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1987]

Notes

SUBSTANTIVE ADMISSIBILITY OF A NON-PARTY WITNESS' PRIOR INCONSISTENT STATEMENTS: PENNSYLVANIA ADOPTS THE MODERN VIEW

I. INTRODUCTION

Until the Pennsylvania Supreme Court's decision in *Commonwealth v. Brady*,¹ the Pennsylvania judiciary adhered to the orthodox view that a non-party witness' prior inconsistent statements were not admissible as substantive evidence.² As a result, in cases where a testifying witness contradicted his prior statements, counsel had virtually no recourse but to plead surprise and hope to get the prior statements admitted for the purpose of impeaching the witness' testimony.³ If admitted for that pur-

1. 510 Pa. 123, 507 A.2d 66 (1986).

2. See, e.g., *Commonwealth v. Waller*, 498 Pa. 33, 39 n.2, 444 A.2d 653, 656 n.2 (1982) (disapproving lower court opinion applying modern rule, stating modern rule was never applicable in Pennsylvania); *Commonwealth v. Gee*, 467 Pa. 123, 135-36 n.5, 354 A.2d 875, 880-81 n.5 (1976) (court noted strong criticism of it but applied it to facts of case); *Commonwealth v. Tucker*, 452 Pa. 584, 590 n.2, 307 A.2d 245, 248 n.2 (1973) (noting that substantive admissibility does not violate confrontation clause, but adhering to orthodox rule).

3. See C. McCORMICK, *McCORMICK ON EVIDENCE* § 251, at 744 (3d ed. 1984) [hereinafter C. McCORMICK, *EVIDENCE*]. McCormick cites two alternatives to substantive admissibility of prior statements: impeachment and support for a witness' credibility where the prior statement is consistent with the in-court testimony. *Id.*; see also Ordover, *Surprise! That Damaging Turncoat Witness Is Still With Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403*, 5 HOFSTRA L. REV. 65, 67 (1976-77) [hereinafter Ordover, *Rules Analysis*] (where prosecution, prior to adoption of Federal Rule of Evidence 607, could prove surprise and damage by a witness' prior inconsistent statement, it could then only be admitted to impeach). In Pennsylvania, the element of surprise is not an essential element for the introduction of a witness' prior statements for the purpose of impeaching his testimony. See, e.g., *Brady*, 510 Pa. at 134, 507 A.2d at 72; *Commonwealth v. Waller*, 498 Pa. 33, 39, 444 A.2d 653, 656 (1982). In *Waller*, for example, appellant was shot while sitting in a car with another man. *Id.* at 36, 444 A.2d at 655. Appellant was later charged with shooting the man who allegedly had shot him while appellant was being driven to the hospital. *Id.* The man who had been sitting with appellant in the car testified that he neither saw appellant with a gun nor heard gun shots. *Id.* at 39, 444 A.2d at 657. This statement was inconsistent with a prior statement given by the witness. *Id.* The *Waller* court stated that courts have discretion to admit prior inconsistent statements to impeach based on several of the following factors: (1) whether the testimony was unexpected and thus "surprised" the party who called the witness to testify; (2) whether the testimony was contradictory; (3) whether the testimony was harmful or injurious to the party having called the witness to testify; and (4) whether the scope of cross-examination during which the prior statement

pose, counsel could only hope that the jury would consider the statement as substantive evidence despite a judicial instruction to the contrary.⁴ Otherwise, the damage done to a case by a "turncoat witness" could be devastating.⁵

Responding to criticism by legal commentators,⁶ other courts,⁷ and

was introduced was excessive. *Id.* at 39, 444 A.2d at 656. Despite such factors, the discretionary power of the courts in this regard has been construed liberally so that "the tendency of the courts is to permit parties to show the truth without strict regard to technicalities." *Id.* at 39, 444 A.2d at 657 (quoting *Commonwealth v. Smith*, 424 Pa. 544, 548, 227 A.2d 653, 655 (1967)) (emphasis omitted). Essentially, prior inconsistent statements have been used to impeach without the element of surprise when the interests of truth and justice so require. *See Commonwealth v. Gee*, 467 Pa. 123, 137, 354 A.2d 875, 881 (1976).

4. *See Ordovery, Rules Analysis, supra* note 3, at 66. This practice was both acknowledged and prohibited in Pennsylvania as early as 1839, when the Pennsylvania Supreme Court noted that a witness' prior statements were introduced "ostensibly to discredit him, but, in truth, to operate as independent evidence" when submitted to the jury. *Smith v. Price*, 8 Watts 447, 448 (1839) (*per curiam*). Similarly, McCormick notes that limiting instructions employed by courts to ensure that the prior inconsistent statements are considered only for their impeachment value are likely to go unheeded by the jury. C. McCORMICK, EVIDENCE, *supra* note 3, § 251, at 746; *see also United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) (despite limiting instruction, it is difficult for jury to distinguish between impeachment and substantive evidence); *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 426 (Mo. 1985) (*en banc*) ("The repetitive effect of calling attention to the prior inconsistent statement by the instruction . . . highlight[s] the matter . . . making [the jury] more inclined to rely on the statement than to disregard it.").

5. *See McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 575 (1947) [hereinafter McCormick, *Turncoat Witness*]. A turncoat witness is a witness who has on some prior occasion told a different story than that to which he is testifying on the stand. *Id.* In his article, McCormick cites factual situations in which turncoat witnesses changed the outcome of particular proceedings and states that the orthodox rule is "poisonous to the interests of a party who has had the misfortune of having his crucial witness persuaded, suborned, seduced, or intimidated into changing his story." *Id.*

6. *See, e.g., C. McCORMICK, EVIDENCE, supra* note 3, § 251 (3d ed. 1984); 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1018 (Chadbourn rev. 1970); McCormick, *Turncoat Witness, supra* note 5; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

McCormick wages his criticism of the orthodox rule by attacking its hearsay rationale and asserting that the witness' prior statements are actually more trustworthy than his subsequent in-court testimony. C. McCORMICK, EVIDENCE, *supra* note 3, § 251, at 745. According to McCormick, prior statements are more reliable than subsequent testimony because they are made nearer in time to the event that they describe. *Id.* In fact, McCormick notes that other exceptions to the hearsay rule are also based on an assumption of fresher memory. *Id.* McCormick further notes that the requirement of oath is no longer a practical means of assuring that the testimony is trustworthy, and thus is not a valid basis for excluding a witness' prior inconsistent statements from substantive admissibility. *Id.* at 744.

