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Sherri K. Adelkoff

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Dialing "M" for Murder: Analyzing the Admissibility of the Telephone Dying Declaration

A Bradford County Court of Common Pleas jury convicted Terry Ray Chamberlain ("Chamberlain") of two counts of first degree murder, burglary, and possession of an instrument of crime.\(^1\) The convictions arose from the shooting deaths of Chamberlain's estranged wife, Sherri Chamberlain, and her boyfriend, Gregory Inman.\(^2\) At the penalty phase of the trial, the jury found aggravating circumstances, but no mitigating circumstances, and fixed the death penalty for the first degree murder convictions.\(^3\) The trial court formally imposed sentence and denied Chamberlain's motions for a new trial and post-trial and post-sentence relief.\(^4\) Chamberlain appealed to the Supreme Court of Pennsylvania as of right, pursuant to 42 Pa. Cons. Stat. Ann. section 744(4).\(^5\)

2. Chamberlain, Brief for Appellee at 5; Brief for Appellant at 14.
4. Chamberlain, Brief for Appellee at 5; Brief for Appellant at 14.
   The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases: . . .
   (4) Automatic review of sentences as provided by 42 Pa. C.S. §§ 9546(d) (relating to relief and order) and 9711(h) (relating to review of death sentence).
   (h) Review of death sentence —
   (1) A sentence of death shall be subject to automatic review by the Supreme
Of the sixteen issues on appeal, whether the trial court erred in

Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or
(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d)

(iii) Deleted.

(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

42 PA. CONS. STAT. ANN. § 9711(h).

6. In addition to the telephone dying declaration issue, Chamberlain appealed the following fifteen issues:

1. Whether the evidence provided at trial was sufficient or insufficient to support the verdict?

2. Whether the trial court properly or erroneously denied a motion for a new trial on the ground that the verdict was against the weight of the evidence?

3. Whether the trial court properly or erroneously concluded that the prosecutor's closing argument did not include unduly prejudicial personal assertions of guilt or inferential conclusions that were not supported by the evidence?

4. Whether the trial court properly or erroneously concluded that there was no due process violation in the failure of the police to preserve certain evidence where the alleged exculpatory nature of the lost evidence was not facially apparent and where there is no evidence that the police acted in bad faith?

5. Whether the trial court properly or erroneously denied a defense continuance request?

6. Whether it was constitutionally permissible or impermissible to allow prosecutors discretion in determining whether a death penalty should be sought in a given case; and whether relief from the death penalty is warranted under Section 9711(h) of the Judicial Code?

7. Whether the trial court properly or erroneously concluded that the Commonwealth did not withhold any exculpatory or material evidence?

8. Whether the trial court properly or erroneously denied a motion for a new trial on the ground of after-discovered evidence?

9. Whether the trial court properly or erroneously denied a motion to dismiss the Criminal Information based on allegations of vindictive prosecution?

10. Whether the trial court properly or erroneously admitted evidence of prior bad acts?

11. Whether the trial court properly or erroneously denied Chamberlain's motions for mistrial?

12. Whether the trial court properly or erroneously denied a motion to quash the Criminal Information based on an alleged violation of the Commonwealth's Attorney's Act?

13. Whether the trial court properly or erroneously denied a motion to dismiss the Criminal Information based on legal insufficiency and failure to establish a prima facie
admitting the hearsay testimony of Kim Ulrich under either the
dying declaration or the excited utterance exception to the hearsay
rule when the declarant allegedly made the statement via telephone
raises an important and interesting question — whether a telephone
dying declaration can ever (or should ever) rise to the level of
trustworthiness inherently necessary for admission into evidence.
Although the elements of the dying declaration and excited
utterance exceptions differ, the resolution of the telephone dying
declaration question under the facts presented in Chamberlain
necessarily resolves the excited utterance issue. Therefore, this
Comment primarily focuses on the dying declaration question. Part
A reviews the relevant evidence presented at Chamberlain’s jury
trial that resulted in his conviction. Part B outlines the hearsay rule
and the rationales underlying its exceptions, specifically the dying
declaration exception. Part C proposes a rationale for deciding the
dying declaration issue under the facts presented in Chamberlain.
Part D analyzes whether a telephone dying declaration can ever, or
should ever, rise to the level of trustworthiness inherently
necessary for admission into evidence.

