 170.
7. *Id.*
8. *Id.*

trooper released her and she returned to her car.[9] She claimed that Jones then sped off down the highway without headlights, whereupon she and her passenger, now driving, raced down I-95 in pursuit of the police cruiser.[10] After the woman and her friend realized they would be unable to reach Jones, they called the police.[11]

At trial, Byrd, a state police officer, was permitted to testify over objections that he overheard a conversation on CB radio channel 19 a short time before the victim's complaint was broadcast over the police radio. The conversation described a small car chasing a lightless "Smokey Bear."[12]

On appeal to the Court of Special Appeals, Jones claimed that the trial court erred in admitting this evidence under the present sense impression exception to the hearsay rule. The intermediate court agreed,[13] stressing that Byrd was unable to corroborate, through his own present sense impressions, the event the declarants described.[14] Not only was Byrd not on the scene himself, but he was merely an eavesdropper rather than a participant in the conversation.[15] To the Court of Special Appeals, these factors meant that the evidence lacked sufficient attributes of reliability, relevance, and trustworthiness to be admissible.[16]

The Court of Special Appeals relied on its holding in *Booth v. State*[17] to reverse the trial court's decision in *Jones*. In *Booth*, the wit-

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9. *Id.*

10. *Id.* at 26, 532 A.2d at 170.

11. *Id.*, 532 A.2d at 169-70.

12. *Id.* at 27, 532 A.2d at 171. Before the jury, Officer Byrd said:

> On the CB radio in the state police car, Channel 19, I overheard a trucker on the CB said [sic] that it was Smokey the Bear southbound in a police car with no lights on and right after that . . . another trucker on Channel 19 advised that there was a little car just took off [sic] behind Smokey the Bear trying to catch him at a high rate of speed.

Id. at 28-29, 532 A.2d at 171.

At the trial level Byrd had related the conversation in direct quotes: "Look at Smokey Bear southbound with no lights on at a high rate of speed," and the response, "[l]ook at that little car trying to catch up with him." *Id.* at 28, 532 A.2d at 171. The Court of Appeals did not rule on the legal significance, if any, of the officer's change in language—whether it represented a change in recollection or merely a different way of saying the same thing. The court pointed out that the trial judge was not asked to rule on the narrative version, and further stated that counsel for the defendant did not preserve for review the question of the change in words. *Id.* at 29-30, 532 A.2d at 172. Judge Eldridge filed a one-paragraph concurring opinion stating that he would hold that there was no material variance in the two statements. *Id.* at 35, 532 A.2d at 175.

13. Jones v. State, 65 Md. App. 121, 127, 499 A.2d 511, 514 (1985).

14. *Id.* at 126, 499 A.2d at 513.

15. *Id.* at 125, 499 A.2d at 513.

16. *Id.* at 126, 499 A.2d at 513.

17. 62 Md. App. 26, 488 A.2d 195 (1985), *aff'd*, 306 Md. 313, 508 A.2d 976 (1986).

ness testified as to a telephone conversation she had with the declarant/murder victim, Ross, on the night of his murder.[18] The trial court permitted the witness to testify that Ross told her that a girl named Brenda was in the apartment at the time.[19] The witness said that she then heard, over the telephone, a female voice and the door of the victim's apartment being opened.[20] When she asked Ross who was there, he responded that Brenda was talking to "some guy" behind the door.[21]

According to the Court of Special Appeals, the evidence in *Booth* was far more reliable than that sought to be admitted in *Jones* because (1) the declarant was known to the witness and identifiable to the court; (2) one of the parties to the conversation in question was the witness, who, unlike any of the conversants in *Jones*, was available for cross-examination; and most importantly, (3) the witness herself could corroborate the present sense impressions, as she could verify that she heard a female speaking in the apartment and someone come to the door.[22]

After the Court of Special Appeals decided *Jones v. State*, the Maryland Court of Appeals heard *Booth*.[23] The court upheld the Court of Special Appeals' affirmation of Booth's conviction, but decided the case on different grounds.[24] In the opinion that has become the definitive Maryland ruling on the present sense impression exception, the Court of Appeals held that what is required for admissibility is that the declarant be describing, without preparation, an event that he or she is personally observing as it occurs.[25] The underlying rationale is that "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation."[26] The *Booth* court, unlike the Court of Special Appeals, held that the identity of the declarant need not be known, and that a present sense impression need not be "corrob-

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18. *Id.* at 29, 488 A.2d at 197.

19. *Id.*

20. *Id.*

21. Jones v. State, 65 Md. App. at 126, 499 A.2d at 513. In its *Jones* opinion, the Court of Special Appeals stressed these facts in *Booth*, stating that they indicated the witness could provide necessary corroboration. *Id.* at 126, 499 A.2d at 513.

