

1-1-2013

Evidence - Present Sense and Common Sense: Stretching the 803(1) Hearsay Exception to Its Limits - United States v. Hieng, 679 F.3D 1131 (9th Cir. 2012)

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Recommended Citation

18 Suffolk J. Trial & App. Advoc. 177 (2013)

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**EVIDENCE—PRESENT SENSE AND COMMON
SENSE: STRETCHING THE 803(1) HEARSAY
EXCEPTION TO ITS LIMITS—*UNITED STATES V.
HIENG*, 679 F.3D 1131 (9TH CIR. 2012)**

In law school evidence classes across the United States, second year students grapple with the rules governing hearsay exceptions: business records, statements made for the purpose of medical treatment, statements made by party opponents, etc.¹ Although the present sense impression exception is one of the rules least feared by law students, the United States Court of Appeals for the Ninth Circuit confronted a unique situation that would be prime for any law school exam in *United States v. Hieng*.² In a mere four sentences, a majority of the three-judge panel held that hearsay calculations tallying the number of marijuana plants officers destroyed, which totaled over 1000 plants, qualified under the present sense impression exception.³ However, a vehement concurrence argued the exception had been stretched to its breaking point.⁴ This comment will discuss the different approaches to the present sense impression exception used by the majority and concurring opinions, and then argue that courts should avoid such extreme rule bending by keeping the present sense impression out of the past.⁵

¹ See generally FED. R. EVID. 803 (enumerating exceptions to rule against hearsay). The Federal Rules of Evidence contain twenty-three exceptions to the rule against hearsay. *Id.* Hearsay is defined under Rule 801 as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” FED. R. EVID. 801(c). See generally *Anderson v. United States*, 417 U.S. 211, 220-21 (1974) (discussing hearsay rule).

² 679 F.3d 1131 (9th Cir. 2012). See *id.* at 1145-46 (Berzon, J., concurring) (arguing present sense impression exception did not apply to hearsay testimony given at trial).

³ *Id.* at 1142; see also FED. R. EVID. 803(1) (defining present sense impression exception to rule against hearsay). The relevant text of the rule reads: “Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.” *Id.*

⁴ *Hieng*, 679 F.3d at 1147 (Berzon, J., concurring). The holding of this case extends the present sense impression exception beyond its original understanding and purpose. See *id.* (arguing present sense impression inapplicable in case at bar); see also FED. R. EVID. 803(1) advisory committee’s note (“The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.” (alteration in original)); *Shepard v. United States*, 290 U.S. 96, 105-06 (1933) (detailing hearsay example); *Tampa Elec. Co. v. Getrost*, 10 So. 2d 83, 83-85 (Fla. 1942) (same).

⁵ See Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA.

On August 28, 2007, agents from the Fresno County Sheriff's Department discovered a large marijuana growing operation at a residence leased by the defendant, Orm Hieng.⁶ The marijuana plants were planted in fifteen to twenty rows at a vineyard on the premises, as well as within the home.⁷ After the defendant and another individual were taken into custody, the officers simultaneously tallied and destroyed the plants.⁸ Officers went down each row and either cut or ripped the plants from the ground, keeping a mental tally of the plants they had eradicated.⁹ Once an entire row was eliminated, each officer would report the number of plants removed to Fresno County Sheriff's Department Detective Jensen, who then recorded the figures.¹⁰

Based on the evidence seized from his home and surrounding property, Orm Hieng was charged with intentionally conspiring to manufacture a controlled substance with the intent to distribute in violation of 21 U.S.C. § 841(a).¹¹ During trial, the investigating detectives could not recall the exact number of plants they individually counted and destroyed, but testified that they gave their total to Detective Jensen, who then recorded the tally.¹² Detective Jensen testified he kept an accurate count of the plants destroyed based upon the officers' statements and put the final tally of 1109 marijuana bushes in his report.¹³ Hieng was convicted by a jury and sentenced to ten years in prison, the minimum sentence required

ST. U. L. REV. 907, 919 (2001) ("While the rule does not specify a time interval and even contemplates a 'slight lapse' of time, the intent and spirit of the rule is that admissibility ends with the exceedingly short time period before reflective thought can occur."); *see also infra* note 28 and accompanying text (discussing various contemporaneity requirements used by courts).

