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Present Sense Impressions Cannot Live in the Past

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PRESENT SENSE IMPRESSIONS CANNOT LIVE IN THE PAST

Douglas D. McFarland

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PRESENT SENSE IMPRESSIONS CANNOT LIVE IN THE PAST

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I. INTRODUCTION

While earlier commentators, codes, and cases hinted or suggested that the statement of a witness describing an event while perceiving it should be admissible over a hearsay objection,[1] the present sense impression was not generally recognized as an exception to the hearsay rule until the enactment of the Federal Rules of Evidence in 1975.[2] The federal rule, unchanged from 1975 to the present, sets forth the exception:

> 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*.[3]

Carried along by the popularity of the federal evidence rules, the present sense impression has since been adopted in the evidence codes or rules of four-fifths of the states.[4]

Since by definition a present sense impression is uttered spontaneously while the declarant is perceiving the subject of the declaration, the guarantees of trustworthiness of the exception are agreed to be two: no possibility of memory loss and little or no danger

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1. *See infra* Part II.

2. *See* Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1926 (1975). The Supreme Court of the United States promulgated the rules in November, 1972. *See* 34 L. Ed. 2d (Issue 5 of the Advance Pamphlet) 1, 94 (1972).

3. FED. R. EVID. 803(1) (emphasis added); 88 Stat. 1926, 1939 (1975).

4. *See infra* note 131.

of insincerity.[5] These guarantees are based on the declarant's making the statement while "perceiving the event or condition." Unfortunately, many courts have seized on the "immediately thereafter" language of the rule to stretch the time allowed between the event and the statement. Since a time lapse destroys both of the exception's guarantees of trustworthiness, this Article proposes amending the federal rule—and copying state codes and rules—to delete the last three words, "or immediately thereafter."

II. HISTORICAL PERSPECTIVE

More comprehensive histories of the present sense impression have been written.[6] This section traces the history briefly, with emphasis on the origin of "immediately thereafter."

The present sense impression is clearly the child of commentators, not courts. James Bradley Thayer is generally credited with plucking the exception from the mists of the *res gestae* doctrine in the late nineteenth century.[7] Yet Thayer wrote of "declarations of fact which were very near in time to that which they tended to prove," that is, statements "substantially contemporaneous."[8] His century-old discussion did not distinguish sharply between the present sense impression and the excited utterance.[9] Thayer should likely be identified as a prophet, not a progenitor, of the present sense impression.

John Henry Wigmore shared Thayer's distaste for the *res gestae* doctrine, but disagreed that near contemporaneity of a statement to an event provided sufficient trustworthiness to justify a hearsay

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5. *See infra* Part III.

6. *See e.g.*, 4 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE ¶ 803(1)[01] (repl. ed. 1996); Teree E. Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 LOY. U. CHI. L.J. 299, 300-06 (1979); Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 870-75 (1981); Kathryn E. Wohlsen, Note, *The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 DICK. L. REV. 347, 347-51 (1977).

7. *See* James Bradley Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae* (pts. 1-3), 14 AM. L. REV. 817 (1880), 15 AM. L. REV. 1, 71 (1881). Like the doctrine of *res gestae* itself, the article is misty about the present sense impression, discussing also what today would be excited utterances, verbal acts, states of mind, dying declarations, and present body conditions, among other routes around a hearsay objection. *See id.* pt.3, at 80-107.

8. *Id.* pt. 3, at 107. The case that inspired Thayer's article involved the murder of the defendant's mistress, who staggered from her home with her throat slit and uttered, "See what Bedingfield has done to me." *Id.* pt. 3, at 96. The statement—rejected as a dying declaration for lack of foundation of knowledge of impending death—is doubtful as a present sense impression because it was uttered some time after the event was complete, yet seems to be the classic excited utterance. Federal Rule of Evidence 803(2) excepts from the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

9. *See* Thayer, *supra* note 7, pt. 3, at 80-107.

exception.[10] Wigmore believed sufficient trustworthiness for the statement came only with an event creating shock and excitement.[11] In other words, Wigmore accepted the excited utterance but not the present sense impression. For the next half-century, most commentators followed Thayer's path accepting the present sense impression, but most courts followed Wigmore's path accepting only the excited utterance.[12]

Despite the courts general rejection of, or at least indifference to, the present sense impression, the committee drafting the Model Code of Evidence during the late 1930s and early 1940s, under the leadership of reporter Edmund Morgan,[13] included both the excited utterance and the present sense impression in the tentative drafts proposed to the American Law Institute.[14] The ALI accepted both:

> Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made
>
> (a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter; or
>
> (b) while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains.[15]

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10. *See* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1747, 1757 (Chadbourn rev. 1976). Wigmore wrote that admitting hearsay "simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test and to remove all limits of principle." *Id.* § 1757, at 238.

11. *See id.* § 1757, at 238-40.

12. *See generally* EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 342 (1963); GLEN WEISSENBERGER, FEDERAL EVIDENCE § 803.1 (2d ed. 1995); Foster, *supra* note 6, at 304-05; Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 U. FLA. L. REV. 215, 221-22 (1989); Waltz, *supra* note 6, at 875; Wohlsen, *supra* note 6, at 351.

The well-known case of *Houston Oxygen Co. v. Davis*, 161 S.W.2d 474, 476-77 (Tex. 1942), has often been discussed as an early case recognizing the present sense impression. *See, e.g.*, FED. R. EVID. 803 advisory committee's note. This opinion may, however, have received more attention than its due. The statement was an exclamation by a passenger in a car when another car whizzed past at high speed (the differential in speed of the two cars was probably large because of wartime speed limits). *See* 161 S.W.2d at 476-77. As can be seen, the statement could easily have fit the excited utterance exception. The language of the court did not place the statement into the excited utterance exception, yet neither did it develop a coherent analysis of a present sense impression. The fame of the case may be attributable more to commentary than analysis by the court.

A few other states also recognized the present sense impression by court decision, although all of these cases could well have fit snugly within the excited utterance. *See* State v. Smith, 285 So. 2d 240, 244 (La. 1973) (Louisiana); Commonwealth v. Coleman, 326 A.2d 387, 389 (Pa. 1974) (Pennsylvania); Marks v. I. M. Pearlstine & Sons, 26 S.E.2d 835, 838-39 (S.C. 1943) (South Carolina).

13. *See* MODEL CODE OF EVIDENCE at III (1942).

14. *See* 18 A.L.I. PROC. 165 (1941); MODEL CODE OF EVIDENCE Rule 512 (1942).

15. MODEL CODE OF EVIDENCE Rule 512 (1942). This rule received almost no attention from the ALI in plenary session. The only mention of the rule during the three

The states universally rejected the Model Code of Evidence, sometimes with vehemence.[16] The Model Code failed badly for two primary reasons: it went a long way toward abolishing the hearsay rule,[17] and it placed great discretion in the trial judge to accept or reject evidentiary offers and in the jury to evaluate them.[18]

Even though the Model Code was rejected, the phrase "or immediately thereafter" for the first time appeared as part of the present sense impression exception to the hearsay rule.[19] The origin of the phrase cannot be determined, but in all likelihood Morgan borrowed it from the dominant evidence writer of the time, Wigmore, who opined as early as 1904 in his treatise that "spontaneous exclamations" should be excepted from the hearsay rule: "The typical case presented is a *statement or exclamation, by an injured person, immediately after the injury, declaring the circumstances of the injury*, or *by a person present at an affray*, a railroad collision, or other exciting occasion, asserting the circumstances of it as observed

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years the ALI debated the proposed evidence code was the following statement of Professor Morgan presenting the rule: "Subdivision (b) is accepted now almost everywhere. Subdivision (a) is not accepted in a number of jurisdictions. Subdivision (a) is what Mr. Thayer thought represented the law with reference to this matter; Subdivision (b) is Mr. Wigmore's view of it; we adopt both." 18 A.L.I. PROC. 165 (1941).

16. *See* James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 945 (1962).

17. *See* Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 205 (1960). Rule 503 of the 1942 Model Code of Evidence provided "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination." So any hearsay statement from an unavailable declarant would be admitted, as would one from a declarant available and present for cross-examination. What hearsay would remain inadmissible between these two provisions is difficult to imagine; only a statement from an available, yet uncalled, witness would be proscribed. Clause (a) was recognized to be "more liberal than any existing legislation"; and clause (b), to have "some support in the recent authorities." MODEL CODE OF EVIDENCE Rule 503 advisory committee's note.

Thirty years later the drafters of the Federal Rules of Evidence encountered the same opposition to changing the well-recognized rule excluding hearsay with many specific exceptions admitting it. Consequently, they decided to keep the common law system of the rule with its exceptions mostly intact. *See* FED. R. EVID. art. VIII advisory committee's note.