PART A: COMMONWEALTH V. CHAMBERLAIN: THE TRIAL EVIDENCE

Terry Lee Chamberlain’s estranged wife, Sherri Chamberlain, and
her boyfriend, Gregory Inman, were found dead at their Bradford
County, Pennsylvania, residence in the early morning hours of
August 22, 1991.7 Each victim died of multiple gunshot wounds.8
The trial court permitted, over objection, the hearsay testimony
of Kim Ulrich under either the dying declaration or excited
utterance exception to the hearsay rule.9 Accordingly, Mrs. Ulrich

See Chamberlain, Brief for Appellee at 1; Brief for Appellant at [1].
8. Chamberlain, Brief for Appellee at 8; Brief for Appellant at 14.
9. Chamberlain, Brief for Appellee at 9; Brief for Appellant at 15. “A statement may
be considered a dying declaration and, therefore, admissible hearsay if, at the time of the
statement, the declarant believes he is going to die, death is imminent and death actually
results.” Commonwealth v. Miller, 417 A.2d 128, 132 (Pa. 1980); Commonwealth v. Frederick,

[An excited utterance may be defined as a spontaneous declaration by a person
whose mind has been suddenly made subject to an overpowering emotion caused by
testified that she received a telephone call on August 22, 1991 that awakened her at 2:24 a.m. She then testified that after she answered the telephone, the caller stated: “Call an ambulance — Terry shot Greg and me.”

Mrs. Ulrich also testified that she recognized the caller's voice as Sherri Chamberlain's, her friend and neighbor with whom she spoke on the telephone more than 100 times that year. Mrs. Ulrich further testified that she engaged in many conversations with Sherri Chamberlain regarding Ms. Chamberlain’s estranged husband and that the victim always referred to him as “Terry.” Mrs. Ulrich described the tone of the caller’s voice as urgent, trembling, and very clear. Mrs. Ulrich’s testimony further revealed that the telephone call endured for approximately 2.5 seconds, during which time Mrs. Ulrich heard no background noises. In addition, Mrs. Ulrich testified that the caller failed to respond to her queries of, “Sherri?”

Following the call, Mrs. Ulrich told her husband, Vaughn, that Chamberlain just shot Sherri Chamberlain and Greg Inman. Mrs. Ulrich then called 911 and told the dispatcher that Chamberlain shot her neighbors.

Vaughn Ulrich immediately dressed and proceeded to the victims’ residence where he discovered their bodies approximately three minutes after the call. Mr. Ulrich testified that he heard no gunshots while en route to the victims’ home. He also stated that when he arrived at the victims’ residence, he did not see or hear anyone exit.

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some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.


10. Chamberlain, Brief for Appellee at 8; Brief for Appellant at 14.
11. Chamberlain, Brief for Appellee at 6; Brief for Appellant at 15.
13. Id.
14. Id.
15. Chamberlain, Brief for Appellant at 20.
16. Id. at 23.
17. Chamberlain, Brief for Appellee at 7.
18. Id.; Chamberlain, Brief for Appellant at 16.
20. Chamberlain, Brief for Appellant at 15.
21. Id. at 21.
Additional testimony revealed that the lower portion of Sherri Chamberlain's body was found on the living room floor; the upper portion was found on the steps leading upstairs to the kitchen, bathroom and bedrooms.22 Next to Sherri Chamberlain's body rested the handset of a wall-mounted telephone.23 Following the arrival of Pennsylvania State Troopers and the coroner, the coroner used the victims' telephone, thus destroying any evidence that could have been obtained from the redial function.24

The Commonwealth's medical expert testified that Sherri Chamberlain sustained five gunshot wounds, including a grazing scalp wound, a chest wound, a shoulder wound, an abdominal wound and a head wound.25 The expert further testified that Sherri Chamberlain's head wound was immediately fatal and her chest wound would have killed her within a few seconds to a couple of minutes, at most.26

A forensic examination of the scene revealed no physical evidence linking Terry Chamberlain to the murders.27 The Commonwealth produced no eyewitnesses and no murder weapon.28

22. Chamberlain, Brief for Appellee at 7.
23. Id. at 7-8.
27. Id. at 14, 23.
28. Id. at 14, 16. The Commonwealth grounded its case against Chamberlain on the following circumstantial evidence:

Stanley Mullen, Chamberlain's co-worker, testified that Chamberlain expressed dissatisfaction that his estranged wife took up residence with another man and that he was forced to pay child support. Chamberlain, Brief for Appellee at 5. Mullen also testified that Chamberlain approached him in search of purchasing a handgun, specifically an unregistered .357 or .38 caliber. Id.