22. *Id.* at 126, 499 A.2d at 513.

23. Booth v. State, 306 Md. 313, 508 A.2d 976 (1986).

24. *Id.* at 330-31, 508 A.2d at 984-85.

25. *Id.* at 331, 508 A.2d at 985. The statements in *Booth*, of course, met those requirements. *Id.*

26. *Id.* at 320, 508 A.2d at 979 (quoting FED. R. EVID. 803(1) advisory committee's note).

orated by an independent and equally percipient observer."[27] Identification and corroboration, while often helpful in measuring the competency of statements as present sense impressions, nonetheless are not what determines the hearsay's reliability.[28] It is the contemporaneous occurrence of event and description that guards against memory loss and other pitfalls typically associated with hearsay testimony.[29]

The Court of Appeals granted certiorari in the *Jones* case to consider it in light of the *Booth* decision.[30] In *Jones* the Court of Special Appeals had warned that "[t]o permit evidence such as that of Byrd would throw open the door to imaginative, if not fabricated, present sense declarations between unknowns."[31] Ironically, it was the Court of Appeals' ruling in *Booth* that left the door open for the possibility of admitting the evidence in *Jones*. The question remains, has the door been left open too wide?

II. BACKGROUND LAW

In *Booth* the Maryland Court of Appeals joined a majority of jurisdictions in adopting the present sense impression exception to the hearsay rule in the form in which it appears in Federal Rule of Evidence 803(1). Under the heading "Hearsay Exceptions; Availability of Declarant Immaterial," rule 803(1) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) **Present sense impression**
>
> A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.[32]

This type of statement, even though hearsay, is considered ad-

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27. Booth v. State, 306 Md. 313, 327-30, 508 A.2d 976, 983-84 (1986).

28. *Id.* at 330, 508 A.2d at 984.

29. For the requirements for admissible present sense impressions, see *Jones*, 311 Md. at 30-32, 532 A.2d at 172-73.

30. *Id.* at 28, 532 A.2d at 171.

31. 65 Md. App. at 126-27, 499 A.2d at 513.

32. FED. R. EVID. 803(1). In *Booth* the Court of Appeals observed that 28 states have codified present sense impression exceptions to the hearsay rule, most of which are patterned after rule 803(1). Booth v. State, 306 Md. 313, 321, 508 A.2d 976, 979 (1986). *See, e.g.*, N.C. R. EVID. 803(1); N.H. R. EVID. 803(1); W. VA. R. EVID. 803(1).

For a case in which a declarant was held to be "explaining" a contemporaneous event, see State v. Reid, 367 S.E.2d 672, 674-75 (N.C. 1988) (police officer's testimony as to what a police captain told him as the latter was destroying a rape kit was admitted as present sense impression evidence because declarant was explaining the destruction of the evidence as it happened).

missible because due to the statement's contemporaneity, not only is the declarant not likely to be fabricating a story, but there also has been insufficient time for the declarant's memory to have become distorted.[33]

In the nineteenth century, jurists recognized a "*res gestae*"[34] exception to the general rule that hearsay is inadmissible.[35] *Res gestae* was an umbrella encompassing several types of spontaneous statements: those relating to present bodily condition or present mental states and emotions, excited utterances, and declarations of present

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33. FED. R. EVID. 803(1) advisory committee's note. The advisory committee discussed the time element and permissible subject matter of these declarations in its note to rule 803. Under the present sense impression exception, the committee recognized that "precise contemporaneity" is not always possible and "hence a slight lapse is allowable." Also, the statement must be limited to "description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther." *Id. See, e.g.*, Commonwealth v. Peterkin, 511 Pa. 299, 513 A.2d 373 (1986), *cert. denied*, 479 U.S. 1070 (1987). In *Peterkin*, the Supreme Court of Pennsylvania ruled that the reliability of present sense impression evidence turns on its contemporaneity with the event being described. *Id.* at 312, 513 A.2d at 379. A gas station employee, subsequently killed during a robbery, had made several earlier statements to third parties about the defendant. *Id.* The court considered admissible those statements made to a witness over the telephone while the employee was observing the defendant testing a gun, locking the door, and getting into a car. *Id.* The court said other statements made by the employee to third parties about the defendant's possession of a gun and the combination to the safe were not shown to be contemporaneous with the observation and therefore were not admissible. *Id.* at 313, 513 A.2d at 380.