Wigmore also assails the orthodox rule, arguing that it often precludes a party from making out a *prima facie* case because crucial evidence contained within a witness' prior statements is inadmissible under the orthodox rule. J. WIGMORE, *supra* note 6, § 1018, at 996 n.2. Moreover, Wigmore states that the

even Pennsylvania's own judiciary,⁸ the *Brady* court discarded the "anti-

orthodox view is unrealistic in that it requires that extreme care be taken in framing the jury charge. *Id.* However, Wigmore notes that even if the charge is properly framed, jurors are required to perform "mental gymnastics" in trying to discern between evidence admissible for its substantive value and that used only for impeachment. *Id.*

Similarly, Morgan attacks the orthodox rule, calling it "pious fraud." Morgan, *supra* note 6, at 193. Morgan notes the concern that the abandonment of the orthodox rule would result in a greater opportunity for the manufacture of evidence. However, he also notes that the opportunity for reconsideration would likely influence the witness' later testimony, not that made closer in time to the event that it describes. *Id.* Like Wigmore, Morgan also notes the tendency of juries to consider the evidence for its substantive value despite a limiting instruction. *Id.*

For a further discussion of criticism of the orthodox rule in terms of the particular benefits afforded by substantive admissibility of a witness' prior inconsistent statements, see *infra* notes 65-68, 71 and accompanying text.

7. See, e.g., *Beavers v. State*, 492 P.2d 88, 94 (Alaska 1971) (reasons underlying orthodox rule are without merit; hearsay rationale is inapplicable to prior inconsistent statements); *State v. Skinner*, 110 Ariz. 135, 142, 515 P.2d 880, 887 (1973) (futile to ask fact-finder to consider statement only for impeachment); *People v. Freeman*, 20 Cal. App. 3d 488, 494, 97 Cal. Rptr. 717, 721-22 (1971) (change in story infers that witness "has something to hide" and provides prior statement with greater indicia of reliability); *Gibbons v. State*, 248 Ga. 858, 864, 286 S.E.2d 717, 722 (1982) (rejection of orthodox rule and adoption of modern rule will "increase the capacity of our criminal justice system to discover the truth"); *Watkins v. State*, 446 N.E.2d 949, 959 (Ind. 1983) (substantive admissibility warranted "because it permits the admission . . . of major testimonial evidence of guilt that would be lost [under the orthodox rule] because it had not been subject to cross-examination at the time of its utterance"); *State v. Lott*, 207 Kan. 602, 606, 485 P.2d 1314, 1317 (1971) (abandonment of orthodox rule in favor of substantive admissibility designed to deal with "turncoat witness" problem); *Nugent v. Commonwealth*, 639 S.W.2d 761, 765 (Ky. 1982) ("no justification" exists for not allowing prior inconsistent statements to be used as substantive evidence); *Rowe v. Farmers Ins. Co.* 699 S.W.2d 423, 425-26 (Mo. 1985) (en banc) ("The traditional rule requiring the exclusion of all prior inconsistent statements as substantive evidence is flawed The chief flaw is that the inconsistent statements of witnesses often are relevant to more than just the credibility of the witness.") (citations omitted); *State v. Igoe*, 206 N.W.2d 291, 297 (N.D. 1973) (most protections afforded by orthodox rule are also provided by substantive admissibility when witness testifies and is subject to cross-examination); *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) (basis of orthodox rule no longer valid since oath no longer provides strong assurance of truth and opportunity for cross-examination and observance of demeanor afforded at current trial) (quoting *State v. Gibbons*, 248 Ga. 858, 863, 286 S.E.2d 717, 721 (1982)), *cert. denied*, 460 U.S. 1103 (1984); *Vogel v. State*, 96 Wis. 2d 372, 381, 291 N.W.2d 838, 843 (1980) ("[T]here is no impediment to substantive use of [a witness'] . . . prior inconsistent statement . . .").

8. See *Commonwealth v. Thirkield*, 502 Pa. 542, 543, 467 A.2d 323, 324 (1983) (per curiam) (McDermott, J., dissenting) ("Limiting the admissibility of prior inconsistent statements . . . severely impedes the truth-determining process."); *Commonwealth v. Gee*, 467 Pa. 123, 146, 354 A.2d 875, 886 (1976) (Roberts, J., dissenting) (orthodox rule "serves only to keep relevant and reliable evidence from the jury. Its result serves no greater principle than judicial inertia."); *Commonwealth v. Loar*, 264 Pa. Super. 398, 412, 399 A.2d 1110, 1117 (1979) (abandoning orthodox rule in favor of modern rule thereby admitting a witness' prior inconsistent statements as substantive evidence) (disap-

quoted" orthodox rule.⁹ Specifically, the court held that the prior inconsistent statements of a witness who is testifying in court, and is thus available for cross-examination, may be used as substantive evidence to prove the truth of the matters asserted.¹⁰

This Note will initially discuss the approaches taken by the federal government in dealing with this issue. Next, this Note will examine the *Brady* decision and its anticipated ramifications, as well as the approaches taken by other jurisdictions. Finally, this Note will recommend that the *Brady* rule be limited in order to ensure the reliability of statements offered for their substantive value. The Note will suggest ways of guaranteeing reliability without unduly restricting the use of certain prior inconsistent statements.

II. BACKGROUND

A. *The Confrontation Clause*

Since both the hearsay rule and the confrontation clause of the United States Constitution¹¹ protect similar interests,¹² modification of a state's hearsay rules to admit a witness' prior inconsistent statements as substantive evidence may implicate a criminal defendant's sixth amendment right to confront the witnesses against him.¹³ In *California v. Green*,¹⁴ for example, the United States Supreme Court analyzed the

proved in *Commonwealth v. Waller*, 498 Pa. 33, 39 n.2, 444 A.2d 653, 656 n.2 (1982)). For a full discussion of *Loar*, see *infra* note 54.

9. 510 Pa. at 130-31, 507 A.2d at 70.