Another co-worker, James Janowsky, testified that he and Chamberlain engaged in conversations approximately 17 months before the murders wherein Janowsky told Chamberlain of an unnamed acquaintance who assisted him with his marital problems by arranging to have a person visit Janowsky's wife's boyfriend to convince him to stop seeing Janowsky's wife. Id. at 6. Janowsky also testified that he told Chamberlain the unnamed individual was willing to have someone put a pillow over Janowsky's wife's head or slap her around a bit. Id. Janowsky stated that Chamberlain became keenly interested in meeting Janowsky's acquaintance, asked Janowsky about contacting the person and that Chamberlain did not desist until Janowsky told him that person no longer provided such services. Id.

An attorney testified regarding his review of documents filed in Chamberlain's divorce. Id. The attorney stated that Sherri Chamberlain would have become eligible to obtain a no-fault divorce on the day of the murders. Id.

A Pennsylvania State Trooper testified that he telephoned Chamberlain twice on the morning of the murders. Id. at 8-9. Tapes of these telephone calls were captured on audiotape by Chamberlain's answering machine and played for the jury. Id. at 9.
A jury convicted Terry Lee Chamberlain of two counts of first degree murder, burglary, and possessing an instrument of crime and fixed the death penalty for the first degree murder convictions. Following formal imposition of sentence, the trial court denied Chamberlain's motions for a new trial and for post-trial and post-sentence relief. As a matter of right, Chamberlain appealed to the Supreme Court of Pennsylvania.

PART B: THE HEARSAY RULE, RATIONALES FOR EXCEPTIONS, EMPHASIZING THE DYING DECLARATION EXCEPTION

"Hearsay" is defined as an out-of-court statement offered to prove the truth of the matter asserted. Any statement, except one made by a witness testifying at trial, constitutes an out-of-court statement. A hearsay statement may be a written or oral communication. Written communications include reports, letters, records and computer printouts. Oral communications include

Chamberlain's voice appeared alert and unemotional. He exhibited no sign of surprise or curiosity from the phone call he received from a police officer at 4:00 a.m. He also failed to question police directions to leave his house with his hands in view.

Another Pennsylvania State Trooper testified that Chamberlain exited his home dressed in a pair of shorts. The trooper further testified that Chamberlain was meticulously clean and smelled of shampoo, deodorant and soap. He stated that Chamberlain's hair was damp at the roots and that he appeared to have been awake when police arrived at his home.

29. Chamberlain, Brief for Appellee at 4; Brief for Appellant at 12-13.
30. Chamberlain, Brief for Appellee at 4; Brief for Appellant at 13-14.
31. Chamberlain, Brief for Appellee at 3; Brief for Appellant at 11.
32. Unlike the Federal Rules of Evidence, which are the product of legislative action, the Pennsylvania Rules of Evidence were, at the time the instant decision was rendered, a product of the common law. On April 1, 1998, however, the Commonwealth of Pennsylvania codified the Pennsylvania Rules of Evidence, effective October 1, 1998.

Hearsay evidence is testimony in court of a statement made out of the court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. Evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he has heard others say. That which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and, as such, hearsay evidence is generally inadmissible unless it falls within one of the many exceptions which provides for admissibility.

34. PACKEL & POULIN, PENNSYLVANIA EVIDENCE, § 801 at 542 (1987).
35. Id. § 801 at 541.
36. Id.
face-to-face communications, telephone communications and recordings of these communications. When a proponent of an out-of-court statement offers it to prove the facts communicated in the statement, the proponent offers the statement for the truth of the matter asserted.

Generally, hearsay is inadmissible at trial because hearsay statements lack the judicial guarantees of trustworthiness provided by an oath and cross-examination. However, four reasons justify the creation of various exceptions to the general rule excluding hearsay: necessity, convenience or efficiency, fairness and inherent guarantees of trustworthiness.

Necessity usually arises due to the unavailability of the witness. A witness is "unavailable" if he is dead, insane, beyond the reach of a summons, holds a privilege permitting him to refuse to testify or is otherwise unavailable to testify.

Convenience or efficiency encompasses what is just and suitable to be adequate in producing a properly desired effect. As this often occurs in the context of admitting business records, the Pennsylvania legislature enacted the Uniform Business Records of Evidence Act. The rationale behind the statute is that, in today's multifaceted business world, a requirement that the entrant of the business record possess personal knowledge of the event recorded, and a requirement of proof of the identity of the recorder would exclude most evidence regarding the activities of large business.