See also Stumpf v. State, 749 P.2d 880 (Alaska Ct. App. 1988); Johnson v. White, 430 Mich. 47, 420 N.W.2d 87 (1988). In *Stumpf*, the Alaska appellate court, citing United States v. Peacock, 654 F.2d 339, 350 (5th Cir. Aug. 1981), *cert. denied*, 464 U.S. 965 (1983), found that "[r]eports about the contents of a telephone call made by the call's recipient to a third party, immediately after the call terminates, are admissible under this rule." 749 P.2d at 894. In *Johnson*, an unidentified declarant told a trial witness that the plaintiff's decedent's car failed to stop at a stop sign. 430 Mich. at 51, 420 N.W.2d at 89. The Supreme Court of Michigan noted that it had been no more than four minutes between the accident and the declaration and held that the interval satisfied the present sense impression exception's requirement, codified in MICH. R. EVID. 803(1), that the statement be made while the declarant was perceiving the event or "immediately after." 430 Mich. at 57, 420 N.W.2d at 91.

34. "*Res gestae*" literally means "things done." It is a term designed to include words, thoughts, gestures—all spontaneous and automatic declarations so connected with an event as to be considered a part of it. BLACK'S LAW DICTIONARY 1173 (5th ed. 1979). In many jurisdictions today "*res gestae*" is no longer a hearsay exception per se; rather, the various types of spontaneous utterances such as excited utterances and present sense impressions each constitute a hearsay exception. For a good description of *res gestae*, see Cassidy v. State, 74 Md. App. 1, 9-16, 536 A.2d 666, 670-73 (1988). In *Cassidy* the Maryland Court of Special Appeals stated that *res gestae* has no use as a separate concept—if the evidence in question fits none of the recognized hearsay exceptions such as present sense impression, then it will *not* be admissible as falling under a separate category called *res gestae*. *Id.* at 15, 536 A.2d at 673.

35. E. CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 288, at 835 (3d ed. 1984).

sense impressions.[36] The case most often cited as the origin of judicial use of the present sense impression hearsay exception is *Houston Oxygen Co. v. Davis*,[37] which, interestingly enough, stressed the need for corroboration by the witness of the declarant's present sense impressions.[38]

Although the exception is recognized today in most jurisdictions, cases dealing with present sense impression are relatively sparse. Like the judges of the two Maryland appellate courts, who recognized that *Booth* fell within the exception yet utilized different criteria, judges in other jurisdictions disagree over whether the exception should be given narrow or broad interpretation and whether specific fact patterns fall within it.[39] When evidence charac-

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36. *Id.* Interestingly, Wigmore never recognized present sense impressions as constituting an exception to the hearsay rule, believing that contemporaneity alone was not a guarantee of trustworthiness. 6 J. WIGMORE, EVIDENCE § 1757, at 238 (J. Chadbourn rev. 1986). For a historical discussion, see Booth v. State, 306 Md. 313, 317-20, 508 A.2d 976, 977-79 (1986). *See generally* Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869 (1981) (discussion of background, history and elements of the present sense impression exception).

For a discussion on the differences between the present sense impression and the excited utterance exceptions, see United States v. Moore, 791 F.2d 566, 572 n.4 (7th Cir. 1986) (admitting a statement of defendant's secretary under excited utterance exception). In *Moore* the Seventh Circuit stated that the excited utterance exception requires that "1) a startling event or condition occurred; 2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; and 3) the statement relates to the startling event or condition." *Id.* at 570.

Maryland courts have recognized *res gestae* exceptions. *See, e.g.*, Mouzone v. State, 294 Md. 692, 697-701, 452 A.2d 661, 664-66 (1982). The Court of Appeals in *Mouzone* discussed *res gestae* exceptions and specifically recognized the excited utterance exception. The court pointed to the "importance of examining the circumstances *in toto* to determine whether the statement was the result of reasoning and reflection or a spontaneous response to the exciting event." *Id.* at 698, 452 A.2d at 664. *See also* Neusbaum v. State, 156 Md. 149, 163-64, 143 A. 872, 878 (1928) (distinguishing between a statement "induced by the shock of seeing a human being run over" by a car and a statement made as a result of a calculated, albeit quickly executed, investigation); Wright v. State, 88 Md. 705, 708, 41 A. 1060, 1061 (1898) (statement made after time for reflection not admissible under *res gestae* exception to hearsay rule).

37. 139 Tex. 1, 6, 161 S.W.2d 474, 476 (1942) (ruling statement was admissible as it was "sufficiently spontaneous to save it from the suspicion of being manufactured").