10. *Id.*

11. *Id.*; U.S. CONST. amend. VI. The sixth amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

12. *California v. Green*, 399 U.S. 149, 155 (1970). The Court noted that the confrontation clause evolved from the need to afford criminal defendants the opportunity to face their accusers in front of the fact-finder, and thus avoid trying defendants on evidence consisting solely of *ex parte* affidavits and the like. *Id.* at 156. In addition, the Court reasoned that the confrontation clause was drafted to ensure that witnesses give their evidence under oath and subject to cross-examination in full view of the jury. *Id.* at 158. Though the *Green* Court acknowledged these similarities, it also noted that the hearsay rule and confrontation clause do not overlap to such an extent that the confrontation clause is merely a constitutional codification of the hearsay rule. *Id.* at 155. Rather, the Court stated that where the declarant of the out-of-court statement is present in court, the protections sought to be obtained under the confrontation clause are generally secured. *Id.* at 158. For a further discussion of the United States Supreme Court's decision in *Green*, see *infra* notes 14-31 and accompanying text.

13. 399 U.S. at 157. The *Green* Court stated that any modification of the hearsay rule to admit evidence against a criminal defendant "will often raise questions of compatibility with the defendant's constitutional right to confrontation." *Id.* at 156. The Court further stated that "[s]uch questions require attention to the reasons for, and the basic scope of . . . the Confrontation Clause." *Id.*

14. 399 U.S. 149 (1970).

substantive admissibility of a non-party witness' prior inconsistent statements in terms of their effect on a criminal defendant's sixth amendment right of confrontation.¹⁵ In *Green*, respondent was convicted of furnishing marijuana to a minor.¹⁶ The conviction was based largely on evidence consisting of two prior inconsistent statements made by Melvin Porter, a sixteen-year-old minor who had been arrested for selling marijuana to an undercover policeman.¹⁷ While in police custody, Porter allegedly told a policeman that respondent had called, asked him to sell some "stuff" and had personally delivered the marijuana which Porter later tried to sell.¹⁸

At respondent's preliminary hearing, Porter testified that respondent was his supplier,¹⁹ but departed from his earlier statement by testifying that respondent merely showed him where to pick up the marijuana and had not personally delivered it to him.²⁰ While testifying

15. *Id.* at 155. The issue in *Green* was whether a California evidence statute, which removes a witness' prior inconsistent statements from the hearsay rule and thus provides for their substantive admissibility, was inconsistent with the requirements of the sixth amendment confrontation clause. *Id.* The California statute provided:

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770 [requiring either that the witness be given an opportunity to explain or deny the statement or that the witness has not been excused from giving further testimony in the action].

CAL. EVID. CODE § 1235 (West 1966 & West Compact ed. 1986).

It should be noted that sixth amendment concerns are not relevant to civil cases because the sixth amendment specifically states that it is a right "[i]n all criminal prosecutions." U.S. CONST. amend. VI.

16. *Green*, 399 U.S. at 151.

17. *Id.* at 152. Porter made the first statement while in custody and the second while testifying at respondent's preliminary hearing. *Id.* at 151. Both statements named respondent as Porter's supplier, but contained different accounts of the circumstances surrounding the delivery of the marijuana. *Id.* For a detailed description of the witness' prior statements, see *infra* notes 18-23 and accompanying text.

18. 399 U.S. at 151. Porter made this statement four days after he had been arrested for selling marijuana to an undercover policeman. *Id.* Because the statement was not recorded or reduced to a written document, its substance depended entirely on the testimony of the police officer who was present at the time Porter gave his story. *Id.* at 152. Nevertheless, under California Evidence Code § 1235, the statement was admitted for substantive use at respondent's trial. *Id.* For the provisions of California Evidence Code § 1235, see *supra* note 15.

19. 399 U.S. at 151. The preliminary hearing in which this testimony was heard took place one week after Porter had made his initial statement to police. *Id.*

20. *Id.* According to Porter, respondent had hidden 29 "baggies" of marijuana in some bushes at his parents' home. *Id.* Though the Court noted that Porter was subjected to "extensive cross-examination" about his testimony, no reason was given for the discrepancy between the testimony and his previous statement to police. *Id.*

at respondent's trial,²¹ Porter admitted obtaining the marijuana shortly after a phone call from respondent, but said he could not remember how he obtained it.²²

Later in the trial, however, both of Porter's prior statements were admitted for their substantive value²³ pursuant to California Evidence Code section 1235.²⁴ The statements then became the basis for respondent's conviction.²⁵ The District Court of Appeals reversed the conviction on the ground that California Evidence Code section 1235 unconstitutionally denied respondent his right of confrontation.²⁶ The

21. *Id.* Respondent's case was tried without a jury, two months after the preliminary hearing. *Id.* Porter was the State's main witness. *Id.* The California Supreme Court noted that Porter was "markedly evasive and uncooperative" while testifying. *Id.* at 151-52.

22. *Id.* at 152. Though Porter admitted that he had received a phone call from respondent shortly before he obtained the marijuana, he testified only that respondent had asked him to sell some unidentified "stuff." *Id.* Porter testified that he could not remember the events in question because he had taken LSD twenty minutes prior to respondent's telephone call and thus could not distinguish fact from fantasy. *Id.*

23. *Id.* Portions of Porter's testimony from respondent's preliminary hearing were read into evidence during direct examination. *Id.* After these excerpts were read, Porter said that he guessed he had gotten the marijuana from the bushes at respondent's parents' home, though on cross-examination, he admitted that he only remembered his testimony from the preliminary hearing and not the actual events as they occurred. *Id.* Porter's initial statement was later introduced via testimony by the police officer who was present when Porter was originally questioned about respondent's role in the crime. *Id.* Under California Evidence Code § 1235, the substance of this statement was admissible as evidence of the matters asserted therein. CAL. EVID. CODE § 1235 (West 1966 and West Compact ed. 1986). For the provisions of California Evidence Code § 1235, see *supra* note 15. Porter admitted making both the original statement to police and the subsequent statement at respondent's preliminary hearing. *Green*, 399 U.S. at 152. He also stated that in both cases, he had been telling the truth as he then believed it. *Id.*

24. CAL. EVID. CODE § 1235 (West 1966 and West Compact ed. 1986). This rule of evidence provides that a witness' prior inconsistent statements are not made inadmissible by the hearsay rule so long as the witness is given the opportunity to explain or deny the prior statement during the proceeding in which he or she is testifying. *Id.* For the text of California Evidence Code § 1235, see *supra* note 15.