⁶ *Hieng*, 679 F.3d at 1136-37.

⁷ *Id.* at 1136. There were a total of 1039 marijuana plants growing in the vineyard. *Id.* Each row contained between fifty and seventy plants. *Id.* An additional seventy plants were inside the home. *Id.*

⁸ *Id.*

⁹ *Id.* The record does not state how many officers were involved in this operation. *See id.* (outlining plant destruction procedure without noting number of officers involved).

¹⁰ *Id.*

¹¹ *See Hieng*, 679 F.3d at 1135 (noting substance at issue was over 1000 marijuana plants); *see also* 21 U.S.C. § 841(a) (2006) (detailing statute covering possession with intent to distribute controlled substance). The relevant part of the statute reads:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

§ 841(a).

¹² *Hieng*, 679 F.3d at 1136.

¹³ *Id.*

by the statute.¹⁴ Hieng subsequently appealed his conviction to the United States Court of Appeals for the Ninth Circuit.¹⁵

Many modern legal academics credit the legal scholar James Bradley Thayer for developing the present sense impression exception to the rule against hearsay in the Nineteenth Century.¹⁶ However, prior to the adoption of the Federal Rules of Evidence in 1975, relatively few jurisdictions recognized the present sense impression exception.¹⁷ In one early case, Texas acknowledged such an exception in *Houston Oxygen Co. v. Davis*,¹⁸ where the Commission of Appeals held that statements made by passengers about a passing vehicle were admissible as a present sense impression because the report was made at the moment of observation, there was no time of *calculation* or misstatement, and was made to a passenger who also viewed the incident.¹⁹ Another early case decided in Florida, *Tampa Electric Co. v. Getrost*,²⁰ held hearsay testimony that arose from a phone call made just prior to a man being killed in a workplace was properly admitted as a present sense impression.²¹ The court specifically

¹⁴ *Id.* at 1135 (detailing defendant's sentencing); *see also* 21 U.S.C. § 841(b)(1)(A)(vii) (2006) (providing minimum sentence of ten years). The number of marijuana plants must be over 1000 to qualify for the ten-year minimum sentence. § 841(b)(1)(A)(vii).

¹⁵ *Hieng*, 679 F.3d at 1135. After he was convicted, Hieng simultaneously appealed the decision to United States Court of Appeals for the Ninth Circuit and filed a motion to vacate his sentence under 28 U.S.C. § 2255. *See Hieng v. United States*, No. CV-F-10-1620 OWW, 2010 WL 3583163, at *1 (E.D. Cal. Sept. 10, 2010) (denying defendant's motion to vacate sentence); *see also* 28 U.S.C. § 2255 (2006) (detailing prisoner's right to challenge sentence imposed in violation of Constitution or United States laws). The motion court denied Hieng's motion because he did not make a showing of the "most unusual circumstances" that would support simultaneous direct appeal and filing a motion under 28 U.S.C. § 2255. *Hieng*, 2010 WL 3583163, at *1 (quoting *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988)).

¹⁶ *See* Tere E. Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 LOY. U. CHI. L.J. 299, 301-03 (1979) (crediting James Bradley Thayer with creating modern present sense impression exception (citing James Bradley Thayer, *Bedingfield's Case: Declarations as a Part of the Res Gestae*, 14 AM. L. REV. 1, 10 n.1, 83-107 (1881))); Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 871 (1981) (same).

¹⁷ *See* Foster, *supra* note 16, at 304-05 (discussing development of present sense impression exception through academic routes rather than common law); *see also* Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 HOW. L.J. 319, 327-28 (2009) (discussing development of present sense impression hearsay exception).

¹⁸ 161 S.W.2d 474 (Tex. Comm'n App. 1942).

¹⁹ *Id.* at 476-77 (holding hearsay statements admissible). The statements at issue in *Hous. Oxygen Co.* occurred when a passenger said the driver of a speeding car must have been drunk, and it was likely they would get into an accident if they kept driving in that manner. *Id.* at 476.