38. *Id.* at 5, 161 S.W.2d at 476. The witness, an occupant of a car, observed another car passing by at a high rate of speed. This witness recounted a comment made by a second occupant of his car, who reportedly said that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." *Id.* The Texas court ruled that (1) by its very nature, this statement, although unexcited, was safe from the declarant's memory defects; (2) there was little or no time for calculated misstatements; and (3) the reporting witness had equal opportunity to observe and verify. *Id.* at 6-8, 161 S.W.2d at 476-77. According to the court, these factors rendered the statement competent and the evidence reliable. *Id.*

39. *See infra* notes 40-43.

terized as fitting into this exception is not admitted, however, the clear reason is because the court has made a judgment that it is untrustworthy. In making that judgment of unreliability, courts have pointed to such shortcomings as lack of proven contemporaneity[40] and lack of proof that the declarant was speaking from personal knowledge,[41] especially when the declarant is unknown[42] or the witness cannot provide corroborating testimony.[43]

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40. In some cases the shortcoming is clear-cut, as it was in Halfacre v. State, 292 Ark. 331, 731 S.W.2d 179 (1987). In *Halfacre*, the Supreme Court of Arkansas ruled as inadmissible a police officer's testimony about a description given to him by a witness to a robbery. *Id.* at 334, 731 S.W.2d at 180. The hearsay description did not fall into the present sense impression exception because it was given "some time after the robbery, and not while [the eyewitness] was perceiving the event, or immediately thereafter." *Id.*

Other times, however, extrinsic evidence may show the lack of contemporaneity. In a citizens band (CB) case involving a conviction for interstate transportation of a stolen vehicle, a police officer was permitted to testify about a conversation he had with an unidentified declarant on the CB who told him he had seen "two white shirtless males walking from the place where the truck had been abandoned." United States v. Cain, 587 F.2d 678, 679 (5th Cir. 1979). Shortly after the conversation in question, other unidentified people came on the radio and told the officer they had seen two shirtless white males walking five to six miles east of the abandoned truck. *Id.* At that location, the defendant and his companion, escaped prisoners who fit the description, were taken into police custody. *Id.* They were subsequently charged not only with escape but also with the federal stolen vehicle violation. *Id.* The court determined, however, that the defendant's presence five miles away from the truck within a few moments of the CB radio report that described him leaving the truck made it impossible that the first transmission had been contemporaneous with the event. *Id.* at 681. The court ruled that the officer's testimony about that conversation—which linked the defendant to the stolen truck—therefore should not have been admitted under the present sense impression exception. *Id. See also* Commonwealth v. Peterkin, 511 Pa. 299, 313, 513 A.2d 373, 380 (1986), *cert. denied*, 479 U.S. 1070 (1987) (without evidence about the amount of time between the victim's observation of the gun and the combination in appellant's possession, and the victim's statement to the witness, the court was unable to conclude that the events were sufficiently contemporaneous). For further discussion of *Peterkin*, see *supra* note 33.

41. In Miller v. Keating, 754 F.2d 507 (3d Cir. 1985), an unknown bystander at the scene of an automobile accident had announced, "the bastard tried to cut in." *Id.* at 509. The court found that the statement, standing alone, lacked trustworthiness. *Id.* at 512. The court pointed out that there was no way to know whether the declarant had personally observed the car cutting in. *Id.* at 511. Rather, the bystander could have been making a conclusion based on what he saw after the accident took place, or he even could have been a participant who was covering for his own actions. *Id.* at 511-12. His unavailability for questioning compounded the problem. The court concluded that there was no way to infer that the unknown declarant spoke from personal knowledge. *Id.* at 511.

42. *See Miller*, 754 F.2d at 511; *Cain*, 587 F.2d at 679.

43. The New York Appellate Division upheld a requirement for corroboration of present sense impression declarations by the testifying witness in People v. Watson, 100 A.D.2d 452, 466, 474 N.Y.S.2d 978, 987 (1984). At issue was a telephone conversation between the witness and the murder victim, *id.* at 457-59, 474 N.Y.S.2d at 982-93, similar to the fact situation in *Booth*. This witness, however, was unable to hear whether

Courts also have addressed the issue of whether the testimony, if admitted, would violate the sixth amendment's confrontation clause, made applicable to the states through the fourteenth amendment.[44] The Supreme Court ruled in *Ohio v. Roberts*[45] that when a hearsay declarant is not present for cross-examination at a criminal trial, his or her declarations are admissible if there are adequate "indicia of reliability."[46] The Court observed, however, that if the statement falls within a "firmly rooted hearsay exception," reliability for purposes of the confrontation clause may be inferred.[47]

III. ANALYSIS

The Court of Appeals' interpretation of *Booth* was correct. An important result of the ruling was the emergence of the flexibility subsequently displayed in *Jones*. If the Court of Appeals had interpreted the present sense impression exception in *Booth* as the Court of Special Appeals had done, there would have been no room for discretion to allow admission of Officer Byrd's testimony in *Jones*. In *Booth*, however, the Court of Appeals deliberately and correctly gave this hearsay exception a broad scope in a thorough opinion that

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anyone had knocked at the door or actually had entered the apartment. *Id.* at 459, 474 N.Y.S.2d at 983. To the New York court, this meant that the witness's testimony that the declarant said, "the super came to check my bathtub" did not contain the "indicia of reliability" required for the confrontation clause. *Id.* at 466, 474 N.Y.S.2d at 987.