25. *Green*, 399 U.S. at 153.

26. *Id.* This decision was based on California Supreme Court precedent which held that California Evidence Code § 1235 denied criminal defendants their right of confrontation as guaranteed by the sixth amendment to the United States Constitution. *Id.* (citing *People v. Johnson*, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968) (en banc), *cert. denied*, 393 U.S. 1051 (1969)). In *Johnson*, defendant was convicted of incest on the basis of prior statements made by his wife and daughter at a grand jury hearing. 68 Cal. 2d at 648, 68 Cal. Rptr. at 601, 441 P.2d at 113. The Supreme Court of California held that a defendant's ability to cross-examine the witnesses against him contemporaneously with their direct testimony is basic to the sixth amendment right of confrontation. *Id.* at 660, 68 Cal. Rptr. at 608, 441 P.2d at 120. According to the *Johnson* court, California Evidence Code § 1235 defeated this principle and was thus unconstitutional. *Id.*

California Supreme Court affirmed this decision.²⁷

The United States Supreme Court, however, vacated the California court's decision and held that the confrontation clause does not require the exclusion of a witness' prior statements where the witness "concedes making the statements, and . . . may be asked to defend or otherwise explain the inconsistency [between the statements]."²⁸ As to the reliability of the witness' prior statements, the Court stated that "[i]f the witness admits [having made] the prior statement . . . or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness."²⁹ The Court emphasized that

27. *Green*, 399 U.S. at 153. The California Supreme Court was "impelled by recent decisions to find § 1235 unconstitutional." *Id.*

28. *Id.* at 164. In fact, Justice White, writing for the majority, stated that "there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well." *Id.* In terms of the confrontation clause, the Court noted that there was no precedential bar to substantive admissibility of a witness' prior inconsistent statements. *Id.* at 161. The Court stated that the concern in other decisions was the use of such statements where the declarant is not available for cross-examination at trial. *Id.* In the case of California Evidence Code § 1235, the Court stated that confrontation objections have been mainly directed at the failure to allow the defendant to confront his witnesses at trial. *Id.* at 157. In this regard, the Court discerned that there is no confrontation problem in "receiving a witness' out-of-court depositions or statements, so long as the witness . . . [is] present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact." *Id.* In supporting this holding, the Court stressed the importance of thorough subsequent cross-examination regarding the witness' prior statement:

[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story

Id. at 159.

As to the fact-finder's opportunity to observe the witness, the *Green* Court noted:

The jury is alerted by the inconsistency in [a witness'] stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once is believing either story. The defendant's confrontation rights are not violated, even though some demeanor evidence that would have been relevant in resolving this credibility issue is forever lost.

Id. at 160.

29. *Id.* at 158. The Court refused to address the issue of whether the witness' apparent lapse of memory as to the events in question substantially impaired respondent's right to cross-examination. *Id.* at 168-69. The Court noted that the Supreme Court of California had not addressed the issue since that court posited that inconsistent statements were not admissible as substantive evidence regardless of the factual situation. *Id.* However, the Court concluded that, given its general holding that substantive admissibility of a witness' prior inconsistent statements does not violate the confrontation clause, admission of

subsequent cross-examination³⁰ at trial with respect to both a witness' past and present statements is "adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony from a prior hearing."³¹

B. *Federal Rule of Evidence 801(d)(1)(A)*

Several years after the Supreme Court's decision in *Green*, Congress passed Federal Rule of Evidence 801(d)(1)(A).³² This rule provides for substantive admissibility of a witness' prior inconsistent statements so long as the declarant testifies in court and is subject to cross-examination.³³ Moreover, the rule further requires that the prior statement be given "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."³⁴

the witness' statements despite a claimed lack of memory poses only a harmless error question which would be better resolved by the state court. *Id.* at 170.

30. *Id.* at 159. The Court noted that the lack of contemporaneous cross-examination is insignificant so long as the witness is subject to "full and effective" cross-examination at trial. *Id.* The Court further noted that the defendant will not be "hampered in effectively attacking the prior statement, solely because his attack comes later in time," especially where the witness' in-court testimony favors the defense, since the witness will often be eager to explain away the prior statement. *Id.* at 160.

31. *Id.* at 168. *But see McCormick, Turncoat Witness, supra* note 5, at 588 (hazard in such rule of error or falsity in relating oral words—"memory of a witness for words spoken in his presence by another is peculiarly faulty and fleeting." Chance of error lessened where statements are written, recorded, or admitted to by declarant).

The *Green* Court ruled that Porter's initial statement to the police was equally admissible for its substantive value as was his testimony from respondent's preliminary hearing. 399 U.S. at 168.

32. The current version of this rule was enacted in 1975, five years after the Supreme Court's decision in *Green*. Federal Rule of Evidence 801(d)(1)(A) provides:

A statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

FED. R. EVID. 801(d)(1)(A).

33. FED. R. EVID. 801(d)(1)(A). For the text of this rule, see *supra* note 32.

34. FED. R. EVID. 801(d)(1)(A). The rule is the result of a compromise between the House and Senate Conference Committees, each of which advocated different formulations of the rule now in force. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7098, 7104. The House advocated allowing only those statements made "while the declarant was subject to cross-examination at a trial [sic] or hearing or in a deposition, to be admissible for their truth." H.R. REP. NO. 650, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7086-87. The Senate advocated a rule similar to the Supreme Court's decision in *Green*. S. REP. NO. 1277, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7063. The Senate noted that requiring prior statements to be made

Although the Advisory Committee expressed the view that it was unwilling to authorize blanket admissibility of a witness' prior inconsistent statements, it nonetheless recognized that certain circumstances warranted substantive admissibility.³⁵ Accordingly, it formulated Federal Rule of Evidence 801(d)(1)(A) to provide "general safeguards" to the reliability of statements sought to be admitted for substantive use.³⁶ Requiring that the prior statements have been made under oath is one such safeguard.³⁷ By adopting such a requirement, Congress strived to ensure the accuracy of the statement sought to be admitted for its substantive value.³⁸ Though both the Advisory Committee and the Senate Judiciary Committee argued that the requirement of oath is no longer a strong assurance of reliability,³⁹ the House Judiciary Committee noted that, because the testimony is being recorded in a formal judicial pro-

under oath and subject to cross-examination was unnecessary. *Id.* For a general discussion of the legislative history of Federal Rule of Evidence 801(d)(1)(A), see Comment, *Prior Inconsistent Statements: Conflict Between State and Federal Rules of Evidence*, 34 MERCER L. REV. 1495, 1503-05 (1983).