18. Reporter Morgan elucidated the overall philosophy of the Model Code:

> The Code of Evidence therefore proceeds upon the theory that it is to be administered by an honest and intelligent judge; and that the trier of fact, whether or not a jury, has the capacity and desire to hear, consider and fairly evaluate all data which reasonable men would use if confronted with the necessity of solving a problem of like importance in their everyday life.

Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 10 (1942). Of the judge, Morgan stated, "The proposed Code leaves no room for doubt as to the power of the trial judge. His historic role as master of the trial is restored. He has complete control of the conduct of the trial." *Id.* at 13. Of the jury, Morgan stated, "Rule 503, like the rest of the Code, treats the jurors as normal human beings, capable of evaluating relevant material in a court-room as well as in the ordinary affairs of life." *Id.* at 48. These attitudes contributed to rejection of the Model Code. Quick, *supra* note 17, at 217.

19. MODEL CODE OF EVIDENCE Rule 512 (1942).

by him."[20] In reading this language, one must keep in mind Wigmore wrote of the excited utterance; he did not accept the present sense impression as sufficiently trustworthy to be a separate exception to the hearsay rule.[21] To the extent that Morgan may have borrowed the words "immediately after" from Wigmore, he borrowed from the wrong exception.

In 1953, less than a decade after the failure of the Model Code, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Rules of Evidence.[22] The Uniform Rules were drafted from the Model Code, and indeed Morgan was once again the reporter.[23] In the area of spontaneous statements, the drafters crafted a narrower present sense impression, a similar excited utterance, and a broad new statement of recent perception. These three exceptions were placed into the same rule:

> *Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally.* A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.[24]

The present sense impression in the Uniform Rules, part (a), was narrower than the Model Code, omitting the troublesome "immediately thereafter" language; the excited utterance, part (b), was similar albeit written in more sparing language; the statement of recent perception, part (c), introduced a new and particularly questionable exception.[25] The Uniform Rules of Evidence, adopted in

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20. 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1746, at 2248 (1904). The same language has continued in the treatise to the present. WIGMORE, *supra* note 10, § 1746, at 194.

21. *See* WIGMORE, *supra* note 10, § 1757, at 238-40.

22. UNIF. R. EVID. (1953).

23. *See* UNIF. R. EVID. prefatory note at 161-62 (1953).

24. UNIF. R. EVID. 63(4) (1953).

25. The statement of recent perception "is new and represents a carefully considered middle ground between the liberal extreme of the A.L.I. Model Code of Evidence and the ultra conservative attitude opposing any liberalization in the exceptions to the rule against hearsay." UNIF. R. EVID. 63(4) cmt. (1953). The drafters recognized the proposed rule stretched the hearsay doctrine and so placed four separate safeguards on the statement: (1) the declarant must be unavailable, (2) the statement must have been made "while his recollection was clear," (3) it must have been made "in good faith," and (4) it must have been made "prior to the commencement of the action." *Id.* The drafters further stated the rule "is drafted so as to indicate an attitude of reluctance and require most careful scrutiny

only four states,[26] had little more success than did the Model Code of Evidence.

This general rejection of the Uniform Rules had little to do with the present sense impression, although the history of rejection highlights that Federal Rule of Evidence 803(1) was the first successful adoption of the exception. The drafters of the Federal Rules of Evidence, following Thayer and Morgan instead of Wigmore, included the present sense impression as the first-listed exception to the hearsay rule, rule 803(1). The drafters followed the language of the Model Code of Evidence rather than the Uniform Rules of Evidence in including the last three words, "or immediately thereafter." Despite vigorous opposition from the organized bar and others,[27] Congress accepted the rule.

Accordingly, the present sense impression has been available in federal courts for twenty-five years. A review of every one of the reported federal cases,[28] as well as a substantial sampling of the reported state cases,[29] decided in this quarter-century leads to two

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in admitting hearsay statements under its provisions." *Id.* Despite these limiting safeguards and even given a court's "attitude of reluctance," one can seriously question the reliability of a statement of recent perception on memory and insincerity grounds. This note will not be extended to do so since this Article analyzes the present sense impression, not a statement of recent perception.

The advisory committee in 1969, and the Supreme Court in 1972, included the statement of recent perception in the proposed Federal Rules of Evidence as one of the exceptions requiring that the witness be unavailable:

> A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

FED. R. EVID. 804(b)(2), *in* 34 L. Ed. 2d (Issue 5 of the Advance Pamphlet) 1, 111 (1975)) (deleted by Congress). The proposal created strong positions pro and con. *See e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 479, at 722 nn.45-46 (collecting arguments); Chadbourn, *supra* note 16; Note, *Rule 8-04(b)(2) of the Proposed Federal Rules of Evidence: A Step Too Far?*, 4 VAL. U. L. REV. 327, 328-32 (1970). The House of Representatives deleted the proposed rule as "a new and unwarranted hearsay exception of great potential breadth," not having "sufficient guarantees of trustworthiness to justify admissibility." H.R. REP. NO. 93-650, at 6 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075.

Despite this later rejection, five states adopted the exception from the proposed rules. *See* Kenneth E. Kraus, Comment, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, 1985 WISC. L. REV. 1525, 1527. One commentator reported experience with the exception to be positive. *See id.* at 1544.

26. CAL. EVID. CODE § 1240 (repealed 1965); KAN. STAT. ANN. § 60-460(d)(1) (1964); N.J.R. EVID. 63(4)(a) (replaced 1993); UTAH R. EVID. 63(4)(a) (replaced 1983). The only one of these remaining in force is the Kansas statute.

27. *See* Imwinkelried, *supra* note 12, at 231 & nn.145-47.

28. The following information is derived from a search of Rules 801-03 Notes of Decisions, 28 U.S.C.A. app. (West 1984 & Supp. 2000), and Rules 801(d)-803(5), Notes of Decisions, FED. R. EVID. DIGEST (Lwyrs. Co-op. 1995 & Supp. 2000).

29. These were searched using the Notes of Decisions to UNIF. R. EVID. 803(1), 13B U.L.A. 269 (2000 & Supp. 2000).

observations. First, the present sense impression exception is seldom used. Far fewer than 100 reported federal cases discuss the exception, and fewer than half of those discuss the time lapse allowable by "immediately thereafter." Many of the opinions admitting present sense impressions are arguably dicta since the statements are also admitted as excited utterances. Given that there are 108 federal courts (ninety-four districts, thirteen courts of appeals, and the Supreme Court), the numbers average out to less than one case per court per twenty-five years. The Supreme Court has never decided a present sense impression case. Reported state present sense impression cases are also few and far between. Of course, this does not reveal whether the exception has been useful in the unreported, day-to-day trial of cases, which cannot practically be determined, but it surely shows that the present sense impression has not been the bold new exception many anticipated.

Second, a surprising number of the present sense impression cases—roughly two-thirds—are criminal cases. Since most of these reported cases are on appeal, and because only the defendant can appeal, the statements were offered by the prosecution. These observations are not offered as evaluative, but as descriptive of how courts actually use the present sense impression exception.

III. RELIABILITY OF THE PRESENT SENSE IMPRESSION

Commentators agree hearsay is inadmissible because it presents four testimonial dangers: misperception, faulty memory, insincerity, and mistransmission.[30] To illustrate, a person (declarant) observes an event or condition and reports on it (makes a declaration) to a second person (witness) who later repeats the statement in court. The out-of-court declaration, offered for the truth of the matter it asserts, is suspect for four separate reasons. The declarant may have misperceived the event originally. The declarant may have perceived correctly yet suffered memory loss about the event before making the out-of-court declaration to the witness. The declarant may have lied to the witness about the event. The witness may have misunderstood declarant's report of the event. While these dangers exist for every witness, hearsay is deemed inadmissible because the declarant is not under oath, not in the presence of the jury, and cannot be cross-examined.[31] The inability to cross-examine the witness is widely viewed as the chief justification of the rule.[32]

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30. *See, e.g.*, Foster, *supra* note 6, at 324; Imwinkelried, *supra* note 12, at 216-17.

31. *See* MCCORMICK ON EVIDENCE § 245, at 374 (John William Strong ed., 5th ed. 1999) [hereinafter MCCORMICK ON EVIDENCE].

32. *See id.*

The present sense impression poses only two of these four hearsay dangers, and so it is thought reliable enough to warrant an exception to the hearsay rule.[33] While dangers of misperception[34] and mistransmission remain, the dangers of memory loss and insincerity are eliminated or greatly reduced.[35]

A. Memory Loss

The present sense impression brings with it no hearsay danger of memory loss.[36] So long as the statement is uttered while the declarant is perceiving the event or condition, the declarant's memory cannot be involved. Of course, this holds true only so long as the event and the statement are fully contemporaneous. No time delay between the event and the statement can be tolerated or memory problems arise.