44. U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *See also infra* notes 72 & 74.

45. 448 U.S. 56 (1980).

46. *Id.* at 66, 73. The Supreme Court also stated that "normally" when a hearsay declarant is not present to testify at a criminal trial, the confrontation clause "requires a showing that he is unavailable." *Id.* at 66. The Court did note, however, that such a "demonstration of unavailability" is "not always required." *Id.* at 65 n.7. *See infra* note 72 and accompanying text.

47. *Roberts*, 448 U.S. at 66. The Supreme Court did not define "firmly rooted." One commentator believes that the present sense impression exception should not be so considered. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1, 27-32 (1987). Goldman wrote that the rationale linking contemporaneity and reliability is based on "questionable psychological assumptions." *Id.* at 28-29. Those include, according to Goldman, any assumption that "descriptive accuracy is a natural consequence of observation and that this accurate observation is preserved by a contemporaneous statement." *Id.* (footnote omitted). Goldman concluded that the only way to reconcile these exceptions with reliability requirements of the confrontation clause is to discard notions of "firmly rooted" exceptions and have courts examine all such evidence on a case-by-case basis to ensure that under the particular circumstances there are guarantees of trustworthiness. *Id.* at 47. It is apparent that courts do examine particular circumstances involving present sense impression evidence to determine trustworthiness. The Maryland Court of Appeals' analysis in *Jones* is only one example. *See infra* notes 74-77 and accompanying text.

most likely will be cited by courts of other jurisdictions in future cases.[48]

A. Corroboration

The Court of Appeals' conclusion in *Booth* that corroboration is not absolutely required was well reasoned. The advisory committee to the Federal Rules of Evidence nowhere discusses a necessity for corroboration.[49] Moreover, most cases on point stress that it is *trustworthiness* that must be shown.[50] When courts point to the existence of corroboration, it is because the corroboration strengthens a finding of trustworthiness.[51]

The Court of Special Appeals in *Jones*, in discussing what makes

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48. *See, e.g.*, People v. Luke, 136 Misc. 2d 733, 737, 519 N.Y.S.2d 316, 319 (N.Y. Sup. Ct. 1987). At issue in *Luke* were declarations made over the telephone to the 911 operator while a burglary was in progress. *Id.* at 734, 519 N.Y.S.2d at 317. The New York Supreme Court in *Luke* considered whether the declarations were reliable present sense impressions absent corroboration, and cited *Booth* as an example of a state high court holding that corroboration was not required. *Id.* at 736-38, 519 N.Y.S.2d at 318-19.

The *Luke* court also had to consider the issue in light of the New York Appellate Division's holding in People v. Watson, 100 A.D.2d 452, 466, 474 N.Y.S.2d 978, 987 (1984), that corroboration was required. For a discussion of *Watson*, see *supra* note 43. The *Luke* court found the *Watson* limitation inapplicable because the surrounding circumstances in *Luke*, unlike those in *Watson*, were such that the present sense impression had "a great deal of reliability." 136 Misc. 2d at 739, 519 N.Y.S.2d at 320. Among additional circumstances indicating reliability to the court was the fact that the declarant's identity was known to the prosecution. *Id.* In addition, police officers arriving at the crime location within minutes observed a scene that indicated the declarant's statements were accurate. *Id.*

49. The Maryland Court of Appeals, in *Booth*, observed that "the drafters of the Federal Rules knew how to word a requirement of corroboration, and did not do so" with this exception. Booth v. State, 306 Md. 313, 327, 508 A.2d 976, 983 (1986).

50. *See* cases cited *infra* note 51.

51. In State v. Case, 100 N.M. 714, 676 P.2d 241 (1984), the court excluded testimony because it found "questionable" the statement reportedly made by the declarant, whose whereabouts were unknown at the time of the trial. *Id.* at 718, 676 P.2d at 245. The witness would have testified that the declarant announced, "there goes [the murder victim]" several days after the murder allegedly occurred. *Id.* at 717, 676 P.2d at 244. The witness herself saw nothing. *Id.* After ascertaining that the identification was based on a brief glimpse of a person thought to be the victim, the court concluded that exclusion of the statement, the nature of which was "questionable," was not error. *Id.* at 717-18, 676 P.2d at 244-45.