37. Id.
38. Id. at 542; see also Cassidy, 462 A.2d at 272.
40. Packel & Poulin, supra note 34, § 803 at 557.
41. Id. at 557-58.
43. Black's Law Dictionary defines "convenient" as "[P]roper, just; suitable; fit; adapted; proper; becoming appropriate." Black's Law Dictionary 330 (6th ed. 1990). Black's Law Dictionary defines "efficient" as "[c]ausing an effect; particularly the result or results contemplated. Adequate in performance or producing properly a desired effect." Id. at 515.
44. Packel & Poulin, supra note 34, § 803 at 558.
45. "A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its act." 42 Pa. Cons. Stat. Ann. § 6108 (1984 & West Supp. 1997) ("Uniform Business Records of Evidence Act").
"Fairness" is evenhandedness and equality between conflicting interests. Fairness typically arises in the context of prior admissions made by an accused because it is considered fair that a party's previous incriminating statements be used against him if they are inconsistent with his trial position.

The final rationale for excepting statements from the hearsay rule becomes operative when the circumstances attendant to the hearsay statement provide sufficient guarantees of trustworthiness that render unnecessary the normal judicial assurances of an oath and cross-examination. Three justifications support this rationale: (1) the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification is formed; (2) even though a desire to fabricate might present itself, other considerations, including the danger of easy detection or the fear of punishment, probably counteract its force; and (3) the statement was made under such conditions that if an error were actually made it probably would have been detected and corrected.

The proponent of the hearsay statement bears the burden of proving the preliminary or foundational facts necessary to satisfy the requirements of the exception. The trial court then determines whether the proponent of the hearsay statement offered sufficient facts to satisfy the elements of the exception for admission into evidence. Admissibility of evidence is committed to the sound discretion of the trial court and will not be reversed, absent an abuse of discretion. The trial court abuses its discretion when it pursues a course that represents not merely an error of judgment, but where the judgment is manifestly unreasonable, the law is not applied, or the record demonstrates that the action is a result of partiality, prejudice, bias, or ill will. When the trial court improperly admits evidence and permits the jury to consider it, the

48. PACKEL & POULIN, supra note 34, § 803 at 558; § 805 at 653.
49. Id. at 557. See also Commonwealth v. Smith, 681 A.2d at 1290 (citing JOHN HENRY WIGMORE, 5 WIGMORE ON EVIDENCE § 1420 at 202-03; § 1422 at 204-05 (3d ed. 1940)).
50. WIGMORE, supra note 42, § 1422 at 254. The dying declaration exception rests entirely on reason (iii); i.e., the fear of divine punishment. Id.
remedy is the grant of a new trial.55

A statement may be considered a dying declaration and, therefore, admissible hearsay if, at the time of the statement, the declarant believes he is going to die, death is imminent and death actually results.56 Admissibility of a dying declaration depends on all the surrounding circumstances, including the weapon used, the nature and extent of the declarant’s injuries, the declarant’s conduct, and his spoken words.57 However, admissibility primarily depends upon the declarant’s state of mind.58 Two rationales justify the dying declaration exception to the hearsay rule: (1) the necessity for the testimony of the deceased declarant; and (2) the inherent trustworthiness of a declarant’s statement when facing death.59

The declarant’s words remain the best evidence of his belief in impending death.60 However, this belief may be inferred from the circumstances, including the nature of the declarant’s wounds.61 Often, the testimony of the declarant’s treating physician or of a medical expert, regarding the fatal nature of the wounds, generally suffices to show the declarant’s expectation of impending death.62

The second element requires that the proponent establish the imminence of the declarant’s death.63 It is not enough that the declarant did, in fact, die.64 The declarant must have been dying in fact when he made his declaration.65 Furthermore, death must actually result66, but death need not be immediate.67 Although never

57. Knable, 85 A.2d at 117.
58. Id.
59. Commonwealth v. Riggins, 386 A.2d 520 (Pa. 1978). When the declarant is conscious of the imminence of death, the solemnity of the occasion justifies giving the dying declaration the same weight as sworn testimony. Id. at 522. *“When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating the most impressive of sanctions.”* Id. at 523 (quoting 1 WHARTON’S CRIMINAL LAW § 669).
62. See Speller, 282 A.2d at 28; Plubell, 80 A.2d at 829.
63. Frederick, 498 A.2d at 1324.
65. Id. (citing Commonwealth v. Smith, 314 A.2d 224, 225 (1973)).
66. Frederick, 498 A.2d at 1324.
67. Commonwealth v. Lockett, 139 A. 836 (Pa. 1927) (declarant died ten days after
specifically addressed by the Supreme Court of Pennsylvania, it appears that the declarant must have actually died as a result of his injuries. The court has, however, expressly held that dying declarations are restricted to the circumstances immediately attending the homicide and are inadmissible if they relate to former and distinct occurrences not immediately connected with the declarant's death.