People, including testifying witnesses and hearsay declarants, forget quickly. Early studies reported a memory loss of roughly two-thirds of information within a day.[37] Recent studies raise even more serious doubt about the rapidity and degree of memory loss.

First, declarants forget quickly. To test this, one study showed subjects a three-minute videotape that included depiction of a theft from an unattended purse in a snack bar.[38] The subjects then unscrambled words for four minutes in order "to interrupt short-term memories of the events and people depicted in the film, thus better approximating naturalistic conditions in which an eyewitness encounters a time delay before being asked specific memory questions."[39] The subjects next answered thirty-two memory

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33. *See, e.g.*, Foster, *supra* note 6, at 324.

34. Like its cousin the excited utterance, the present sense impression ignores potentially large perception problems. *See, e.g.*, Foster, *supra* note 6, at 324-26; Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 27-29 (1987).

35. The technique of triangulating hearsay and hearsay exceptions into left-leg dangers and right-leg dangers was introduced in Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1975). Tribe found that most hearsay exceptions alleviate either both left-leg dangers (insincerity, mistransmission) or both right-leg dangers (misperception, memory loss); he concluded "*one good leg is enough*." *Id.* at 966. The present sense impression—like the excited utterance—forms an odd combination. Its trustworthiness results from elimination, or at least substantial alleviation, of one left-leg danger (insincerity) and one right-leg danger (memory loss). *See* Foster, *supra* note 6, at 324 n.89. Consequently, it has neither one bad leg nor one good leg.

36. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 31, § 271; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.03[1] (Joseph M. McLaughlin ed., 2d ed. 1998); Foster, *supra* note 6, at 313-14.

37. *See* Dillard S. Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391, 393 (1933); Imwinkelried, *supra* note 12, at 227.

38. *See* Michael D. Robinson et al., *Reaction Time and Assessments of Cognitive Effort as Predictors of Eyewitness Memory Accuracy and Confidence*, 82 J. APPLIED PSYCH. 416, 418 (1997).

39. *Id.*

questions, such as "What was the thief doing before the female teacher entered the snack bar?"[40] The subjects given four multiple-choice responses were fifty-seven percent accurate, and the subjects given open-ended questions were fifty-one percent accurate.[41] In other words, persons who were aware they would be tested on their observations of a discrete, specific event were able to answer correctly little more than half of the questions after a time delay of less than five minutes.

Second, other psychological effects contribute to faulty memory when time passes between an event and the report. The witness may confabulate. Confabulation is an effort by the subconscious mind to fill memory gaps to complete a consistent story;[42] "'gap filling' may provide an explanation for behaviors or impulses that seem reasonable, innocuous, and accurate but that are erroneous."[43] The witness may succumb to misinformation effect: "Information presented after an event can change a person's report of that event."[44] Many studies show that when an eyewitness receives false information from another source before reporting on the event, the witness may report the false information: for example, a witness who saw an armed robber with a silver hammer, then heard someone else state the robber had a screwdriver, may report the robber had a screwdriver.[45] Needless to say, neither confabulation nor the misinformation effect can occur when the declarant/witness makes a statement while perceiving an event. Memory is not involved.

These studies show potentially severe memory problems of multiple types can and do begin to assert themselves shortly after an event is perceived. Traditional concerns about the hearsay danger of memory loss are well grounded. To the extent that the present sense impression is not strictly contemporaneous, that is, not strictly present tense, these memory problems can arise. When the statement is strictly contemporaneous, the memory danger vanishes.

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40. *Id.*

41. *See id.* at 419.

42. *See* CHARLES V. FORD, LIES! LIES!! LIES!!! THE PSYCHOLOGY OF DECEIT 58-59 (1996).

43. *Id.* at 60.

44. Elizabeth F. Loftus et al., *Creating New Memories that Are Quickly Accessed and Confidently Held*, 17 MEMORY & COGNITION 607, 607 (1989).

45. *See* Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 J. EXPERIMENTAL PSYCH.: GEN. 100, 100 (1989) (collecting studies). *See generally* Imwinkelried, *supra* note 12, at 224-27, on the many types of memory problems that can assert themselves.

B. Insincerity

Insincerity—declarant lies—is probably the danger of most concern for any hearsay statement.[46] The present sense impression alleviates the hearsay danger of insincerity because the declarant has little or no time to fabricate a lie.[47] This guarantee of trustworthiness is closely akin to the excited utterance. The witness perceives an event; the witness blurts out a statement concerning the event. Conceivably, a clever prevaricator can have a previously prepared cadre of falsehoods to utter while an event is taking place, but that possibility is small to the point of nonexistence. A witness suddenly or unexpectedly confronted with an event is almost certain to blurt out a truthful sense impression about that event.

As with memory, truth follows only when the event and the statement are strictly contemporaneous. People can form lies quickly. Old and new studies agree that less than one second is required to fabricate a lie. According to an early collection of social science studies, reaction times between the time of an event and attempts at deception can range from .83 seconds to 32 minutes.[48] Thus, a clever liar was able to lie within one second of an event. Another early article stated that the time required to lie is "from 1/10 of a second to 5 seconds, rarely as long as a minute," so "conscious or unconscious falsification is measured in stopwatch time intervals rather than in minutes."[49]

Two relatively recent studies confirm that response latency, that is, the time between the event and the statement, can be less than one second for a lie. One research team reported the following

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46. *See* 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6333, at 85 (1997).

47. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 31, § 271; WEINSTEIN & BERGER, *supra* note 36, § 803.03[1]; Foster, *supra* note 6, at 314; Note, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 NW. U. L. REV. 666, 668-69 (1976) [hereinafter *The Present Sense Impression*].

48. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 436-37 (1928). The two primary studies used were Herbert Sidney Langfield, *Psychophysical Symptoms of Deception*, 15 J. ABNORMAL PSYCH. 319, 325 (1920), and William M. Marston, *Reaction-Time Symptoms of Deception*, 3 J. EXPERIMENTAL PSYCH. 72, 87 (1920). Hutchins & Slesinger argued the time interval allowed should be in the discretion of the trial judge, but they also said that discretion was likely to be fallible. Hutchins & Slessinger, *supra*, at 437. Consequently, they concluded, "[i]n order more fully to guard against deceit, a good deal of reliance is placed on shock, and the emotion generated thereby, provided it is severe enough to still the reflective faculties." *Id.* Clearly the authors were writing of excited utterances, not present sense impressions.

49. Quick, *supra* note 17, at 210 & n.24. The author based this conclusion both on Hutchins & Slesinger, *supra* note 48, and on advice from the members of the psychology department at Wayne State University. *See* Quick, *supra* note 17, at 210 n.24. These conclusions have been cited with approval in WEISSENBERGER, *supra* note 12, § 803.3; Foster, *supra* note 6, at 315; Goldman, *supra* note 34, at 30; and *The Present Sense Impression*, *supra* note 47, at 669.

response latency times: for a previously prepared lie, .8029 seconds; for a truthful statement, 1.6556 seconds; and for a spontaneous lie, 2.967 seconds.[50] That means the truth took longer to get out than a previously conceived lie, and that even a lie fabricated on the spur of the moment required less than three seconds to create and utter. These results are consistent with another study that looked at two variables: response latency and Machiavellianism.[51] Machiavellianism is not relevant for our purposes other than to note it measures the willingness of a person to manipulate others.[52] A person with a high score in Machiavellianism (a high "Mach") is more willing than a person with a low Mach score to manipulate others, and this probably includes lying to them.[53] Response latencies for prepared lie responses averaged .81 seconds for high Machs and .73 seconds for low Machs; the response latencies for truthtellers were 1.17 seconds and 1.48 seconds for high and low Machs, respectively; and the response latencies for spontaneous lie responses were 1.35 seconds and 1.78 seconds for high and low Machs, respectively.[54] In this study, again all prepared liars were quicker than all truthtellers, and some spontaneous, manipulative liars were even quicker than some nonmanipulative truthtellers. The slowest subjects to fabricate, nonmanipulative spontaneous liars, required fewer than two seconds to fabricate a lie. These results should be disturbing to courts and commentators who believe the time lapse allowed for a present sense impression should be flexible and within the discretion of the trial judge.[55]

Liars may be detected by their demeanor,[56] but this method is inapplicable for the present sense impression hearsay exception since the declarant utters the statement out-of-court, beyond the

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50. *See* John O. Greene et al., *Planning and Control of Behavior During Deception*, 11 HUMAN COMMUN. RES. 335, 350-59 (1985).

51. *See* Henry D. O'Hair et al., *Prepared Lies, Spontaneous Lies, Machiavellianism, and Nonverbal Communication*, 7 HUMAN COMMUN. RES. 325, 327-29 (1981).

52. *See id.* at 329.

53. *See id.*

54. *See id.* at 334-35 tbls.3 & 5.