35. FED. R. EVID. 801 advisory committee's note. The Advisory Committee noted that substantive admissibility is warranted in situations where the prior statement was made under oath and the declarant testifies in court, subject to cross-examination. *Id.*

36. *Id.* For a discussion of the safeguards to reliability provided by Federal Rule of Evidence 801(d)(1)(A), see *infra* notes 37-42 and accompanying text.

37. See FED. R. EVID. 801(d)(1)(A).

38. See H.R. REP. NO. 650, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7087 (in context of House version of proposed rule). Rule 801(d)(1)(A) also requires that the prior statement be made while the declarant was subject to the penalty of perjury at a trial, hearing, other proceeding or in a deposition. FED. R. EVID. 801(d)(1)(A). The House noted that requiring the prior statement to be made in the context of a formal proceeding resolves any dispute as to whether the prior statement was made and provides "additional assurances of the reliability of the prior statement." H.R. REP. NO. 650, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7087; see also Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A)*, 613 and 607, 75 MICH. L. REV. 1565, 1582 (1977) (Congress chose to limit substantive admissibility to situations in which "likelihood of total fabrication was practically non-existent and the risk of subtle influence, coercion, or deception was significantly reduced"); Ordovery, *Rules Analysis*, *supra* note 3, at 74 (federal rule adopted in response to several fears, including increased pressure to obtain more pretrial statements and possibility of trials conducted with use of carefully drafted statements prepared in counsels' office); Comment, *supra* note 34, at 1505 ("To insure the reliability of the prior statement, the rule now requires that a statement be 'given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.'").

39. See FED. R. EVID. 801 advisory committee's note. The Advisory Committee stated that the oath "receives much less emphasis than cross-examination as a truth-compelling device," and that only one of the many exceptions to the hearsay rule requires a statement to be made under oath. *Id.* The Senate Judiciary Committee noted that a witness, when qualifying or denying a prior statement, is doing so under oath, thus diffusing the need for an oath contemporaneous with the making of the statement. S. REP. NO. 1277, 93d

ceeding, the fact-finder is assured that the statement was actually made.⁴⁰ The requirement under Federal Rule of Evidence 801(d)(1)(A) that the declarant be subject to cross-examination concerning the prior statement provides a second method of safeguarding the reliability of the prior statement.⁴¹ The Advisory Committee⁴² and other commentators⁴³ have noted that cross-examination at trial better assures the reliability of the prior statement than the requirement of oath. Yet, despite such guarantees of reliability, many have argued that Federal Rule of Evidence 801(d)(1)(A) is over-inclusive in that it allows only those statements made in the context of a formal proceeding to be admitted as substantive evidence, and thus excludes statements made under other circumstances with similar guarantees of reliability.⁴⁴

C. *The Modern Approach to Substantive Admissibility*

1. *The Pennsylvania Rule: Brady and Beyond*

Before the *Brady* decision, the law in Pennsylvania was well-settled: a non-party witness' prior inconsistent statements could not be used as substantive evidence to prove the matters asserted therein.⁴⁵ Rather,

Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7062.

40. H.R. REP. NO. 650, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7087 (requirement that prior statement be made under oath, along with context of formal proceeding itself and opportunity for cross-examination, provide "firm additional assurances of reliability"); see also N.H. R. EVID. 801(d)(1)(A) reporter's note (formal context of statements admissible under federal rule makes declarant aware of import of statements).

41. See FED. R. EVID. 801(d)(1)(A).

42. FED. R. EVID. 801 advisory committee's note (cross-examination regarded as better "truth-compelling device" than oath).

43. See, e.g., Graham, *supra* note 38, at 1569-71 (noting effectiveness of subsequent cross-examination and diminishing role of oath); McCormick, *Turncoat Witness*, *supra* note 5, at 576 (cross-examination is major protection of reliability; oath no longer principal safeguard of reliability).

44. See, e.g., Commonwealth v. Loar, 264 Pa. Super. 398, 412-13, 399 A.2d 1110, 1117 (1979) (adopting position that requirement of oath is unnecessary; prior inconsistent statements by witness in court who is subject to cross-examination is admissible as substantive evidence regardless of whether made under oath); C. McCORMICK, EVIDENCE, *supra* note 3, § 251, at 747 (3d ed. 1984) (federal rule practically "confine[s]" substantive admissibility of prior inconsistent statements to statements made in course of formal legal proceedings); Graham, *supra* note 38, at 1566, 1583 (federal rule is "overly strict" and restricts statements with "strong guarantees of reliability" from substantive admissibility); Ordover, *Rules Analysis*, *supra* note 3, at 69 (Congress' "all-or-nothing" approach does not afford courts discretion to determine reliability on case-by-case basis; admissibility should be based on reliability as determined from surrounding circumstances rather than formality of statement).

45. See, e.g., Commonwealth v. Waller, 498 Pa. 33, 38-39, 444 A.2d 653, 656 (1982) (while prior statement itself is limited to impeachment, responses by witness while being questioned about statements during cross-examination may be considered by fact-finder as substantive evidence); Commonwealth v. Gee, 467 Pa. 123, 135-36, 354 A.2d 875, 880 (1976) (noting criticism of orthodox rule but

such statements could only be used to impeach the credibility of the declarant.⁴⁶ In following the orthodox rule, Pennsylvania courts relied on the hearsay rule as a basis for excluding a non-party witness' prior inconsistent statements from substantive admissibility.⁴⁷ Specifically, the Pennsylvania courts asserted that a witness' prior statements were too unreliable to be admitted as substantive evidence⁴⁸ because the declarant was not under oath, subject to contemporaneous cross-examination or in the presence of the fact-finder when the statement was made.⁴⁹

continuing to adhere to it in case where defense called witnesses to testify about events surrounding stabbing death of gang member, knowing that witnesses had changed their story prior to trial); *Commonwealth v. Tucker*, 452 Pa. 584, 589, 307 A.2d 245, 248 (1973) (quoting in part 3A J. WIGMORE, *supra* note 6, § 1017, at 993) (prior statement not to be used as substantive evidence, but only to show that witness is capable of making errors in testimony); *Commonwealth v. Brady*, 338 Pa. Super. 137, 140, 487 A.2d 891, 892 (1985) (citing well-settled Pennsylvania law precluding admission of witness' prior inconsistent statements as substantive evidence); *Commonwealth v. McGuire*, 302 Pa. Super. 226, 234, 448 A.2d 609, 613 (1982) (prior inconsistent statements of non-party witness not admissible as substantive evidence).