²⁰ 10 So. 2d 83, 85 (Fla. 1942).

²¹ *Id.* at 85 (discussing factual circumstances surrounding hearsay statements). In *Getrost*, an assistant for an electrical company gave hearsay testimony from his supervisor, a man killed in an electrical accident. *Id.* at 84-85. The supervisor had called the assistant and claimed he ordered

noted “there was no occasion for [the statement] to have resulted from reflection or premeditation.”²² However, the Supreme Court narrowly defined what counts as a “present” impression in *Shepard v. United States*,²³ where the Court held statements that “faced backward” about a past event do not fall into the hearsay exception.²⁴

Notwithstanding early hesitations, forty-four states have adopted the present sense impression exception into their rules of evidence.²⁵ The key premise behind the exception is the close temporal link between the time of the observation and the time of the statement, ensuring the statement has substantial contemporaneity to the event described.²⁶ Despite the focus on chronological proximity, courts have found “substantial contemporaneity” when the statement occurred between ten and twenty-three minutes after the described event.²⁷ Moreover, how a court defines an

the power to be cut to the lines on which he was working; however, the power was not cut and the supervisor received a powerful electrical shock. *Id.* at 83-84. The Florida Supreme Court focused on the assistant’s intimate knowledge of the procedures involved with working on electrical wires and the contemporaneity of the statements as sufficient indicators of reliability. *Id.* at 84-85.

²² *Id.* at 85.

²³ 290 U.S. 96 (1933).

²⁴ *Id.* at 105-06 (“The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker.”). The hearsay testimony excluded in *Shepard* was a statement made by a dying woman: “Dr. Shepard has poisoned me.” *Id.* at 98. The testimony was about a past event and was used to prove the truth of the matter asserted, not to show her state of mind or level of suffering. *Id.* at 105; *see also* McFarland, *supra* note 5, at 928 (“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.”).

²⁵ *See* Imwinkelried, *supra* note 17, at 330 (noting California, Connecticut, Minnesota, Nebraska, Oregon, and Tennessee reject exception).

²⁶ *See* *United States v. Green*, 556 F.3d 151, 155 (3d Cir. 2009) (emphasizing requirement of “substantial contemporaneity” between time of observation and hearsay statement (quoting *United States v. Manfre*, 368 F.3d 832, 840 (8th Cir. 2004)); *United States v. Woods*, 301 F.3d 556, 562 (7th Cir. 2002) (“The exception is based on the theory that it is less likely for a declarant to ‘deliberate or conscious[ly] misrepresent’ the event if there is ‘substantial contemporaneity’ between the statement and the event.” (alteration in original) (quoting FED. R. EVID. 803 advisory committee’s note)); *see also* Foster, *supra* note 16, at 300 (“Outright rejection, on hearsay grounds, of *contemporaneous statements* which describe the perception of the declarant may deprive the trier of fact of valuable information” (emphasis added)).

²⁷ *See* *United States v. Blakey*, 607 F.2d 779, 786 (7th Cir. 1979) (holding maximum of twenty-three-minute interval admissible as present sense impression); *United States v. Mejia-Velez*, 855 F. Supp. 607, 613-14 (E.D.N.Y. 1994) (ruling 911 call made eighteen minutes after event was admissible as present sense impression); *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703, 705-07 (S.D. Ga. 1993) (ruling 911 call after approximately ten-minute, 6.3 mile drive admissible as present sense impression); *see also* Imwinkelried, *supra* note 16, at 331 (detailing various time lapses where present sense impression exception applies); McFarland, *supra* note 5, at 920 (describing cases where various lapses in time supported present sense impression

“event” can expand the scope of the rule even further by tolling the clock, creating a wider window through which hearsay statements can qualify under the exception.²⁸ In addition to substantial contemporaneity, courts must also consider *Crawford v. Washington*,²⁹ which folded the Confrontation Clause into hearsay analysis, requiring a determination of whether a statement is testimonial or non-testimonial.³⁰ Beyond the standard hearsay exceptions, Federal Rule 807 also allows for a residual exception where a trial judge makes a finding that the statement is trustworthy, is relevant to a material fact, is the most probative evidence, and admitting such a statement “serve[s] the . . . interests of justice.”³¹

exception).