See also State v. Flesher, 286 N.W.2d 215, 218 (Iowa 1979); Commonwealth v. Coleman, 458 Pa. 112, 120, 326 A.2d 387, 390-91 (1974). In *Flesher* the Supreme Court of Iowa adopted the present sense impression exception for the state and also ruled that corroboration was not required. 286 N.W.2d at 218. At issue in *Flesher* was a telephone conversation the witness had with his wife, the murder victim. *Id.* at 216. The lower appellate court had pointed out that when telephone conversations are involved, "independent verification of the facts giving rise to the declarant's impression may be impossible," but nevertheless found the testimony sufficiently reliable. *Id.* at 220. The

present sense impression declarations admissible, incorrectly applied *McCormick's Handbook on the Law of Evidence's* (*McCormick*) analysis of the reliability of such evidence. *McCormick* believes that three safeguards exist with statements that fall within this exception to the hearsay rule: (1) contemporaneous observations ensure against errors based on the declarant's faulty memory, (2) there is no time for deliberate fabrication, and (3) the declarant usually speaks to a third person also present at the scene, who later becomes the trial witness. The third person also observed the event and therefore can provide corroboration.[52] The *Jones* Court of Special Appeals interpreted these as requirements for the present sense impression exception, observed that Byrd personally could not corroborate the witnesses' observations, and concluded that "[p]lainly, the testimony of Byrd does not satisfy *McCormick*'s third factor . . . ."[53] *McCormick*, however, actually distinguishes between a rationale for allowing admission and a requirement that must be fulfilled before guidance may be admitted.[54] When corroboration does exist, courts point to it because it may provide "an added assurance of accuracy,"[55] justifying the admission. That most witnesses are able to provide this corroboration, however, is not sufficient reason to make it required, according to *McCormick*.[56]

McCormick even characterizes the position taken by some courts that corroboration is required as "a radical departure from the general pattern of exceptions to the hearsay rule."[57] *McCormick* concluded, "The matter had better be left for consideration as an aspect of weight and sufficiency of the evidence rather than becoming an added needlessly complicating requirement for admissibility."[58]

Iowa Supreme Court affirmed, noting that corroboration, or the lack thereof, should only affect the weight afforded the declaration. *Id.* at 218.

In *Coleman* the facts were similar. At issue was the admissibility of testimony by the victim's mother about a telephone conversation the witness had had with the victim just prior to the murder. 458 Pa. at 114, 326 A.2d at 388. The Pennsylvania court pointed to the existence of some corroboration for the witness's testimony: the witness, speaking to her daughter over the telephone, could hear shouting in the background, and the defendant himself admitted that he and the victim were arguing loudly at the time. *Id.* at 119, 326 A.2d at 390. Nevertheless, the court stressed that verification is *not* a prerequisite of admissibility under the present sense impression exception. *Id.*

52. E. CLEARY, *supra* note 35, § 298, at 860.

53. 65 Md. App. at 125, 499 A.2d at 513.

54. E. CLEARY, *supra* note 35, § 298, at 862-63.

55. *Id.* at 863.

56. *Id.*

57. *Id.* at 862.

58. E. CLEARY, *supra* note 35, § 298, at 863.

B. *Reliability*

The Court of Appeals in *Jones* separated the question of trustworthiness of present sense impression evidence from the issue of the credibility assigned evidence by the factfinder.[59] While some courts, including Maryland's Court of Special Appeals, would consider corroboration to relate directly to trustworthiness and therefore would exclude unsupported declarations, the Court of Appeals prefers that corroboration or lack of it be a factor for juries to consider in weighing the evidence.[60] What is essential, according to the court, is that the statements be demonstrably contemporaneous with the event in question and that it be evident that the declarant was speaking from personal knowledge.[61]

Moreover, in *Booth* the Court of Appeals held that although identification of the declarants may be helpful in establishing that it was a competent present sense impression, identification is not required, as the statement itself may demonstrate the percipiency of the observer.[62] In *Jones* the court found that the CB statements were " 'self-evidently contemporaneous,' "[63] thereby obviating the need for identification as well as satisfying the timing requirement.[64]

In addition, the Court of Appeals in *Jones* dismissed the defend-

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59. 311 Md. at 32, 532 A.2d at 173.

60. *Id.*

61. *Id.* These characteristics result in the "inherent trustworthiness" the Court of Appeals ascribes to present sense impression statements. *Id. See also* United States v. Medico, 557 F.2d 309 (2d Cir. 1977). In *Medico* an eyewitness to a bank robbery gave the license number of the getaway car to a bank customer, who gave it to the witness bank employee, who wrote it down. *Id.* at 313. Even though the first two people involved were unavailable, the court deemed the evidence reliable because the timing involved was so close to contemporaneous that the likelihood of inaccuracy was very small. *Id.* at 315-16.