46. *Commonwealth v. Waller*, 498 Pa. at 38-39, 444 A.2d at 656. For a list of Pennsylvania cases which limited the use of a witness' prior inconsistent statements to impeachment, see *supra* note 45.

47. 510 Pa. at 128, 507 A.2d at 68-69 ("The orthodox rule deems hearsay generally, and prior inconsistent statements specifically, too unreliable to be admitted as substantive evidence . . ."); see, e.g., *Commonwealth v. Gee*, 467 Pa. 123, 135-36, 354 A.2d 875, 880 (1976) (prior inconsistent statements are hearsay and thus not admissible as substantive evidence; only admissible to impeach credibility of in-court testimony); *Dincher v. Great Atl. & Pac. Tea Co.*, 356 Pa. 151, 156, 51 A.2d 710, 713 (1947) (evidence of witness' prior inconsistent statement that defendant came running at him with butcher knife inadmissible as substantive evidence because made in violation of hearsay rule). *Contra Commonwealth v. Loar*, 264 Pa. Super. 398, 411-13, 399 A.2d 1110, 1117 (1979) (better view is that witness' prior inconsistent statements are admissible as substantive evidence where witness is in court subject to cross-examination).

48. See, e.g., *Brady*, 510 Pa. at 128, 507 A.2d at 68-69. For a further discussion of the hearsay rationale for the orthodox rule, see *infra* note 49 and accompanying text.

49. 510 Pa. at 128, 507 A.2d at 68-69. A considered argument in favor of the orthodox rule was advocated by the Supreme Court of Minnesota. See *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939). In *Saporen*, a witness testified that he had seen defendant in a particular room at a boarding house near the end of October. *Id.* at 359, 285 N.W. at 899. This testimony was inconsistent with a prior statement made by the witness to a probation officer in which the witness said that he had seen defendant at the boarding house on November 2. *Id.* at 359, 285 N.W. at 900. The lower court allowed the state to impeach the witness with evidence of his prior statement. *Id.* at 359, 285 N.W. at 899. That evidence consisted of the statement itself as well as testimony by the probation officer who had procured the statement and the stenographer who had recorded and transcribed it. *Id.* at 359, 285 N.W. at 900-01. The court noted that the evidence presented was not confined to the inconsistency of dates, but encompassed declarations made by the witness which tended to inculcate defendant. *Id.* at 360, 285 N.W. at 900. After stating the orthodox rule and Wigmore's argument against it, the court reasoned: (1) the fact that the witness is currently

Although Pennsylvania's rationale for adhering to the orthodox rule was not unique,⁵⁰ the promulgation of Federal Rule of Evidence

under oath does nothing to solemnize his prior statement; (2) subsequent cross-examination of the witness regarding the prior statement is ineffective since the "principle virtue [of cross-examination] is in its immediate application of the testing process. Its strokes fall while the iron is hot . . . [and] [f]alse testimony is apt to harden . . . as the witness has opportunity for reconsideration . . ."; and (3) use of a witness' prior inconsistent statements would increase the likelihood that declarations resulting from undue influence and coercion would be admitted as substantive evidence. *Id.* at 361-62, 285 N.W. at 900-01. It should be noted that Minnesota, with the adoption of Minnesota Rule of Evidence 801(d)(1)(A), has changed its position regarding the substantive admissibility of a non-party witness' prior inconsistent statements. See MINN. R. EVID. 801(d)(1)(A). For a discussion of current state rules, see *infra* notes 91-112 and accompanying text.

See also *People v. Johnson*, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968) (en banc), cert. denied, 393 U.S. 1051 (1969) (analysis in terms of effect of modern rule on sixth amendment right of confrontation); *Ruhala v. Roby*, 379 Mich. 102, 125, 150 N.W.2d 146, 156 (1967) ("Stale friendly cross-examination 'with respect to' a prior extra-judicial statement is no substitute for timely, adversary cross-examination 'upon' a statement."); FED. R. EVID. 801 advisory committee's note (hearsay problem arises when witness denies making statement or admits making statement but denies that it was true; no hearsay problem when witness adopts the prior statement); C. McCORMICK, EVIDENCE, *supra* note 3, § 251, at 744 ("The logic of the orthodox view is that the [prior] statement of the witness is hearsay since its value rests on the credit of the declarant, who, when the statement was made, was not (1) under oath, (2) in the presence of the trier [of fact], or (3) subject to cross-examination."); 3A J. WIGMORE, *supra* note 6, § 1018, at 996 ("[T]he theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination."); *Graham*, *supra* note 38, at 1568 ("[D]enial of substantive effect to a witness' prior inconsistent statements . . . [is] based on a threefold rationale of lack of trustworthiness: (1) the statement was not made under oath, (2) the trier of fact did not observe the declarant's demeanor at the time the statement was made, and (3) the declarant was not subject to contemporaneous cross examination . . ."); *McCormick, Turncoat Witness*, *supra* note 5, at 575 (value of statement "rests on the credit of the declarant, who was not under oath nor subject to cross-examination, when the statement was made"); *Morgan*, *supra* note 6, at 192 ("The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross examination."); Comment, *supra* note 34, at 1497 (no indication that prior statement is reliable when declarant is not subject to cross-examination).