PART C: COMMONWEALTH v. CHAMBERLAIN: A PROPOSED RATIONALE

Before Chamberlain, the issue of the admissibility of a telephone dying declaration never arose in this Commonwealth. In fact, the vast majority of dying declaration cases involved face-to-face declarations. Thus, no on-point precedent exists. The court may, however, find instructive its holding in Commonwealth v. Coleman, as well as three opinions from courts of other jurisdictions.

First, in Coleman, the court upheld the trial court's admission of the testimony of the decedent's mother concerning a telephone call she received from the decedent under the present sense impression

shooting); Commonwealth v. Stickle, 398 A.2d 957 (Pa. 1979) (declarant survived for approximately one month).

68. Packel & Poulin, supra note 34, § 804.2 at 641.


70. See, e.g., Knable, 85 A.2d at 116 (declarant's face-to-face dying declaration to doctor at hospital, "Don't let her get away with it," found inadmissible, but not reversible error); Miller, 417 A.2d at 130 (declarant's face-to-face dying declaration to police, "Clarence Miller did this to me," found admissible); Frederick, 498 A.2d at 1324 (declarant's face-to-face dying declaration to two persons rendering declarant aid identifying defendant as person who shot declarant found admissible); Riggins, 386 A.2d at 522 (declarant's face-to-face dying declaration to declarant's mother and mother's co-worker identifying three assailants who stabbed her found admissible); Cooley, 348 A.2d at 105-06 (declarant's face-to-face dying declaration to police, "I was shot by Jim Dandy. He's back there," found admissible); Speller, 282 A.2d at 28 (declarant's face-to-face dying declaration to physician, "Big Mac shot me," found admissible); Plubell, 80 A.2d at 827-28 (declarant's face-to-face dying declaration to father that declarant's wife "had got [him] this time," found admissible); Little, 364 A.2d at 918 (declarant's face to face dying declaration to police that defendant shot him found inadmissible for failure to show declarant's awareness of impending death); Lockett, 139 A. at 838 (declarant's face-to-face dying declaration to magistrate at hospital in form of affidavit detailing circumstances of declarant's wounds found admissible); Stickle, 398 A.2d at 962-64 (declarant's face-to-face dying declaration to police and medical personnel that defendant beat, choked, raped, and poured gasoline over her, which ignited, found admissible). In one case concerning a written dying declaration, the declarant first stated orally in the presence of two persons that the defendant had shot her and then placed her mark on a written statement. Commonwealth v. Green, 141 A. 624, 625 (Pa. 1928).

Telephone Dying Declaration

exception to the hearsay rule. In that case, the decedent-declarant telephoned her mother. During a ten-minute conversation, the decedent told her mother that her boyfriend (the defendant) refused to permit her to leave the apartment they shared, that he said he would hang up the phone and then kill her. During this conversation, the mother heard the defendant shouting in the background. Five minutes after the call, the defendant, spattered with blood and lacerated about the face, hailed a police car and stated that he hurt his girlfriend. Five minutes later, the police found the decedent in the apartment dead of multiple stab wounds. In upholding the admission of this hearsay testimony under the present sense impression exception, the court found that the confluence of time and events vested special reliability in the statements. The court further found that the facts and the defendant's admission that he argued with the decedent prior to the telephone call corroborated the mother's hearsay testimony.

Second, in State of Louisiana v. Martin, the Court of Appeals of Louisiana upheld the admission of a 911 recording as an excited utterance, "if not a true dying declaration." In that case, the decedent telephoned 911 after the defendant allegedly set him on fire. During the course of the decedent's recorded conversation with the 911 emergency operator, the decedent identified the defendant as the person who set him on fire.