55. *See e.g.*, *infra* text accompanying notes 65-66.

56. The literature on detection of deception is substantial. The great bulk of it discusses evaluation of nonverbal communication. Scholars advise observing voice pitch, speech rate, hand to mouth gestures, scissoring legs, and the like. All of these behaviors are nonverbal and will be undetectable in an out-of-court statement. One writer advises to detect deception by observing "postural shifts, gaze avoidance, and amount of smiling; response latency, fundamental frequency, and answer length; and consistency, plausibility, and social desirability of answer." W. PETER ROBINSON, DECEIT, DELUSION, AND DETECTION 114 (1996). While "answer length[,] . . . and consistency, plausibility, and social desirability of answer" may appear from the report of an out-of-court statement, the other detection clues are completely nonverbal and therefore of no use to the trier of fact, given that the declaration is out of court. *Id.*

observation of the trier of fact.[57] The declarant need not be available to testify. Consequently, the only guarantee of sincerity of the present sense impression is strict contemporaneity. Because social science demonstrates that liars fabricate lies with amazing rapidity, contemporaneity must mean exactly that: a time lapse between the event and the statement cannot be tolerated. A present sense impression must be uttered before "Hey, wait just a second" kicks into consciousness.

IV. FEDERAL COURT DISREGARD OF CONTEMPORANEITY

A. A Brief Overview

The federal rule provides an exception to the hearsay rule for "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[58] The drafters of this rule intended the present sense impression to require contemporaneity.[59] The last three words were added to recognize the slight lapse of time the brain requires to convert thought to words.[60] Yet the drafters could have been much clearer about the intent of their language; they said only "Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable."[61] The intent seems to have been that the words "immediately thereafter" included only the fraction of a second needed to allow the mind to form the perceptive thought and the mouth to utter it. Most commentators have so interpreted the rule, and have opined that the time lapse requirement should be enforced with rigor.[62] These commentators agree the time lapse allowable is only that "slight lapse" before reflective thought intervenes.

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57. Perhaps this is one reason several courts and commentators emphasize that a present sense impression will likely be made to another person who can witness the same event (and presumably report on the nonverbals of the declarant). *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 31, § 271; MUELLER & KIRKPATRICK, *supra* note 25, § 434, at 383; WEINSTEIN & BERGER, *supra* note 36, § 803.03[1].

58. FED. R. EVID. 803(1).

59. *See* FED. R. EVID. 803(1) advisory committee's note.

60. *See id.*

61. *Id.*

62. "While principle might seem to call for a limitation to exact contemporaneity, some allowance must be made for the time needed for translating observation into speech. Thus, the appropriate inquiry is whether sufficient time elapsed to have permitted reflective thought." MCCORMICK ON EVIDENCE, *supra* note 31, § 271, at 475.

> The phrase "immediately thereafter" accommodates the human realities that the condition or event may happen so fast that the words do not quite keep pace, and proving a true match of words and events may be impossible for ordinary witnesses, so it would be foolish to require a statement to be truly simultaneous with the event or condition. The exception allows enough flexibility to reach statements made a moment after the fact, where a small

The trial judge will always have some discretion to decide whether the time lapse is so long as to allow reflection, that is, time for memory loss and fabrication.[63] That discretion should not, however, exceed the time it takes for the second hand to pass once around the clock. A judge mindful of both hearsay theory and the speed of prevaricators will be even more demanding and not allow a time lapse beyond a handful of seconds.

Twenty-five years of reported decisions applying federal evidence rule 803(1) show that the federal courts are generally willing to ignore the strict contemporaneity requirement and approve the admission of statements made far more than a few seconds after an event.[64] The federal courts have been admitting past sense impressions, or what might be called stale sense perceptions. The general attitude appears to have been set by an early case that admitted a statement made at an unknown time, up to twenty-three minutes after the event: the court asserted, "There is no *per se* rule indicating what time interval is too long under Rule 803(1)."[65] This quotation, which has been repeated by other federal courts,[66] is facially correct but greatly misleading. While the rule does not specify a time interval and even contemplates a "slight lapse" of time,

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> delay or "slight lapse" (to use the phrase in the ACN) is not enough to allow reflection, which would raise doubts about trustworthiness.

MUELLER & KIRKPATRICK, *supra* note 25, at 384-85.

> The phrase "immediately thereafter" is intended to accommodate the pragmatic realization that an event may be so fleeting in time as to preclude simultaneous comment, and it consequently permits flexibility in admitting statements made moments after the event where a slight lapse in time appears natural under the circumstances. The time elapsed between the statement and the event must be sufficiently short to indicate a lack of reflection . . . .

WEISSENBERGER, *supra* note 12, at 436.

> It is too much to ask for instantaneousness since not even the "simultaneous" language translations at United Nations sessions are precisely that; the circuit from eye or ear (or nose or fingers) to brain to mouth may take a few seconds, especially when the declaration transmitted to and emitted from the mouth is a calm one, and people's reaction time can vary. However, 803(1)'s language, rationale, and history do strongly suggest that, absent some special corroborative circumstance, there should be no delay beyond an acceptable hiatus between perception and the cerebellum's construction of an uncalculated verbal description.

Waltz, *supra* note 6, at 880.

63. *See, e.g.*, ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK § 4.11 (1991); WEINSTEIN & BERGER, *supra* note 36, at § 803.03[2].

64. *See infra* text accompanying notes 67-75.

65. United States v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979).

66. *See, e.g.*, United States v. Hawkins, 59 F.3d 723, 730 (8th Cir. 1995), *judgment vacated on other grounds*, 516 U.S. 1168 (1996); United States v. Parker, 936 F.2d 950, 954 (7th Cir. 1991); United States v. Santos, 65 F. Supp. 2d 802, 823 (N.D. Ill. 1999), *rev'd*, 201 F.3d 953, 964 (7th Cir. 2000) (finding that the typewritten report of the meeting was admissable as present sense impression, but a handwritten note attached to the typewritten report did not qualify as a present sense impression and was thus inadmissible).

the intent and spirit of the rule is that admissibility ends with the exceedingly short time period before reflective thought can occur.

While twenty-three minutes appears to be the longest "slight lapse" allowed, other decisions have approved the admission of present sense impressions uttered a few seconds,[67] one minute,[68] three to five minutes,[69] five minutes,[70] seven minutes,[71] five to ten minutes,[72] ten minutes,[73] fourteen and one-half minutes,[74] and at least eighteen minutes[75] after the event. Other federal cases have rejected offers of present sense impressions because they involved too great a time lapse; these cases ranged from a low of ten minutes to a high of two days, so they presented rather easier decisions.[76]

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67. *See* United States v. Portsmouth Paving Corp., 694 F.2d 312, 323 (4th Cir. 1982) (stating that within "no more than a few seconds," declarant had laid down telephone and described the conversation).

68. *See* United States v. Montero-Camargo, 177 F.3d 1113, 1124 (9th Cir. 1999) (stating that a passing motorist's tip to border patrol guards had been made "about a minute" after he observed the event), *amended by* 183 F.3d 1172 (9th Cir. 1999), *and withdrawn, reh'g en banc granted*, 192 F.3d 946 (9th Cir. 1999), *and reinstated in part*, 208 F.3d 1122 (9th Cir. 2000) (en banc), *cert. denied sub nom.* Sanchez-Guillen v. United States, 121 S. Ct. 211 (2000).

69. *See Parker*, 936 F.2d at 954 ("Parker walked a short distance to the foot of an escalator, where the officers asked her four or five questions. The group then walked 100 feet or so to the baggage area, where the redcap made his statements [that defendant had given him a bag containing drugs].")

70. *See* Coleman v. Howell, 20 Fed. R. Evid. Serv. (CBC) 327, 328, 330-31 (4th Cir. 1986) (unpublished opinion noted at 785 F.2d 304) (describing how three men in a car accused of having run a truck off the road five minutes earlier said, "It wasn't us, it wasn't us. There's another car down there in the woods with the truck. It blew a tire and went over in front of the truck.").

71. *See Hawkins*, 59 F.3d at 730 (noting that seven minutes had elapsed from neighbor's report of a disturbance to the time of the declarant's statement on a 911 call).

72. *See* United States v. Santos, 65 F. Supp. 2d 802, 823, 825 (N.D. Ill. 1999) (describing how declarant returned to her desk and prepared a report of the meeting), *rev'd*, 201 F.3d 953, 964 (7th Cir. 2000) (finding that the typewritten report of the meeting was admissable as present sense impression, but a handwritten note attached to the typewritten report did not qualify as a present sense impression and was thus inadmissible).

73. *See* Miller v. Crown Amusements, Inc., 821 F. Supp. 703, 705-07 (S.D. Ga. 1993) (stating that the 911 caller reported a description of a hit-and-run truck after driving 6.3 miles to a telephone).