62. Booth v. State, 306 Md. 313, 325, 508 A.2d 976, 981-82 (1986). *See also* State v. Smith, 285 So. 2d 240 (La. 1973). In *Smith* an unknown woman handed the robbery victim a slip of paper with defendant's license number written on it. *Id.* at 242. The court found the paper admissible hearsay under either the present sense impression or the excited utterance exceptions. The court found the declaration reliable even though the identity of the eyewitness was unknown. *Id.* at 244.

63. 311 Md. at 30, 532 A.2d at 172 (quoting respondent's counsel at oral argument). For a contrasting declaration, see United States v. Cain, 587 F.2d 678 (5th Cir. 1979), discussed *supra* note 40.

64. 311 Md. at 30-31, 532 A.2d at 172-73. Jones also claimed that the statement that the car was "trying to catch up with" the police cruiser was an opinion, and therefore inadmissible. *Id.* at 32-33, 532 A.2d at 173. The court disagreed, saying that "[a]lthough couched in terms of an opinion, the statement in the context of this case is the quintessence of a shorthand statement of fact, describing in few words a number of facts about the proximity, apposition, and movement of two motor vehicles." *Id.* at 33, 532 A.2d at 174. The court concluded that "[t]he form in which the information was communicated did not render it inadmissible." *Id.*

ant's concern that without corroboration there is no way to test the truth of the witness's testimony.[65] Essentially, the court would not recognize the existence of a credibility problem that is in substance any different from that normally arising with any oral testimony. Declaring that "[t]here is no absolute safeguard against lying,"[66] the court rightly concluded that any witness "who would testify that he heard something when he did not could as well testify that he saw something when he did not."[67]

The Court of Special Appeals also had questioned the relevance of the disputed evidence to the *Jones* case, pointing out that it was not reliably ascertained that the CB conversation had in fact pertained to Jones, the complainant, or even to I-95.[68] As the Court of Appeals pointed out, however, for the radio conversation to have been in fact irrelevant, it would be necessary for one to believe that at the time of the incident, in the general vicinity, there was another small car chasing a different lightless state police car—a coincidence the court understandably had difficulty imagining.[69]

C. *Common Sense and Discretion*

The Court of Appeals believed that the Court of Special Appeals' fear of encouraging wholesale fabrication between unknown declarants was outweighed by the "inherent trustworthiness of a statement of perception given contemporaneously with the event being described . . . ."[70] *Jones*, therefore, turned on the Court of Appeals' perception of the trustworthiness of the present sense impressions at issue. Satisfied as to threshold relevancy and finding the evidence as reliable as any present sense impression, the court stressed that the evidence fell within the requirements of the exception.[71] Had the court felt otherwise, it retained enough discretion under *Booth* to have construed the situation narrowly and ordered the testimony's exclusion.[72] Had the court believed, for example,

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65. *Id.* at 31-32, 532 A.2d at 173.
66. *Id.* at 32, 532 A.2d at 173.
67. *Id.*
68. 65 Md. App. at 126, 499 A.2d at 513.
69. 311 Md. at 34, 532 A.2d at 174.
70. *Id.* at 32, 532 A.2d at 173.
71. *Id.* at 35, 532 A.2d at 174.
72. The court could have found that the evidence lacked the indicia of reliability to satisfy the confrontation clauses of the state and federal constitutions. Instead, the court found that the necessity and reliability tests of Ohio v. Roberts, 448 U.S. 56 (1980), were satisfied. 311 Md. at 34-35, 532 A.2d at 174-75.

See also Brown v. Tard, 552 F. Supp. 1341 (D.N.J. 1982). In *Tard* the defendant filed a habeas corpus petition after being convicted in state court of first degree murder,

that the facts were so bizarre as to have no credibility whatsoever,[73] the court could have insisted upon other extrinsic evidence of reliability that would show, for instance, that the statements were contemporaneous or that they were in fact a result of the declarants' personal perceptions.[74] Alternatively, the court could have ruled that the evidence's probative value was outweighed by the possibility of unfair prejudice.[75] The court's conclusion in *Jones* is a victory for practicality and common sense over judicial obscuration, and it reflects the court's deference to the truth-finding process.

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claiming his constitutional right of confrontation had been denied. *Id.* at 1344. The district court held admissible testimony of a man regarding a telephone conversation with the declarant/murder victim in which she said the defendant was in her apartment fixing the air conditioner. The court held that the evidence fit into New Jersey's present sense impression exception and thus was reliable for confrontation clause purposes. *Id.* at 1351.

See also Commonwealth v. Howard, 375 Pa. Super. 43, 50-51, 543 A.2d 1169, 1173 (1988) (court rejected defendant's argument that right to confrontation was denied, stating that the evidence fell under present sense impression exception to hearsay rule).