²⁸ See *United States v. Hamilton*, 948 F. Supp. 635, 639 (W.D. Ky. 1996) (breaking perception of suspect and identification of that person into two independent events); see also *McFarland*, *supra* note 5, at 922 (describing how some courts link series of events into “single, continuous event” (emphasis omitted) (quoting *United States v. Beck*, 122 F.3d 676, 682 (8th Cir. 1997))). *McFarland* criticizes courts that allow the present sense impression doctrine to “gobble up” large series of events into a single occurrence. *McFarland*, *supra* note 5, at 922-23. He cites *United States v. Beck* as a prime example of how a series of connected, yet still independent events can be merged into a single, large event, thereby greatly expanding the period when statements can fall into the present sense impression exception. *Id.* at 922-23 (citing *United States v. Beck*, 122 F.3d 676 (8th Cir. 1997)). *McFarland* views *Beck* as dangerous because long series of events, occurring over many hours, could be merged, thereby separating the perception and statements by longer periods of time. *Id.* In *Beck*, the court merged a series of transactions where an informant purchased guns from a defendant, turned them over to police, and then explained the transaction to police. 122 F.3d at 682.

²⁹ 541 U.S. 36 (2004).

³⁰ See *id.* at 51 (defining testimonial statements as those that create evidence rather than reacting to present situations); see also *United States v. Solorio*, 669 F.3d 943, 952 (9th Cir. 2012) (analyzing undercover officers’ observations as non-testimonial). In *Solorio*, the United States Court of Appeals for the Ninth Circuit determined reports made by two undercover officers were not testimonial in nature. *Id.* at 952-53. Given the “high-risk situation” of a large drug exchange, the statements were primarily made for pursuing an arrest, not creating a record for trial. *Id.* at 952; see also FED. R. EVID. 807 (detailing residual exception to rule against hearsay). The residual exception runs a lower risk of implicating *Crawford* because the best or most probative evidence rule often requires the declarant to appear in court to testify. See *Larez v. City of Los Angeles*, 946 F.2d 630, 644 (9th Cir. 1991) (holding quotes in newspaper article not “best evidence” when reporters available to testify).

³¹ FED. R. EVID. 807(a)(4) (delineating residual hearsay exception). The residual exception allows for a judge to admit a hearsay statement if the opposing party is given proper notice and the following conditions are met:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

FED. R. EVID. 807(a)(1)-(4); see also cases cited *supra*, note 30 (detailing testimonial statements and best evidence examples).

The temporal limits of the present sense impression exception ensure that there is no time for fabrication, calculation, or memory loss by the declarant, thereby bolstering the reliability of the statement.³² However, temporal limits have not always been strictly enforced as accommodations have been made for lapses reaching ten, fourteen, and eighteen minutes.³³ Various courts and commentators have noted that statements requiring an “intermediate step” likely fall outside the scope of 803(1).³⁴ Moreover, when statements are made for a “particular reason,” there is a question of whether the statements are made contemporaneously, or are “calculated interpretations of events.”³⁵

In *Hieng*, the United States Court of Appeals for the Ninth Circuit began its analysis by noting that Detective Jensen’s testimony involved three levels of hearsay: first, the other officers’ statements to Jensen communicating the number of plants removed; second, Jensen’s recording

³² See Waltz, *supra* note 16, at 880 (detailing contemporaneity of declaration required in light of rule’s use of “simultaneous”); see also Foster, *supra* note 16, at 322 (reasoning purpose of exception is to transport trier of fact back to time of incident). Cf. H.R. REP. NO. 93-650 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7079-80 (rejecting additional rule of evidence allowing hearsay exception for recently perceived events). The proposed rule, which would have been codified under Rule 804(b)(2), was rejected “as creating a new and unwarranted hearsay exception of great potential breadth. The Committee did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness to justify admissibility.” 1974 U.S.C.C.A.N. at 7079-80; see also Foster, *supra* note 16, at 315-16 (discussing rejection of proposed rule 804(b)(2)).