Third, in People v. Leonard, the Supreme Court of Illinois upheld the trial court's admission of a telephone hearsay statement under the spontaneous statement exception. In Leonard, the decedent

72. Commonwealth v. Coleman, 326 A.2d 387 (1974). The present sense impression exception to the hearsay rule includes those declarations concerning conditions or non-exciting events that the declarant observes at the time of his declaration. Coleman, 326 A.2d at 389 (citing Morgan, Res Gestae, 12 WASH. L. REV. 91, 96 (1937)). The declaration's relative immediacy guarantees the indicium of reliability because the declarant has little opportunity to reflect upon or calculate a misstatement. Coleman, 326 A.2d at 389.
73. Coleman, 362 A.2d at 390.
74. Id. at 388.
75. Id. at 390.
76. Id. at 388.
77. Id.
78. Coleman, 362 A.2d at 390.
79. Id.
81. Martin, 562 So.2d at 471.
82. Id.
placed a telephone call to the testifying witness and identified himself.\textsuperscript{84} During the course of their conversation, the decedent stated, "He's got a gun."\textsuperscript{85} The witness then heard another voice state, "Tell the mother f-manager to come down now, now, now."\textsuperscript{86} She recognized the other voice as that of the defendant.\textsuperscript{87} The witness then hung up the phone and called the police.\textsuperscript{88} The victim died of a close-range gunshot wound to the chest.\textsuperscript{89} Three other witnesses corroborated the hearsay testimony by testifying that they saw the decedent and the defendant struggle over a gun at a time that was virtually contemporaneous with the telephone call.\textsuperscript{90} Accordingly, the court held that sufficient circumstantial evidence was presented corroborating a sufficiently startling event to admit the testimony under the spontaneous statement exception to the hearsay rule.\textsuperscript{91}

Finally, in \textit{State v. Flesher}, the Court of Appeals of Iowa upheld the admission of a telephone declaration under its present sense impression exception to the hearsay rule.\textsuperscript{92} In that case, the witness-husband was engaged in a conversation with his decedent-wife when he heard a knock at the door.\textsuperscript{93} The wife answered the door.\textsuperscript{94} She then returned to the telephone conversation and told her husband that the defendant was at the door and that she had let her in.\textsuperscript{95} This evidence placed the defendant at the murder scene.\textsuperscript{96}

The common thread linking the facts of Coleman, Martin, Leonard, and Flesher (and, therefore, justifying their evidentiary holdings) is the undisputed presence of a sufficient guarantee of trustworthiness, in that no question existed as to whether the decedent in each case was, in fact, the declarant. The

\begin{footnotesize}
\begin{enumerate}
\item N.E.2d 804 (Ill. 1961)).
\item Leonard, 415 N.E.2d at 360.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Leonard, 415 N.E.2d at 361.
\item Id. at 362.
\item Id.
\item State v. Flesher, 286 N.W.2d 215 (Iowa Ct. App. 1979). Iowa holds that a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter is admissible under the present sense impression exception to the hearsay rule. \textit{Flesher}, 286 N.W.2d at 216-18.
\item Id. at 216.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
distinguishing fact present in those cases, and lacking in Chamberlain, is that the declarants spoke with the testifying witnesses; these conversations sufficiently guaranteed the trustworthiness of the callers' identities. As such, the Coleman, Martin, Leonard, and Flesher courts properly proceeded to analyze whether the facts satisfied the requirements of the particular hearsay exception advanced by the proponent. Although each hearsay exception contains different preliminary or foundational facts necessary to satisfy its elements, courts cannot lose sight of the underlying reasons for the hearsay exceptions. In the instant case, certainly, Sherri Chamberlain is dead and, therefore, unavailable. However, the facts must demonstrate that the circumstances attendant to the hearsay statement provide sufficient guarantees of trustworthiness that Sherri Chamberlain, in fact, placed the call.

In deciding this issue, the court must look to the attendant circumstances. First, the call roused Kim Ulrich from her sleep at 2:24 a.m. and lasted only 2.5 seconds.\(^97\) The timing of the call and its short duration raise the issue of whether Mrs. Ulrich was sufficiently coherent to have been certain as to the caller's identity. Second, Kim Ulrich engaged in no conversation with the caller. This fact also goes against positive identification. Third, the caller failed to respond to Mrs. Ulrich's queries of “Sherri?"\(^98\) Again, this fact weighs against certainty of identification. Fourth, during this 2.5 second call, Mrs. Ulrich heard no background noises.\(^99\) If, for example, Mrs. Ulrich heard Gregory Inman speak in the background, this fact would probably be enough to corroborate the declarant's identity because both victims were found dead at the same residence. Lack of background noises, therefore, further clouds the identification issue. Fifth, the coroner destroyed any corroborative evidence that could have been obtained from the victims' telephone redial function when the coroner used the telephone.\(^100\) Sixth, although the handset of the telephone was found lying next to Sherri Chamberlain's body,\(^101\) it is possible that she merely attempted to place a call before her death or that the killer planted the telephone next to her body.