74. *See* United States v. Obayagbona, 627 F. Supp. 329, 334, 339-40 (E.D.N.Y. 1985) (stating that a surveillance tape showed that fourteen and one-half minutes had elapsed between the drug deal and the agent's describing the defendant to other agents).

75. *See* United States v. Mejia-Velez, 855 F. Supp. 607, 613-14 (E.D.N.Y. 1994) (noting that a first 911 call came two minutes after event and a second 911 call sixteen minutes after the first).

76. *See, e.g.*, United States v. Mitchell, 145 F.3d 572, 576-77 (3d Cir. 1998) (rejecting an anonymous note found on a car windshield forty minutes after robbery because the time elapsed was "probably too long," although "the temporal limitation might have been satisfied" had the note been left prior to a 911 call, itself at least twenty-two minutes after the robbery); Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 890 (9th Cir. 1991) (rejecting the statement of by-then deceased who temporarily awoke from coma and spoke two days after a bicycle accident); Rock v. Huffco Gas & Oil Co., 922 F.2d 272, 280 (5th Cir. 1991) (accident report made two days later); United States v. Cruz, 765 F.2d 1020, 1024-25

B. Odd Notions of Contemporaneity

The opinions that approve the admission of stale statements do not engage in an analytical approach to the hearsay dangers and the principles behind the present sense impression exception. Rather, they grasp the "immediately thereafter" language and tug and knead it into their own catch phrases, none of which truly require contemporaneity to prevent time for reflective thought. One case admitted the report of a 911 caller "describing the shooting and the defendant's appearance *almost immediately* after defendant fled the [scene]."[77] Yet the caller had time enough to think to go to a telephone, dial 911, and make a report.

A second case involved arson of a house owned by one J.T. Mills.[78] Police attempted to call Mills at his new house at one in the morning, fifteen minutes after the fire, to notify him of the fire.[79] The person answering the telephone made a quick search and stated "J.T. Mills is not home."[80] This statement was "made *virtually on the heels* of the discovery that Mills was not at home."[81] This result may be acceptable on the theory that "J.T. Mills is not home" is reporting a continuing present condition, yet the declarant had plenty of time to think about what response to make before returning to the telephone.

(11th Cir. 1985) (disapproving, yet affirming as harmless error, the admission of an agent's identification of a cocaine supplier about an hour after the sale); United States v. Cain, 587 F.2d 678, 681 (5th Cir. 1979) (rejecting a citizens' band radio report linking defendants to an abandoned car received when they were seen walking five to six miles away from it); Hilyer v. Howat Concrete Co., 578 F.2d 422, 426 n.7 (D.C. Cir. 1978) (rejecting as a present sense impression a statement made fifteen to forty-five minutes after the accident, but admitting it as an excited utterance); United States v. Hamilton, 948 F. Supp. 635, 639 (W.D. Ky. 1996) (calling the identification of a drug dealer ten minutes later a close question); Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 620-21 (D.N.J. 1982) (rejecting complaints to a consumer hot line made an indeterminate time after the event); United States v. Narciso, 446 F. Supp. 252, 288 (E.D. Mich. 1977) (rejecting a patient identification of a nurse dispensing medications two hours after the event).

77. United States v. Campbell, 782 F. Supp. 1258, 1261 (N.D. Ill. 1991) (emphasis added). The court reasoned as follows:

> Although the incident in the drug store was complete when Wilson called "911," he made the telephone call, describing the shooting and the defendant's appearance almost immediately after defendant fled the store. Any delay between the event and the telephone call does not suggest that there was time for Wilson to consciously reflect and to fabricate a story. Accordingly, the contemporaneous requirement is satisfied here.

Id. The delay between the time of the event and the time of the statement described in the excerpt contrasts sharply with another statement, this one a true present sense impression, admitted in the same case: the latter statement was a 911 report in which a police officer reported his route and actions as he was actually chasing the defendant. *See id.* at 1259-60.

78. *See* First State Bank v. Maryland Cas. Co., 918 F.2d 38 (5th Cir. 1990).

79. *See id.* at 40.

80. *Id.* at 41.

81. *Id.* at 42 (emphasis added).

A third case involved a prosecution for perjury in which the transcript failed to show the defendant had been sworn.[82] The only evidence of an oath consisted of the "informal notes" of the recording secretary made "*close to the time* of the event."[83] How much time passed from the oath taking to the note writing cannot be determined from the case.

A fourth case involved a defendant arrested for transporting cocaine and phenacyclidine (PCP).[84] The evidence linking the defendant to the bag was the hearsay declaration of a train station redcap (a porter) made at least three and probably more than five minutes after the event.[85] The court said the interval between the event and the statement "*was extremely short*"[86]—which is badly inaccurate—and that the "redcap's statements were sufficiently contemporaneous to satisfy the requirements of Rule 803(1)"[87]—which is better but still inaccurate. The court buttressed its decision by noting the redcap had no motivation to lie, which may or may not have been accurate, but failed to note his memory may have been faulty.[88] The redcap certainly had time to contemplate what he would say as the police and the defendant engaged in their colloquy and then approached him.[89] In the fifth case, an informer purchased guns from the defendant and so stated when he next turned them over to the police officer who had observed the buy.[90] The statement about the guns "was made immediately after he had purchased them from [the defendant]. All the events were *part of a single, continuous event*."[91] Since the buy and the transfer to the police were all part of the same event, the statement was strictly present tense, said the court.[92]

The reasoning in this last case would be particularly destructive to the trustworthiness of a present sense impression since the

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82. *See* United States v. Kehoe, 562 F.2d 65, 70 (1st Cir. 1977).

83. *Id.* (emphasis added).

84. *See* United States v. Parker, 936 F.2d 950 (7th Cir. 1991).

85. *See id.* at 954. The time lapse between the event and the hearsay statement is an estimate based on the following facts: "[A]fter showing the redcap her bag, Parker walked a short distance to the foot of an escalator, where the officers asked her four or five questions. The group then walked 100 feet or so to the baggage area, where the redcap made his statements." *Id.*

86. *Id.* (emphasis added).

87. *Id.* Apparently the redcap was unavailable to testify or the court would have been presented with an easy case. Instead of inquiring what bag the defendant had left with him, the redcap could instead have been asked what the defendant said at the time of checking the bag. The defendant's own statement would of course have been an admission. *See* FED. R. EVID. 801(d)(2)(A).

88. *See Parker*, 936 F.2d at 954.

89. *See id.*

90. *See* United States v. Beck, 122 F.3d 676 (8th Cir. 1997).

91. *Id.* at 682 (emphasis added).

92. *See id.*

definition of an "event" would be almost infinitely elastic. Any event could be defined to include a series of actions so that a statement made at the end of the series would be contemporaneous with the early part of the "event." If a gun buy followed by a transfer to police followed by a statement to police is part of a single event, then an auto accident followed by a trip to the hospital followed by a statement to an investigating attorney is part of a single event. The present sense impression would gobble up a goodly portion of the hearsay rule.

Another grouping of federal cases admitted similarly stale statements by reliance on odd notions of contemporaneity instead of reliance on "immediately thereafter." In the first case, an unidentified 911 caller who drove 6.3 miles to the nearest telephone to report the description of a truck in a hit-and-run accident made a "*substantially contemporaneous*" statement.[93] Surely the caller—whose identity and possible interest were unknown—must have been rehashing, rehearsing, and recasting the report for the entire 6.3-mile drive. For all we know, another person was with him and the two were debating what they had seen. In a second case, three calls made by two witnesses were admitted as "*substantially contemporaneous*" with the shooting they reported.[94] One of the three calls was made two minutes after the end of the first, and a third call sixteen minutes after completion of the second.[95] A third court in dictum said the rule requires a statement be made "*virtually contemporaneously*" and rejected a statement made as much as forty minutes after the event; yet the rejection was for lack of evidence of personal knowledge by the maker of the statement, not for the time lapse.[96] In a fourth case, a statement by an undercover agent that the defendant had furnished drugs to him fourteen and one-half minutes earlier was admitted as a prior consistent statement of a witness, an excited utterance, and a present sense impression because "[w]here a precisely contemporaneous declaration cannot be made, *near*

93. Miller v. Crown Amusements, Inc., 821 F. Supp. 703, 705-07 (S.D. Ga. 1993) (emphasis added).

94. United States v. Mejia-Velez, 855 F. Supp. 607, 613 (E.D.N.Y. 1994) (emphasis added). No need existed to admit these statements, as both witnesses testified at the trial, *see id.*; the statements were merely prior consistent, corroborative statements.