³³ See *United States v. Mejia-Velez*, 855 F. Supp. 607, 613-14 (E.D.N.Y. 1994) (detailing two 911 calls occurring over eighteen-minute span); *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703, 705-07 (S.D. Ga. 1993) (allowing testimony of 911 call that occurred after six-mile drive causing ten-minute delay); *United States v. Obayagobona*, 627 F. Supp. 329, 339-40 (E.D.N.Y. 1985) (finding fourteen-minute lapse between drug deal and statement acceptable).

³⁴ See, e.g., *United States v. Green*, 556 F.3d 151, 155-56 (3d Cir. 2009) (holding statements made in response to law enforcement questions about event did not qualify); *United States v. Faust*, 850 F.2d 575, 586 (9th Cir. 1988) (holding letter that went through many drafts did not qualify under exception); Foster, *supra* note 16, at 314 (describing memory as complex process that can be interfered with by other mental processes (citing I. Daniel Stewart, Jr., *Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 9 (1970)); Imwinkelried, *supra* note 17, at 345 (describing exception parameters). Professor Foster delineates how memory is influenced by perception. Foster, *supra* note 16, at 314. Moreover, she notes a recollected memory is “reconstructed at the time of its recall with the aid of various factors, such as knowledge acquired prior to the experience, initial perception of the occurrence, inferences drawn from sensory and perceptual data acquired subsequent to the event, and the influence of the emotional impact, if any, of the experience.” *Id.*, at 314. (citing Robert S. Spector & Teree E. Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 589 (1977)).

³⁵ *United States v. Woods*, 301 F.3d 556, 562 (7th Cir. 2002) (reasoning statements addressing FBI agents were calculated and not mere descriptions); *Green*, 556 F.3d at 157 (statements to DEA agents were reflections on events rather than mere accounts of events); see also *United States v. Ponticelli*, 622 F.2d 985, 992 (9th Cir. 1980) (holding that declarant’s hearsay statements calculated because spoke to his attorney).

of those numbers; and third, his official report.³⁶ The majority opinion outlined how the statements made to Jensen communicating the number of plants removed qualified under the present sense impression exception to the rule against hearsay.³⁷ Each report to Jensen qualified as an account of a recent perception because the officers had eradicated a row of plants immediately prior to the report.³⁸ The majority conceded that the counts took “some minutes;” however, the observations were close enough in time to mitigate any possible risk of memory loss.³⁹

In a stinging concurrence, Judge Berzon concluded that the present sense impression was not applicable to the first level of hearsay—the reports to Jensen.⁴⁰ Judge Berzon discussed how the lapse in time between the start of the counts and the final reporting was significant enough to raise issues of memory and deception.⁴¹ She further determined that the mental processes required to collect, destroy, and count the plants constituted an intermediate step between perception and reporting.⁴² Judge Berzon then concluded that the “residual exception” codified under Rule 807 was the most applicable rule to resolve the hearsay issue.⁴³ She noted that the use of the residual exception would mitigate the need for a *Crawford* evaluation of whether the statements were testimonial because that exception requires the “most probative evidence,” which would be the officer’s own reports as to their counts.⁴⁴ Despite the notice requirement of

³⁶ 679 F.3d 1131, 1142-43 (9th Cir. 2012) (describing levels of hearsay at issue). The court handled the second two levels of hearsay—the written numbers and his official report—by applying the prior recorded recollection exception, codified in Rule 803(5). *Id.* That rule allows for the prior recorded statement to be read into the record if the witness at one time had personal knowledge of the incident, cannot “fully and accurately” testify about the incident, he or she made a prior written statement about the incident while it was fresh in the witness’s mind, and the writing “accurately reflects the witness’s knowledge” of the incident. FED. R. EVID. 803(5).

³⁷ *Hieng*, 679 F.3d at 1141-43 (analyzing hearsay issues); *see also* FED. R. EVID. 803(1) (defining present sense impression exception to rule against hearsay).