50. See, e.g., *State v. Whelan*, 200 Conn. 743, 749, 513 A.2d 86, 90 (1986) (prior inconsistent statements not admissible under orthodox rule because declarant not under oath, in presence of fact-finder or subject to cross-examination); *State v. Saporen*, 205 Minn. 358, 361-62, 285 N.W. 898, 901 (1939) (absence of oath and opportunity for contemporaneous cross-examination make prior inconsistent statements inadmissible under hearsay rule); *Brady*, 510 Pa. at 128, 507 A.2d at 68-69 (prior inconsistent statements too unreliable to be admitted as substantive evidence under orthodox rule because declarant not under oath, subject to cross-examination or in presence of fact-finder when statement was made). For a further discussion of the orthodox rule, see *supra* note 49 and accompanying text.

801(d)(1)(A),⁵¹ criticism by legal commentators⁵² and abandonment of the orthodox rule by other jurisdictions⁵³ prompted some members of the Pennsylvania judiciary to re-examine the commonwealth's position regarding the substantive admissibility of a witness' prior inconsistent statements.⁵⁴ Despite growing doubt and inquiry concerning the continued efficacy of adhering to the orthodox rule, Pennsylvania courts did

51. For the text of Federal Rule of Evidence 801(d)(1)(A), see *supra* note 32.

The Pennsylvania Supreme Court first took note of the rule in *Commonwealth v. Gee*, stating that the adoption of Federal Rule of Evidence 801(d)(1)(A) served as yet another example of the criticism waged upon the orthodox rule by courts and legal commentators alike. *Gee*, 467 Pa. 123, 136 n.5, 354 A.2d 875, 880 n.5 (1976).

For a further discussion of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 32-44 and accompanying text.

52. For a discussion of commentators who have criticized the orthodox rule, see *supra* note 6. For a further discussion of the orthodox rule in terms of the particular benefits afforded by substantive admissibility of a witness' prior inconsistent statements, see *infra* notes 65-68, 71 and accompanying text.

53. See *Commonwealth v. Gee*, 467 Pa. 123, 145, 354 A.2d 875, 885 (1976) (Roberts, J., dissenting). In his dissenting opinion in *Gee*, Justice Roberts noted that many jurisdictions had broken from the orthodox rule and adopted a more modern rule allowing for substantive admissibility of a witness' prior inconsistent statements. *Id.* Justice McDermott, dissenting in *Commonwealth v. Thirkield*, also noted that many other jurisdictions had discarded the orthodox rule. *Commonwealth v. Thirkield*, 502 Pa. 542, 543, 467 A.2d 323, 324 (1983) (per curiam) (McDermott, J., dissenting). Justice McDermott cited these authorities in urging the court to address the issue and adopt the modern rule. *Id.* at 543 n.1, 467 A.2d at 324 n.1 (per curiam) (McDermott, J., dissenting). Similarly, the Pennsylvania Superior Court noted the trend toward substantive admissibility in *Commonwealth v. Loar*, 264 Pa. Super. 398, 411-12, 399 A.2d 1110, 1117 (1979). For a full discussion of *Loar*, see *infra* note 54.

54. See *Commonwealth v. Thirkield*, 502 Pa. 542, 543, 467 A.2d 323, 324 (1983) (per curiam) (McDermott, J., dissenting); *Commonwealth v. Gee*, 467 Pa. 123, 143, 354 A.2d 875, 884 (1976) (Roberts, J., dissenting); *Commonwealth v. Loar*, 264 Pa. Super. 398, 411-12, 399 A.2d 1110, 1117 (1979).

In *Commonwealth v. Loar*, the Pennsylvania Superior Court tried to abolish the orthodox rule in favor of a more liberal one, though the court's decision to allow substantive admissibility of a witness' prior inconsistent statements was later rejected by the Pennsylvania Supreme Court. See *Commonwealth v. Waller*, 498 Pa. 33, 39 n.2, 444 A.2d 653, 656 n.2 (1982) (substantive admissibility of prior inconsistent statements "has never been and is not now the law in this Commonwealth"). In *Loar*, a witness who had been implicated in a number of thefts made a statement which linked appellant to those same thefts. 264 Pa. Super. at 406, 399 A.2d at 1114. When called to testify at appellant's preliminary hearing, the witness denied that appellant had been involved in the thefts. *Id.* At the Commonwealth's request, the witness then read his prior statement to the court. *Id.* at 406-07, 399 A.2d at 1114-15. This statement was admitted as substantive evidence despite an attempt by appellant's counsel to limit its use to impeachment. *Id.* at 407, 399 A.2d at 1115. Although the magistrate presiding over the preliminary hearing allowed the statement to be used as substantive evidence, there is nothing in the published opinion setting forth the magistrate's reason for doing so. *Id.* The *Loar* court upheld the substantive use of the witness' prior statement. *Id.* at 413, 399 A.2d at 1118. The rationale underlying the superior court's decision was similar to the Pennsylvania Supreme Court's

not abandon it until the Pennsylvania Supreme Court's decision in *Brady*.⁵⁵

In *Brady*,⁵⁶ the court held that the "otherwise admissible prior inconsistent statements of a [non-party] declarant who is a witness in a judicial proceeding and is available for cross-examination may be used as substantive evidence to prove the truth of the matters asserted therein."⁵⁷

The appellee in *Brady* was being tried for the murder of a security guard at a manufacturing plant.⁵⁸ Several hours after the murder, appellee's girlfriend, Tina Traxler, gave a tape-recorded statement to police detailing the events surrounding the security guard's death.⁵⁹ In that statement, Traxler said that appellee had stabbed the security guard after he had discovered appellee attempting to pry open a change machine.⁶⁰

reasoning in *Brady*. For a full discussion of *Brady*, see *infra* notes 56-77 and accompanying text.

Under the *Loar* decision, a witness' prior inconsistent statements are admissible as substantive evidence so long as the witness is in court and subject to cross-examination. *Id.* at 412, 399 A.2d at 1117. The court adopted this particular approach to substantive admissibility of prior inconsistent statements after an analysis of California Evidence Code § 1235. *Id.* at 411-12, 399 A.2d at 1117-18. California Evidence Code § 1235 was at issue in *California v. Green*, and figured in the development of Federal Rule of Evidence 801(d)(1)(A). See *Green*, 399 U.S. 149 (1970); FED. R. EVID. 801(d)(1)(A) advisory committee's note. For a full discussion of *Green*, see *supra* notes 12-31 and accompanying text. For a full discussion of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 32-44 and accompanying text.