Three 911 calls were made and admitted as "substantially contemporaneous." *Id.* at 613-14. Witness Aguera called "immediately after the murder, from the very room . . . ." *Id.* at 613. Witness Gajewski called two minutes after completion of Aguera's report, which the court called only a "slight lapse" of time. *Id.* Gajewski called again—sixteen minutes after completion of his first call. *See id.* at 614. This third call is particularly objectionable, yet the court said it was within the same "interlude" of time. *Id.* The interlude endured over twenty minutes. More defensibly, the court also opined both calls would have been admissible as excited utterances. *See id.* at 613-14.

95. *See id.* at 613-14.

96. United States v. Mitchell, 145 F.3d 572, 577 (3d Cir. 1998) (emphasis added).

contemporaneity fulfills the requirements of 803(1)."[97] In two other cases, a "*nearly contemporaneous*" tip from a passing motorist to border patrol agents made "about a minute" after the event[98] and a "*nearly simultaneous*" statement made by an apartment superintendent to the deceased an indeterminate time earlier[99] were both admitted.

Of course, a present sense impression is not a statement "substantially contemporaneous," made "virtually contemporaneously," with "near contemporaneity," "nearly contemporaneous," or "nearly simultaneous." A present sense impression is acceptable as an exception to the hearsay rule only because the declarant had no time to reflect. The statement was uttered while the event or condition was occurring so the dangers of faulty memory and insincerity are removed.

C. Misinterpreting "Immediately Thereafter"

Four other cases hold to the "immediately thereafter" language of the rule, but they completely misinterpret the meaning of that phrase. Instead of requiring the statement to be made immediately after a thought is formed, these cases approve statements made "immediately after" the event is complete. For example, a person who attended a business meeting, then returned to her office and drafted a letter describing some of the events at the meeting, stated a present sense impression because "she drafted it immediately after the meeting occurred."[100] This declarant had time to think: the

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97. United States v. Obayagbona, 627 F. Supp. 329, 340 (E.D.N.Y. 1985) (emphasis added).

98. United States v. Montero-Camargo, 177 F.3d 1113, 1123-24 (9th Cir. 1999) (emphasis added), *amended by* 183 F.3d 1172 (9th Cir. 1999), *and withdrawn, reh'g en banc granted*, 192 F.3d 946 (9th Cir. 1999), *reststated in part*, 208 F.3d 1122 (9th Cir. 2000) (en banc), *cert. denied sub nom.* Sanchez-Guillen v. United States, 121 S. Ct. 211 (2000).

99. Robinson v. Shapiro, 484 F. Supp. 91, 95 (S.D.N.Y. 1980) (emphasis added), *aff'd as modified*, 646 F.2d 734 (2d Cir. 1981). The court apparently recognized its decision might be questioned:

> [The statement was] one nearly simultaneous with the event it described, and trustworthy because there was no time for the declarant's memory to falter, little opportunity and no apparent motive for him to dissemble, and occasion for the person to whom the statement was made independently to observe the condition which the statement described or explained . . . .

Id.

100. United States v. Santos, 65 F. Supp. 2d 802, 823 (N.D. Ill. 1999) (describing and admitting the typewritten letter), *rev'd*, 201 F.3d 953, 964 (7th Cir. 2000) (holding, among other things, that the typewritten report was admissable, but a hand delivered note attached to the letter did not qualify as a present sense impression and was thus inadmissible). Even though the declarant had an obvious bias against defendant, *see id.* at 824-25; *infra* text accompanying note 114, the court stated "Defendant offers nothing to suggest that the five to ten minute interval was too long a time to be considered contemporaneous, nor does she offer any arguments that [the letter] is unreliable." *Santos*, 65 F. Supp. 2d at 825. According to this opinion, a five-to-ten-minute time lapse while a

remainder of the meeting, the walk to her office, the drafting and editing of the letter. Yet the court believed the rule was satisfied because she wrote the letter "immediately after" the end of the meeting.[101] Of course, the relevant part of the meeting described was probably far before the end of the meeting, making the time lapse closer to an hour than to a minute.

Another case involved a hearsay declarant who stated to police investigating a domestic dispute that the defendant "had a gun in the house."[102] The defendant was convicted of possession of an unregistered firearm. The court reasoned, "[V]iewing all facts in the light most favorable to the Government, we can assume that her statement was made immediately after the officers separated her and Jackson after he assaulted her. . . . It was immediately after this altercation that Ms. Jackson spoke of the gun."[103] The sequence was the declarant saw the gun, she and the defendant later had an unrelated altercation, the police arrived, and she spoke to them. Even looking past the misuse of "immediately thereafter" to mean the next temporal event, one must ask when the declarant saw the defendant with the gun: was it five minutes, five hours, five days, or five months before the altercation? The past sense impression could have preceded the hearsay statement by five years.

Two of the four cases misusing "immediately thereafter" are closely akin. Both cases involved a hearsay declarant who after hanging up the telephone turned to a companion and repeated what was said in the conversation, and both opinions admitted the statement as made "immediately after" the telephone conversation.[104] Again, the entire telephone conversation was treated as an "event."[105] Yet in each case the declarant was not listening with one ear and repeating what was said as the conversation continued. The

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biased declarant leaves a meeting, walks to her office, and drafts a letter qualifies under the rule, since drafting the letter was the activity she undertook "immediately after" the meeting. *Id.* at 823.

Apparently the prosecutor was laboring under the same misapprehension, as shown by the trial transcript:

> "Q: Now, after this meeting did you do anything?
> A: I left the meeting. I went back to my desk, and I typed up what had just occurred about the cutoff of the brokers.
> Q: Did you do that immediately after?
> A: Yes."

Id. at 823 (quoting the transcript).

101. *Id.* at 823.

102. United States v. Jackson, 124 F.3d 607, 618 (4th Cir. 1997).

103. *Id.* Note also the strong motive declarant possessed to fabricate a statement against defendant. *See id.* at 618; *infra* text accompanying note 119.

104. United States v. Perkins, Nos. 96-5337, 97-6452, 1999 U.S. App. LEXIS 12028, at *6 (6th Cir. June 7, 1999) (unpublished opinion noted at 187 F.3d 639), *cert. denied*, 528 U.S. 944 (1999); United States v. Peacock, 654 F.2d 339, 350 (5th Cir. Aug. 1981), *vacated in not relevant part on reh'g*, 686 F.2d 356 (Former 5th Cir. 1982).

105. *See Perkins*, 1999 LEXIS 12028, at *10; *Peacock*, 654 F.2d at 350.

declarant made no report until the close of the conversation.[106] The relevant portion of the telephone conversation could have taken place several minutes from the end of the call. The declarant had time for error as later portions of the conversation crowded to the fore of memory and time to fabricate falsehoods to tell the eagerly awaiting companion.[107]

D. Ignoring Strong Motives to Lie

The last three cases mentioned deserve additional discussion because they admitted statements by declarants who had both a strong motive to implicate the subject of the statement in wrongdoing and time enough to fabricate a story doing exactly that. Probably the clearest example in these cases was the conviction of defendant Perkins for possession of cocaine with intent to distribute.[108] The only evidence linking the defendant to the drug deal was informant Goode's hearsay statement to police: Goode carried on a telephone conversation with the defendant, then reported to waiting police that "Perkins told him that he would do the deal with Goode by sending McKinley with the drugs."[109] The defendant argued at trial that Goode was in complete control of an elaborate deception framing him, and Goode indeed later received a reduced sentence for his testimony in seven drug cases.[110] Even so, the court concluded that "the telephone conversations were events that Goode described and/or explained to [police] immediately after they occurred."[111]

This discussion of motive to falsify hearkens back to the case in which the declarant attended a business meeting, then returned to her office and drafted a letter reporting on the meeting.[112] That decision has already been criticized for allowing the letter to be considered as written "immediately thereafter."[113] In addition, the declarant letterwriter had a strong and obvious bias against the defendant she incriminated with her letter. As early as the opening

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106. *See Perkins*, 1999 LEXIS 12028, at *10; *Peacock*, 654 F.2d at 350.

107. The *Peacock* decision asserts that "Darrell repeated Harvey's comments to his wife immediately after talking with Harvey on the phone. There was no time for him to consciously manipulate the truth." 654 F.2d at 350. That is rather obviously inaccurate. Research shows a lie requires no more than a second or two to form. *See supra* text accompanying notes 48-54. Even common wisdom should show the weakness of the court's statement. Most people have had the experience of talking on the telephone with half the mind on the conversation and the other half whizzing through thoughts of how much and how to pass it along.

108. *See Perkins*, 1999 LEXIS 12028, at *4.

109. *Id.* at *6.

110. *See id.* at *7.

111. *Id.* at *10.

112. *See* United States v. Santos, 65 F. Supp. 2d 802, 823 (N.D. Ill. 1999), *rev'd*, 201 F.3d 953, 964 (7th Cir. 2000).