³⁸ *Hieng*, 679 F.3d at 1142.

³⁹ *Id.* at 1142 n.2.

⁴⁰ *Id.* at 1145-46 (Berzon, J., concurring) (reasoning calculation and time lapse precluded application of present sense impression exception).

⁴¹ *Id.* at 1147 (Berzon, J., concurring) (citing Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 914 (2001)).

⁴² *Id.* at 1147 (Berzon, J., concurring) (citing Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869 (1981)).

⁴³ *See Hieng*, 679 F.3d at 1148 (Berzon, J., concurring) (“I am not suggesting we reverse. Instead, I would rely on what the government does argue—that the catchall hearsay exception applies.”); *see also* FED. R. EVID. 807 (creating residual exception separate from other hearsay exceptions).

⁴⁴ *Hieng*, 679 F.3d at 1146 (Berzon, J., concurring) (detailing possible implication of Confrontation Clause (citing *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004))); *see also* FED. R. EVID. 807 (creating residual hearsay exception).

Rule 807, Judge Berzon discussed how defense counsel was properly put on notice of the hearsay as the prosecution tried numerous times to introduce the plant counts before they were finally admitted.⁴⁵

In *Hieng*, the Court of Appeals applied a standard that stretches the present sense impression exception beyond its breaking point—an issue correctly articulated in the concurrence by Judge Berzon.⁴⁶ From its origin with James Bradley Thayer, the “temporal congruence” linking the statement to the event has been the lynchpin of the exception.⁴⁷ Despite disagreement among academics over whether strict or loose requirements of contemporaneity should be required, courts have adopted a flexible standard that is not consistent with the spirit of the exception.⁴⁸ Congress explicitly rejected proposed Rule 804(b)(2), fearing it would create an “unwarranted hearsay exception of great potential breadth,” thereby unnecessarily expanding the exception to hearsay to include “recently perceived” events.⁴⁹ Clearly supporters of relaxing the requirements for the

⁴⁵ *Hieng*, 679 F.3d at 1148 (Berzon, J., concurring) (discussing various times defendant put on notice even though no pretrial notice).

⁴⁶ *Id.* at 1146 (Berzon, J., concurring) (“According to the [majority] opinion, the deputies’ calculations were descriptions of the destruction of the marijuana field and therefore admissible as present sense impressions. That application, however, extends Rule 803(1) well beyond its limits.”); see Foster, *supra* note 16, at 313 (opining spontaneity and close temporal proximity necessary to apply present sense impression exception).

⁴⁷ See *supra* note 24 and accompanying text (outlining case and source that discuss temporal link between statement and event described); see also Foster, *supra* note 16, at 303 (detailing Thayer’s discussion of temporal link between statement and described occurrence); Waltz, *supra* note 16, at 871 (“This rule, Thayer said, ‘deals . . . with statements, oral or written, made by those present when a thing took place, made about it, and importing what is present at the very time.’”).

⁴⁸ See FED. R. EVID. 803 advisory committee’s note (“With respect to the *time element*, [the present sense impression exception] recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a *slight lapse* is allowable.” (emphasis added)); McFarland, *supra* note 5, at 919-20 (“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, one minute, three to five minutes, five minutes, seven minutes, five to ten minutes, ten minutes, fourteen and one-half minutes, and at least eighteen minutes after the event.”); see also cases cited, *supra* note 27 (outlining various scenarios where courts have applied present sense impression exception). One of the most often cited cases is *United States v. Blakely*, a 1979 case where a lapse of up to twenty-three minutes *could have occurred*. 607 F.2d 779, 785-86 (7th Cir. 1979). The victim in *Blakely* had a conversation with a witness after the defendant made threatening statements to him. *Id.* at 784. Twenty-three minutes after the threat, the victim made a phone call. *Id.* at 786. The hearsay admitted at trial included statements made to the witness, so the twenty-three minutes represented the longest possible delay, not the actual delay. *Id.* at 786. Many academics have strong opinions regarding the various lengths of time that courts consider to be contemporaneous. Compare McFarland, *supra* note 5, at 918 (arguing for strict contemporaneity in applying exception), with Imwinkelried, *supra* note 17, at 348-49 (advocating for looser view of temporal proximity in applying exception).