Conversely, Mrs. Ulrich testified that she engaged in at least 100

\(^{97}\) Chamberlain, No. 155 (E.D. Pa.) (1997), Brief for Appellant at 14, 23.
\(^{98}\) Id. at 23.
\(^{99}\) Id. at 20.
\(^{100}\) Id. at 16.
\(^{101}\) Chamberlain, Brief for Appellee at 7-8.
conversations with Sherri Chamberlain and recognized her voice.\textsuperscript{102} Moreover, approximately three minutes following the call, Sherri Chamberlain was found shot to death.\textsuperscript{103}

Based on these facts, it is questionable whether the declarant was, in fact, Sherri Chamberlain. If the court finds that the facts fail to provide sufficient guarantees of trustworthiness as to identity, it should not proceed to analyze whether the statement satisfies the elements of a dying declaration.\textsuperscript{104} Conversely, if the court finds that sufficient guarantees of trustworthiness of identity exist, it must then reach the ultimate question of whether the statement meets the elements of the dying declaration.\textsuperscript{105}

\textbf{PART D. THE ULTIMATE QUESTION: WHETHER A TELEPHONE DYING DECLARATION CAN EVER, OR SHOULD EVER, RISE TO THE LEVEL OF TRUSTWORTHINESS THAT THE COURT DEEMS NECESSARY FOR ADMISSION INTO EVIDENCE?}

The \textit{Chamberlain} case begs the important question of whether a telephone dying declaration can ever, or should ever, rise to the level of trustworthiness inherently necessary for admission into evidence. Assume that Sherri Chamberlain answered Mrs. Ulrich's queries of, "Sherri?" Clearly, trustworthiness as to the caller's identity would no longer be an issue and the court could properly proceed to determine whether the proponent proved the preliminary facts necessary to satisfy the elements of a dying declaration. The question then becomes: can the statement, or should the statement, be admissible under this exception?

First, did the words, "Call an ambulance — Terry shot Greg and me," demonstrate that the declarant believed she was going to die? Preliminarily, one may argue that a person facing death and in dire need of medical treatment would call an emergency unit, not a friend. Furthermore, it may be argued that the words, "Call an ambulance," evidence a belief in the necessity of medical treatment and the hope of recovery.

Conversely, one may argue that because the court holds that the

\begin{itemize}
\item \textsuperscript{102} Id. at 7.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} This finding would also disqualify the statement under the excited utterance exception to the hearsay rule.
\item \textsuperscript{105} If the court finds that the statement is trustworthy as to identity, it follows that the statement would be admissible under the excited utterance exception to the hearsay rule.
\end{itemize}
declarant's belief in imminent death may be inferred from the circumstances, the nature of Sherri Chamberlain's wounds satisfy the requirement. Moreover, many statements, including "Don't let her get away with it," "Clarence Miller did this to me," "I was shot by Jim Dandy. He's back there," and "Big Mac shot me," have been upheld as dying declarations even though the words themselves demonstrated no belief in imminent death. The important differences between those statements and the statement at issue, however, are: (1) the declarants made the statements face-to-face with the testifying witnesses; and (2) the testifying witnesses observed the nature and extent of the declarants' injuries. Accordingly, the surrounding circumstances justified the conclusion that each declarant believed in imminent death because the testifying witness observed the gravity of the wounds and the declarant's conduct and demeanor as he spoke.

In the instant case, Mrs. Ulrich never saw Sherri Chamberlain when she spoke the words, "Call an ambulance — Terry shot Greg and me." How, then, can one reasonably infer the declarant's belief in impending death at the precise time the declarant spoke the words? Admissibility of a dying declaration primarily depends on the declarant's state of mind. Without words conveying state of mind and without observation by the testifying witness sufficient to infer state of mind, how can this telephone dying declaration, or any other, ever satisfy the elements of belief in impending death and imminence of death?

Moreover, in Chamberlain, the Commonwealth's medical expert testified that Sherri Chamberlain sustained five gunshot wounds, including a grazing scalp wound, a chest wound, a shoulder wound, an abdominal wound and a head wound. The expert also testified that the head wound was immediately fatal and that the chest wound would have killed Sherri Chamberlain within a few seconds to several minutes, at most.