113. *See supra* text accompanying notes 100-101.

statement, defense counsel attacked the declarant's credibility on the grounds she
"fabricated evidence against Defendant, that she referred to Defendant with unflattering names, that her pin-filled voodoo doll screen saver was a depiction of Defendant, and that she despised Defendant. Defense counsel also commented that [declarant] was worried that Defendant would discover that she received commission-free trades . . . ."[114] The case thus found a present sense impression in a statement from an allegedly biased declarant with ample time to cogitate and craft a falsehood.

Other cases presented less obvious, although still readily apparent, dangers of fabrication by declarants with strong motives to falsify. One case admitted a 911 call from a wife-declarant who had fled to a convenience store following a domestic disturbance with her husband.[115] The statement was admitted as a present sense impression in part because the wife reported "my husband *just* pulled a gun out on me";[116] yet the 911 call came seven minutes after the disturbance was first reported.[117] The marital dispute apparently concerned the wife's accusations that defendant had been with another woman.[118] Despite both an obvious motive to obtain revenge and time for the wife to concoct a story, the court accepted the statement. A similar case involved the mother of the defendant stating to the police that the defendant had threatened members of the family, had assaulted her, and "had a gun in the house."[119] Again, both motive and opportunity to falsify were present.

Receiving hearsay statements from declarants with motives to falsify is not the problem. The rules allow the party against whom a hearsay statement is admitted to attack the credibility of the hearsay declarant.[120] The problem is receiving hearsay statements from declarants with motives to falsify when those statements lack all guarantees of trustworthiness.

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114. *Santos*, 65 F. Supp. 2d at 824 (citation omitted).

115. *See* United States v. Hawkins, 59 F.3d 723, 730 (8th Cir. 1995), *cert. granted, judgment vacated on other grounds*, 516 U.S. 1168 (1996); *see also* United States v. Peacock, 654 F.2d 339, 350 (5th Cir. Aug. 1981), *vacated in not relevant part on reh'g*, 686 F.2d 356 (Former 5th Cir. 1982).

116. *Hawkins*, 59 F.3d at 730. Another part of the call included "there's also drugs and everything else in that apartment up there." *Id.* at 726.

117. *See id.* at 730.

118. *See id.* at 726.

119. United States v. Jackson, 124 F.3d 607, 618 (4th Cir. 1997); *see supra* text accompanying notes 102-103.

120. Rule 806 reads in part: "When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." FED. R. EVID. 806.

E. Disregarding the Lesson of Shepard

In admitting these stale sense impressions, the courts have departed from the wisdom of another line of cases excluding statements offered under the state of mind exception. One case shows the comparison. In an action for securities fraud under Rule 10b-5,[121] the court admitted a telex as a present sense impression on the following reasoning: "Littlejohn stated in the telex 'Ralph Michaels . . . just told me' and, although he later equivocated, Littlejohn testified in his deposition (which was read at trial) that he sent the telex 'immediately' after his conversation with Ralph."[122] The evidence came in since the statement was made "immediately" after the conversation reported (despite the passage of time from the conversation to the drafting and sending of the telex).[123]

This result can be compared to one of the most famous cases in evidence law, *Shepard v. United States*,[124] a prosecution for murder.[125] The Supreme Court refused to approve the admission of a statement from the victim uttered immediately after she drank from a cocktail: "Doctor Shepard has poisoned me."[126] The Court reasoned this statement could not be admitted as present state of mind because it looked to the past: "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."[127]

This reasoning is now embodied in the rules of evidence: then-existing state of mind is admissible, "but . . . a statement of memory or belief to prove the fact remembered or believed [is not]."[128] The present tense statement is admissible as state of mind, the past tense statement is not. A declaration of past state of mind is properly excluded from evidence because it raises the danger of memory loss and greatly expands the opportunity for insincerity in the statement.

The addition of these same hearsay dangers is exactly the reason the present sense impression is properly limited to the present tense. The same result should be reached. "I see" or "I hear" are present sense impressions, "I saw" or "I heard" are not.

Despite the analogy of present/past state of mind to present/past sense impressions, the courts have not recognized the linkage and

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121. 17 C.F.R. § 240.10b-5 (2000).
122. Michaels v. Michaels, 767 F.2d 1185, 1201 (7th Cir. 1985).
123. *See id.*
124. 290 U.S. 96 (1933).
125. *Id.* at 97.
126. *Id.* at 98, 102.
127. *Id.* at 105-06.
128. FED. R. EVID. 803(3).

have allowed several past tense statements remarkably similar to "Doctor Shepard has poisoned me" into evidence as present sense impressions.[129] These statements are purely past tense, with no saving glimmer of the present or future in them.[130] As with the exception for state of mind, the courts should recognize that a past tense statement cannot qualify as a present sense impression.

V. PROPOSAL FOR AN AMENDED RULE

The present sense impression has a controversial history. The exception is not universally accepted. Though embodied in the federal evidence rules for a quarter-century, and accepted by the great majority of states, it has been rejected by some states because of concerns that its trustworthiness is not sufficient.[131] Even many

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129. *See, e.g.*, United States v. Perkins, Nos. 96-5337, 97-6452, 1999 U.S. App. LEXIS 12028, at *6 (6th Cir. June 17, 1999) (unpublished opinion noted at 187 F.3d 639) (declarant spoke on telephone, then reported conversation to police "immediately following"), *cert. denied*, 528 U.S. 944 (1999); United States v. Beck, 122 F.3d 676, 682 (8th Cir. 1997) (declarant told police he had purchased guns from defendant "immediately after" transaction); United States v. Peacock, 654 F.2d 339, 350 (5th Cir. Aug. 1981) (husband/declarant relayed contents of telephone conversation to wife "immediately after talking . . . on the phone"), *vacated in not relevant part on reh'g*, 686 F.2d 356 (Former 5th Cir. 1982); United States v. Santos, 65 F. Supp. 2d 802, 823 (N.D. Ill. 1999) (letter-writer/declarant drafted letter reporting events at meeting "immediately after the meeting occurred"), *rev'd*, 201 F.3d 953, 964 (7th Cir. 2000) (finding that the typed letter was admissable, but an attached, handwritten note did not qualify as a present sense impression and was thus inadmissible); United States v. Campbell, 782 F. Supp. 1258, 1261 (N.D. Ill. 1991) (911-caller/declarant described shooting and defendant's appearance "almost immediately" after defendant fled).

130. Some courts have attempted to brush aside *Shepard* by tying the report of the past event to a present state of mind to do an act in the future. In the best known of these cases, *United States v. Annunziato*, 293 F.2d 373 (2d Cir. 1961), the prosecution offered a witness to testify about a telephone call from defendant to the witness's father. *See id.* at 376. After hanging up the telephone, the father told the son that the defendant wanted a bribe (past event), and he intended to give it to him (present intent of future act). *See id.* The court admitted the testimony because it looked forward; the present intent carried with it into evidence the past event. *See id.* at 376-78. "[T]he pure metal may carry some alloy along with it." *Id.* at 378. This result, itself questionable, cannot be used to justify admission of past sense impressions, for they are not alloyed with a forward-looking portion. They look entirely to the past. For example, *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982), involved a like situation in which, within a few seconds of laying down the phone, the declarant described the conversation concerning rigging of bids. *Id.* at 320-21. Unlike *Annunziato*, this statement contained no second part to the effect "and I'm going to do it." Similarly, in *United States v. Earley*, 657 F.2d 195 (8th Cir. 1981), "immediately after hanging up the phone" declarant turned to her mother and made a statement about the conversation. *Id.* at 198. Again, no part of the statement looked forward.

131. Following adoption of the Federal Rules of Evidence in 1975, the Uniform Rules of Evidence were substantially rewritten in 1986 to conform to the Federal Rules, including verbatim adoption of rule 803(1). The states, by statute or rule, mostly conform to rule 803(1). Of the 50 states, seven states still follow the common law of evidence (Connecticut, Illinois, Massachusetts, Missouri, New York, Pennsylvania, and Virginia). Thirty-two states adopt the present sense impression verbatim or essentially verbatim from both Federal Rule of Evidence 803(1) and Uniform Rule of Evidence 803(1). *See infra* Appendix.

advocates for the exception would hem it in with additional guarantees of trustworthiness.[132] Accordingly, courts should interpret the exception narrowly instead of expansively.

The present sense impression is thought to pose no hearsay dangers of memory loss or insincerity and so to be reliable enough to pass the hearsay bar, even though the potential dangers of erroneous perception and mistransmission remain. As discussed, the dangers of memory loss and insincerity are eliminated or greatly reduced only when the statement is strictly contemporaneous with the event or condition it describes. Studies show that a time lapse of only a second or two allows time to fabricate, and memory loss occurs rapidly.[133] Consequently, a reliable sense impression must be in the present tense. That is why the hearsay exception is for a present sense impression. The exception is not for a past sense impression. The

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The remaining eleven states do not allow admission of the present sense impression or allow admission under circumstances more limited than the Uniform Rules. Three states omit it entirely. *See infra* Appendix. Five states include it with additional safeguards. *See infra* Appendix. Three states require the statement be strictly contemporaneous. *See infra* Appendix.