⁴⁹ H.R. REP. NO. 93-650 (1973), reprinted in 1974 U.S.C.A.N. 7075, 7079-80 (rejecting proposed rule as allowing untrustworthy statements into evidence).

exception, the *Hieng* panel did not give adequate consideration to the temporal delay, to the extra mental processes involved, or to the motivation of law enforcement officers.⁵⁰

As both the majority and concurrence note, there were several minutes between when the officers began destroying and counting the plants, and reporting their totals to Detective Jensen.⁵¹ Although the break in time is troublesome, the various mental processes in which the officers engaged while handling the marijuana operation raise serious concerns: counting, collecting, destroying, and reporting their totals to fellow police officers.⁵² When there is an intermediate step breaking the direct link between the perception and the statement, it should not qualify under the present sense impression exception.⁵³ Although the complexity of the intermediate step may vary, from simple calculation to reports tailored to specific police inquiry, the results are the same—statements are further removed from the perceived events.⁵⁴

⁵⁰ See Foster, *supra* note 16, at 305-06 (citing FED. R. EVID. Rule 803 advisory committee's note) (detailing Congressional endorsement of spontaneity and contemporaneity requirements for present sense impression exception); Waltz, *supra* note 16, at 880 ("Because the present sense impression exception rests so heavily on contemporaneity, that requirement is likely to be enforced with some rigor, at least when powerful corroboration is lacking." (emphasis added)).

⁵¹ *Hieng*, 679 F.3d at 1142 n.2 (noting time of plant eradication likely took "some minutes"); *id.* at 1147 (Berzon, J., concurring) (same); see also *United States v. Green*, 556 F.3d 151, 155-56 (3d Cir. 2009) ("Put differently, the temporality requirement must be rigorous because the passage of time—or lack thereof—is the effective proxy for the reliability of the substance of the declaration; hence the greater the passage of time, the less trustworthy the statement is presumed to be, and the more the scales should tip toward inadmissibility."); *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980) ("The more time that elapses between the declaration and the period about which the declarant is commenting, the less reliable is his statement, because the greater chance there is that his memory is erroneous."); Foster, *supra* note 16, at 314 (discussing various mental processes involved in perception alone).

⁵² See *Hieng*, 679 F.3d at 1147 ("Instead, what Jensen testified to was the *result* of a mental process—counting a series of marijuana plants while they were collected, and, ultimately, determining how many there were in total."); see also cases cited, *infra* note 53 (outlining various hearsay issues).

⁵³ See *United States v. Hamilton*, 948 F. Supp. 635, 639 (W.D. Ky. 1996) (determining police identification procedures constituted intermediate step); Imwinkelried, *supra* note 17, at 345 ("The focus ought to be on the nature of the thought process producing the statement rather than the substantive content of the statement. When the thought process is complex, involving an intermediate step between the receipt of the present sense impression and the utterance, the utterance falls outside the ambit of Rule 803(1)."); see also *United States v. Manfre*, 368 F.3d 832, 840 (8th Cir. 2004) (holding intervening events broke temporal proximity).

⁵⁴ See *Green*, 556 F.3d at 157 (determining questions by DEA agents created "reflection" upon past events); *United States v. Woods*, 301 F.3d 556, 562 (7th Cir. 2002) (reasoning declarant's statements made for listening DEA agents not "contemporaneous"); Imwinkelried, *supra* note 17, at 346 (noting statements in response to questioning breaks contemporaneity requirement); see also *Manfre*, 368 F.3d at 840 (holding intermediate drive broke proximal link between statement and event).