Based on the medical testimony, the following scenario seems probable: Sherri Chamberlain first sustained one or more non-fatal

108. Miller, 417 A.2d at 130.
109. Cooley, 348 A.2d at 105-06.
110. Speller, 282 A.2d at 28.
111. Knable, 85 A.2d at 117.
112. Chamberlain, Brief for Appellee at 9.
113. Chamberlain, Brief for Appellant at 21 and n.1.
wounds. The killer then left the room, giving her the opportunity to use the telephone. At this time, Sherri Chamberlain placed the call to Kim Ulrich. The killer then returned and inflicted the remaining shots, including the fatal shots to the chest and heart. Under this scenario, it is likely that Sherri Chamberlain did not believe that death was imminent because the shoulder wound inflicted at the precise time she placed the call is arguably not fatal. Therefore, the elements of a dying declaration could not be met.

The untrustworthy circumstances surrounding a telephone dying declaration give rise to another scenario. Assume that Carl wants to kill Victoria. Carl knows that Victoria and her estranged husband, Ian, are going through a less-than-civil divorce. Carl craftily plots to kill Victoria on the date the court is to enter the couple's divorce decree in order to implicate Ian. Carl enters Victoria's home and shoots her once in the leg. He then forces Victoria to telephone her friend and state that Ian shot her. After the call, Carl fires the fatal shot.

One may argue that the factual issues raised in the above scenarios are properly resolved by a jury and defense counsel can address these issues and create reasonable doubt. However, it remains well-settled that before a dying declaration may be presented to a jury, the trial court must first determine whether its proponent offered sufficient preliminary or foundation facts necessary to satisfy its elements.\textsuperscript{114} Even if the Chamberlain court concludes that Sherri Chamberlain placed the call to Kim Ulrich, it nevertheless seems improbable that the elements of a dying declaration can be, or should be, met under the facts presented.\textsuperscript{115} The words, "Call an ambulance — Terry shot Greg and me," spoken over the telephone are insufficient to show the declarant's belief in imminent death at the precise time the statement was made because the testifying witness had no opportunity to view the extent of the declarant's wounds. In fact, no one knows the precise order in which the shots were inflicted. Thus, the fact that Sherri Chamberlain did, in fact, die does not mean that she was dying in fact when she made the declaration. Moreover, the testifying witness' lack of observation renders the statement insufficient to support the imminence of death element because, again, the extent of the injuries was uncertain at the time the declarant spoke the


\textsuperscript{115} If the court concludes that Sherri Chamberlain placed the call, the statement could be admitted under the excited utterance exception.
words. In order to qualify as a dying declaration, the declarant must have been dying in fact when she placed the call. Without a witness who observed the extent of the wounds when the statement was made, how can this element ever be satisfied? Certainly, Sherri Chamberlain died, but whether she was dying in fact when she made the statement will never be known. Conversely, if the declarant expressed a belief in imminent death or described the extent of her wounds at the time she made the statement, then the statement could be, and probably should be, admissible.

Can, or should, a telephone dying declaration ever rise to the level of trustworthiness inherently necessary for admission into evidence? Yes, provided that no question exists as to the identity of the caller, the declarant speaks words sufficient to show a belief in imminent death and conveys words to demonstrate she was dying in fact when she made the declaration. However, due to the high standard that must be met to guarantee the trustworthiness of a telephone dying declaration, it seems unlikely that many, if any, factual situations could rise to the level of reliability inherently necessary for admission into evidence.

We will never know whether Sherri Chamberlain placed the call to Kim Ulrich on the night of her murder. It is yet to be seen whether the supreme court will uphold the admissibility of the telephone dying declaration at issue in Chamberlain. What is certain, however, is that if the court upholds this telephone dying declaration, it simultaneously opens a dangerous Pandora's box at the close of the twentieth century's high-technology communication boom that undoubtedly will include the admissibility of the dying declarations transmitted via electronic mail, Internet chat room, and fax machine. Such a decision becomes even more frightening as high-technology communication marches on into the twenty-first century.

Sherri K. Adelkoff

116. The May 1, 1998 arrest of Larry Froistad illustrates the rising impact of high-technology communication on evidentiary issues. The State of North Dakota charged Mr. Froistad with the 1995 murder of his daughter on the basis of confessions he allegedly sent via electronic mail to various members of his online alcoholism support group. See <www.ABCNEWS.com>, May 1, 1998; PITTSBURGH TRIBUNE-REVIEW, May 2, 1998, at A6. The defense maintains that the electronic mail messages are inadmissible because they could have been sent by someone other than Mr. Froistad. <www.ABCNEWS.com>. As of the date of completion of this Comment, this author is unaware of any further developments in the Froistad case.