132. At least five different, additional trustworthiness requirements, often based on cases, are suggested by commentators for the present sense impression. Yet the Federal and Uniform Rules of Evidence require none of them. *See* FED. R. EVID. 803(1); UNIF. R. EVID. 803(1).

First, the statement must be corroborated. *See* 3 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1650 (7th ed. 1998) ("Most Federal Courts are reading a corroboration requirement into Rule 803(1). This is a sensible approach."); Waltz, *supra* note 6, at 884 & n.92 ("The suggestion that corroboration is absolutely required by 803(1) has fared somewhat better with commentators than with courts . . . ."); Cathryn M. Taylor, Comment, *The Need for a New Approach to the Present Sense Impression Hearsay Exception After* State v. Flesher, 67 IOWA L. REV. 179, 180 & n.8 (1981) (collecting articles pro and con on corroboration); *The Present Sense Impression*, *supra* note 47, at 674. *But see* MUELLER & KIRKPATRICK, *supra* note 25, § 434, at 383 n.5 ("The silence of FRE 803(1) on corroboration leaves no doubt that it is not required, but courts sometimes emphasize corroboration anyway.").

Second, the statement must be made to another person who is available as a witness for cross-examination. *See* Foster, *supra* note 6, at 334. One authority does not make this a requirement but suggests the witness will usually be available. *See* MCCORMICK ON EVIDENCE, *supra* note 31, § 271, at 474.

Third, the statement must be spontaneous so that it is "dominated by considerations external to the self, that rational thought or personal will plays no part." Foster, *supra* note 6, at 316-17 (quoting Hutchins & Slesinger, *supra* note 48, at 432 n.2) (concerning excited utterances).

Fourth, the statement must have been made on personal knowledge of the declarant. *See* United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998); Hynes v. Coughlin, 79 F.3d 285, 294 (2d Cir. 1996); Bemis v. Edwards, 45 F.3d 1369, 1373 (9th Cir. 1995). This requirement is sometimes described as requiring the declarant to have perceived the event. *See* MUELLER & KIRKPATRICK, *supra* note 25, § 434, at 387; WEINSTEIN & BERGER, *supra* note 36, at § 803.03[3].

Fifth, the statement must describe or explain the event, not give an opinion or describe a previous event. *See* Perkins v. Marriott Int'l, Inc., 945 F. Supp. 282, 287 (D.D.C. 1996); MUELLER & KIRKPATRICK, *supra* note 25, § 434, at 388; WEINSTEIN & BERGER, *supra* note 36, at § 803.03[4]; Foster, *supra* note 6, at 318-19; Waltz, *supra* note 6, at 879-80.

133. *See supra* Part III.

principled need for strict contemporaneity is the basis for federal evidence rule 803(1), even though the rule includes the unfortunate language "or immediately thereafter."

The federal courts have not properly interpreted this language of rule 803(1). A survey of all reported federal court decisions on the present sense impression since 1975 finds many have admitted stale sense impressions from declarants with both a strong motive to falsify and time for memory loss.[134] While use of the exception in the day-to-day life of trial courts in unreported decisions cannot be assessed, the great majority of reported decisions that have considered the question of time lapse have admitted statements that violate both rule and principle.

The needed change in the law is readily apparent. Federal Rule of Evidence 803(1) should be amended to delete the last three words. As amended, the rule would read:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition.[135]

Elimination of "or immediately thereafter" will be a clear signal of both word and spirit to the courts that a present sense impression is exactly that. Past sense impressions cannot be tolerated, even when uttered "immediately after" the event.

This amendment restores the rule to what the drafters intended, to allow only a split-second to form words. "Immediately thereafter" was never needed. Surely a court would admit the statement "Look, the car just ran the red light" under the amended rule with as much alacrity as the statement "Look, the car is running the red light." Perhaps the former statement has a hint of past tense in it, but it is only the passage of time to get the words out of the mouth. What should not be allowed is the purely past tense statement "The car ran the red light." A past sense impression is merely unexceptional hearsay.

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134. *See supra* Part IV.

135. The proposal is not claimed as original. While the "immediately thereafter" language can be traced to MODEL CODE OF EVIDENCE Rule 512 (1942), subsequently drafted and proposed UNIFORM RULES OF EVIDENCE 63(4) (1953) omitted the language. *See supra* Part II.

While this Article argues for strict contemporaniety, some commentators have argued a slight time lapse should be allowed. *See, e.g.*, Imwinkelried, *supra* note 12, at 250-51; Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236-37 (1922); Jonathan Z. May, Note, *Evidence—Maryland Adopts the Present Sense Impression Exception to the Hearsay Rule*, 17 U. BALT. L. REV. 160, 168-69 & n.76 (1987); Wohlsen, *supra* note 6, at 356-57.

APPENDIX

States that Adopt the Present Sense Impression Essentially Verbatim from Federal Rule of Evidence 803(1) and Uniform Rule of Evidence 803(1)

STATE	STATUTE
Alabama	ALA. R. EVID. 803(1)
Alaska	ALASKA R. EVID. 803(1)
Arizona	ARIZ. R. EVID. § 803(1)
Arkansas	ARK. R. EVID. 803(1)
Delaware	DEL. R. EVID. 803(1)
Hawaii	HAW. REV. STAT. § 626-1, rule 803(b)(1) (1993)
Idaho	IDAHO R. EVID. 803(1) (2000)
Indiana	IND. R. EVID. 803(1)
Iowa	IOWA R. EVID. 803(1)
Kentucky	KY. R. EVID. 803(1)
Louisiana	LA. CODE EVID. ANN. art. 803(1) (West 1995)
Maine	ME. R. EVID. 803(1)
Maryland	MD. RULE 5-803(b)(1)
Michigan	MICH. R. EVID. 803(1)
Mississippi	MISS. R. EVID. 803(1)
Montana	MONT. CODE ANN. § 26-10-803(1) (1999)
Nevada	NEV. REV. STAT. § 51.085 (1997)
New Hampshire	N.H. R. EVID. 803(1)
New Mexico	N.M. R. ANN. 11-803(A)
North Carolina	N.C. GEN. STAT. ch. 8C, rule 803(1) (1999)
North Dakota	N.D. R. EVID. 803(1)
Oklahoma	OKLA. STAT. ANN. tit. 12, § 2803 (1993)
Rhode Island	R.I. R. EVID. 803(1)
South Carolina	S.C. R. EVID. 803(1)
South Dakota	S.D. CODIFIED LAWS § 19-16-5 (Michie 1995)
Texas	TEX. R. EVID. 803(1)
Utah	UTAH R. EVID. 803(1)
Vermont	VT. R. EVID. 803(1)
Washington	WASH. R. EVID. 803(1)
West Virginia	W. VA. R. EVID. 803(1)
Wisconsin	WIS. STAT. § 908.03(1) (1993)
Wyoming	WYO. R. EVID. 803(1)

States that Omit the Present Sense Impression Rule Entirely

STATE	STATUTE
Nebraska	NEB. REV. STAT. § 27-803 (1995)
Oregon	OR. REV. STAT. § 40.460 (1999)
Tennessee	TENN. R. EVID. § 803

States that Do Not Allow Admission of the Present Sense Impression or Allow Admission Under Circumstances More Limited than the Uniform Rules of Evidence

STATE	STATUTE
Florida	FLA. STAT. § 90.803(1) (1999) (including the additional exception "when such statement is made under circumstances that indicate its lack of trustworthiness")
Georgia	GA. CODE ANN. § 24-3-3 (1998) (including the statement "to be free from all suspicion of device or afterthought")
Minnesota	MINN. R. EVID. 801(d)(1)(D) (moving to rule 801 to add the requirement that the declarant be a testifying witness because "[t]he committee was concerned with the trustworthiness of such statements when the declarant was not available to testify at trial")
New Jersey	N.J. STATS. ANN. tit. 2A, ch. 84A, app. A, N.J. R. EVID. 803(c)(1) (West 1994) (including the requirement "and without opportunity to deliberate or fabricate")
Ohio	OHIO REV. CODE ANN., tit.23, OHIO R. EVID. 803(1) (West 1995) (including "unless circumstances indicate lack of trustworthiness")

States that Require the Statement To Be Strictly Contemporaneous

STATE	STATUTE
California	CAL. EVID. CODE § 1241(b) (West 1995)
Colorado	COLO. REV. STAT. § 803(1) (2001)
Kansas	KAN. STAT. ANN. § 60-460(d) (1999)