Academics disagree over whether a declarant's motivation to lie or misrepresent facts should go to the weight or admissibility of the evidence.⁵⁵ In *Hieng*, the minimum mandatory sentence triggered when the detectives recovered over 1000 marijuana plants raises the specter of whether the detectives had a significant motive to fabricate or misstate their totals.⁵⁶ At least some courts have been leery in admitting statements when law enforcement is involved, especially when statements have significant legal consequences.⁵⁷ Lastly, the *Crawford* analysis further implicates many statements made to or by police officers, further complicating the trial court's duties.⁵⁸ When there is a time lapse coupled with a motive to fabricate statements, a defendant has a strong argument that he or she has a fundamental right to examine that witness to probe the possible biases affecting perception of an event.⁵⁹

⁵⁵ Compare *McFarland*, *supra* note 5, at 926-27 (discussing motivation to lie as question of admissibility), and *Foster*, *supra* note 16, at 334-35 (proposing corroboration requirement for admission of present sense impression hearsay), and *Waltz*, *supra* note 16, at 880 (discussing corroboration requirement as necessary for admission), with *Imwinkelried*, *supra* note 17, at 348-50 (arguing motive to lie should affect weight of evidence not admissibility).

⁵⁶ See *Hieng*, 679 F.3d at 1135 (noting defendant sentenced to minimum incarceration of ten years). The total number of plants counted by the detectives was 1109, relatively close to the 1000-plant requirement of 21 U.S.C. § 841(b)(1)(A)(vii). *Id.* at 1135-36. In this case, although no evidence of miscount was presented at trial, the detectives may have "harbor[ed] some motive to falsify, or at least slant, [their] statement[s]" to bring the plant count over 1000. See *Foster*, *supra* note 16, at 301 (detailing motive to lie as factor in evaluating admissibility under present sense impression exception).

⁵⁷ See *Green*, 556 F.3d at 155 (stating declarant's statements inadmissible because resulted from questioning by DEA agents); *Woods*, 301 F.3d at 562 (reasoning declarant's taped narrative to officers inadmissible because statements made for police's benefit); *United States v. Ponticelli*, 622 F.2d 985, 992 (9th Cir. 1980) (holding declarant's hearsay statements calculated because spoke to his attorney); *Hamilton*, 948 F. Supp. at 639 (ruling police identification procedures inadmissible as response to officer provocations).

⁵⁸ See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (holding testimonial hearsay statements subject to Confrontation Clause protections); *United States v. Solorio*, 669 F.3d 943, 953 (9th Cir. 2012) (reasoning officers reporting observations as part of undercover drug buy non-testimonial); see also *Hieng*, 679 F.3d at 1147 (outlining various temporal limits imposed by courts); cases cited *supra* note 53 (same).

⁵⁹ See *Crawford*, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). The statements of the detectives in *Hieng* had significant legal consequences because the number of plants destroyed directly correlated with the severity of the charges. See *Hieng*, 679 F.3d at 1135 (noting mandatory sentence required when more than 1000 plants involved). Similar to statements made to police by other individuals, statements between officers that are not in high-risk or high-danger situations are more akin to evidence collection than to furthering immediate police investigation. See *Solorio*, 669 F.3d at 952-53 (holding reports non-testimonial and necessary given high-risk situation); see also, e.g. *Green*, 556 F.3d at 157 ("Brown's statement in this case is problematic . . . because the statement was only made after he had been questioned by DEA agents about the details of the transaction the statement purports to describe."); *Woods*, 301 F.3d at 562 ("These statements were made for the

United States v. Hieng is just one in a long line of cases that have put further strain on the present sense impression exception to hearsay exclusion. Arguing in her concurrence, Judge Berzon represents a strong voice of reason and moderation preaching to a judiciary that insists on continually molding an exception into a norm. It is clear Congress did not do enough by rejecting proposed rule 804(b)(2); it will take a wholesale modification of rule 803(1)'s language to ensure the spirit of the exception is renewed. While the present sense impression exception continues to cover more and more hearsay, it has expelled most reasonable limits. Only with Congressional action will present sense once again coexist with common sense.

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benefit of the agents—*i.e.*, were calculated and provided for a reason—and are not admissible under the present sense impression exception.”); *Ponticelli*, 622 F.2d at 992 (holding statements to lawyer after arrest were not present sense impressions because of legal implications).