73. *See* State v. Case, 100 N.M. 714, 676 P.2d 241 (1984). For a discussion of *Case*, see *supra* note 51.

74. Booth v. State, 306 Md. 313, 330, 508 A.2d 976, 984 (1986). *See also* Williams v. Melton, 733 F.2d 1492 (11th Cir. 1984). In *Williams* the appeals court reversed the district court's granting of a writ of habeas corpus. *Id.* at 1493. Several bystanders to an automobile accident heard an unknown declarant say that the driver of the other car, who disappeared from the scene, looked like the defendant. *Id.* at 1493-94. The appeals court ruled that the declaration fit into Georgia's general *res gestae* rule and was admissible. The court further ruled that for purposes of the confrontation clause, requirements additional to those of the *res gestae* exception may be imposed to ensure reliability. *Id.* at 1495. The court found that there existed circumstantial evidence at the scene that supported the declarant's identification of the defendant. The court also stressed that this was a discretionary decision to be made on a case-by-case basis. *Id.* at 1496.

75. FED. R. EVID. 403. Due to a general recognition that fact patterns and other more subtle characteristics will differ from case to case, the trial judge has this discretion with nearly every evidence admissibility decision. If the judge feels that admitting otherwise highly relevant evidence will cause unfair prejudice by confusing the jury or suggesting an improper reason for the jury's decision, the judge's decision to exclude it rarely will be reversed on appeal unless the appellate court finds that the judge has abused his or her discretion in not having adequate reasons for the exclusion. E. CLEARY, *supra* note 35, § 185, at 546-48. *See* Cross v. State, 282 Md. 468, 476, 386 A.2d 757, 762 (1978) (trial judge should have excluded evidence of a collateral criminal act because its probative value as evidence of a "common scheme" was substantially outweighed by unfair prejudice to the defense). *See also* Hunt v. State, 312 Md. 494, 540 A.2d 1125 (1988), in which a tape of a murdered police officer's remarks broadcast over the police radio was admitted under the present sense impression exception pursuant to *Booth*. *Id.* at 504 n.4, 540 A.2d at 1129 n.4. The *Hunt* court also discussed the trial judge's discretion in such matters and, citing *Cross*, ruled that the tape was neither unusually sensational nor unfairly prejudicial and therefore it was properly admitted. *Id.* at 504, 540 A.2d at 1130.

IV. CONCLUSION

The Court of Special Appeals, in its *Booth* opinion, precluded the admissibility of evidence such as the CB conversation in *Jones*. That the Court of Appeals did not preclude the evidence indicates its philosophy that the adversary system possesses sufficient safeguards to allow a present sense impression exception to be utilized in a liberal manner. In the name of preventing possible abuse in bizarre situations, the Court of Special Appeals' strict construction in *Booth* and *Jones* generally would have prevented juries from hearing highly probative evidence that possesses sufficient safeguards for reliability. In *Jones* the Court of Appeals preferred to leave it to trial advocacy, emphasizing not only that the jury was free to weigh the evidence and decide for itself the credibility, but also that the defendant's counsel likewise was free to cross-examine the witness and argue for the unreliability of the statements.[76]

Given the rarity of present sense impression cases, the Court of Appeals is correct to leave the Maryland exception broad enough that common sense is not thwarted in the interest of preventing the possible onslaught of fabrication. Other evidence admissibility questions are nearly always discretionary; the Maryland rule does not present any difficulties that cannot be resolved on a case-by-case basis.[77] The door is open, but it can be closed whenever it is truly necessary.

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76. 311 Md. at 32, 532 A.2d at 173.

77. In every case the trial judge has the power to exercise discretion in making decisions on the admissibility of evidence. This often involves what *McCormick* refers to as a "cost benefit calculus." E. CLEARY, *supra* note 35, § 185, at 546-48. In admissibility questions involving present sense impressions, the judge makes a preliminary factual determination that includes ensuring that declarants were speaking from contemporaneous, personal knowledge of the event they described. The court thus ensures the legal competency of the evidence. The judge makes a preliminary judgment as to probative value as well, and has the option to exclude evidence when the judge believes the "benefits" are outweighed by the "costs," or "probable dangers" inherent in the evidence. *Id.* § 185, at 546-47. *See also supra* note 75.

See Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987), in which the author argues for liberalization of the hearsay rules with respect to civil trials because sources of evidence in civil trials generally are more reliable. *Id.* at 94. Park acknowledged the danger of drawing stark general contrasts with criminal trials but stated, "[n]evertheless, it is fair to note the absence, or at least greatly diminished role, of declarants who are informers, accomplices, or prisoners." *Id.* at 99.