55. See, e.g., *Commonwealth v. Floyd*, 508 Pa. 393, 399, 498 A.2d 816, 819 (1985) (murder conviction set aside because prior inconsistent identification admitted as substantive evidence); *Commonwealth v. Waller*, 498 Pa. 33, 38-39 n.2, 444 A.2d 653, 656 n.2 (rejecting superior court decision in *Loar* and reemphasizing orthodox rule as applicable Pennsylvania law).

56. 510 Pa. 123, 507 A.2d 66 (1986). Justice Larsen wrote the majority opinion. *Id.* at 125, 507 A.2d at 66. Chief Justice Nix concurred in the decision, while Justices Flaherty and Zappala dissented. *Id.* at 135, 507 A.2d at 72.

57. *Id.* at 131, 507 A.2d at 70. This is the same position taken by the Pennsylvania Supreme Court in *Commonwealth v. Loar*. For a discussion of *Loar*, see *supra* note 54.

58. 510 Pa. at 125, 507 A.2d at 67. Evidence introduced at trial disclosed that appellee ran his car into a ditch on a dirt road. *Id.* While walking back to town, appellee and his girlfriend came to the manufacturing plant and entered it through a side door. *Id.*

59. *Id.* at 126, 507 A.2d at 67. The court noted that both the witness' mother and her attorney were present when she gave her statement to the police. *Id.* at 131, 507 A.2d at 70. The *Brady* court also noted that "[t]he attorney questioned both Traxler and her mother to assure that the statement was being given knowingly, voluntarily and with understanding of her rights and options." *Id.* at 131-32, 507 A.2d at 70. Two days after giving this statement to the police, Traxler repeated essentially the same account of the events leading up to the stabbing death of the security guard, though the court's opinion does not state in what context the story was repeated. *Id.* at 132, 507 A.2d at 70.

60. *Id.* at 125-26, 507 A.2d at 67.

Prior to trial, Traxler recanted the statement, denying that she and appellee had ever entered the manufacturing plant.⁶¹ After Traxler repeated the recanted version of her story at appellee's trial, the court allowed the Commonwealth to cross-examine her and introduce the prior tape-recorded statement as substantive evidence.⁶² The superior court reversed, holding that the tape-recorded statement was not admissible under existing precedent.⁶³

The Pennsylvania Supreme Court reversed the superior court and adopted the trial court's decision to admit Traxler's prior inconsistent statement as substantive evidence.⁶⁴ In discarding the orthodox rule, the court stated that there are virtually no hearsay concerns presented by the substantive admissibility of a witness' prior inconsistent statements when that witness testifies at trial.⁶⁵ The court reasoned that hearsay concerns are absent because the declarant is now present in court testifying under oath, subject to cross-examination and under the scrutiny of the fact-finder.⁶⁶

61. *Id.* at 132, 507 A.2d at 70. Traxler stated that she and appellee had walked past the plant on their way to a friend's home but had never gone inside. *Id.* Rather, Traxler said that she and appellee went directly to the friend's home where they stayed until the following morning. *Id.* at 132, 507 A.2d at 70-71.

62. *Id.* When questioned about the discrepancy in her stories, Traxler stated that she was afraid of the police and, as a result, had told them what they wanted to hear. *Id.* at 132, 507 A.2d at 71.

63. *Id.* at 126, 507 A.2d at 68. The only rationale offered by the Superior Court in support of its decision was that substantive admissibility of a non-party witness' prior inconsistent statements ran contrary to longstanding Pennsylvania law. *Commonwealth v. Brady*, 338 Pa. Super. 137, 140, 487 A.2d 891, 892 (1985) (quoting *Commonwealth v. McGuire*, 302 Pa. Super. 226, 234, 448 A.2d 609, 613 (1982)).

64. *Id.* at 133, 507 A.2d at 71. The majority stated, "We accept th[e] [trial] court's invitation to hold that the tape-recorded statement was properly admitted as substantive evidence." *Id.*

In a concurring opinion, Chief Justice Nix expressed concern over the "judicial precedent" being set by the case. *Id.* at 135, 507 A.2d at 72 (Nix, C.J., concurring). Chief Justice Nix criticized the trial court for not following the clear mandate of Pennsylvania law at that time. *Id.* (Nix, C.J., concurring). The proper approach, he wrote, would be to exclude the evidence and let the Commonwealth appeal. *Id.* at 136, 507 A.2d at 72-73 (Nix, C.J., concurring).

65. *Id.* at 128, 507 A.2d at 69 (quoting *California v. Green*, 399 U.S. 149, 155 (1970)). This is the position taken by such proponents of the modern rule as Professors McCormick, Morgan, and Wigmore, as well as courts in other jurisdictions that have adopted the modern rule. See generally C. McCORMICK, EVIDENCE, *supra* note 3, § 251; 3A J. WIGMORE, *supra* note 6, § 1018; McCormick, *Turncoat Witness*, *supra* note 5, at 573; Morgan, *supra* note 6, at 177. For a discussion of other jurisdictions that have adopted some version of the modern rule, see *infra* notes 91, 93-112 and accompanying text. For a further discussion of the effect of the modern rule on hearsay concerns, see *infra* notes 66-68, 71 and accompanying text.

66. *Brady*, 510 Pa. at 129, 507 A.2d at 69. Several courts and commentators have suggested that the oath is no longer a valid means of assuring the trustworthiness of a witness' testimony. See, e.g., FED. R. EVID. 801 advisory committee's note ("[T]he oath . . . receives much less emphasis than cross-examination as a

Addressing the concern that subsequent cross-examination of the declaration is not sufficient to ensure the reliability of his or her prior statement, the *Brady* court reasoned that such subsequent cross-examination is likely to be "meaningful and vigorous."⁶⁷ The court further reasoned that the fact-finder will have the opportunity to observe the witness, "bring[ing] to bear his or her sensory observations, experience, common sense and logic . . . to assess [the witness'] credibility and to determine the truth and accuracy of both the out-of-court declarations and the in-court testimony."⁶⁸ The court noted that counsel for both parties questioned Traxler extensively about the inconsistencies in her stories.⁶⁹ As a result, the court concluded that the fact-finder had ample opportunity to observe Traxler's demeanor while she was on the stand.⁷⁰ In addition, the *Brady* court noted that a witness' prior statements often possess superior indicia of reliability because they were made closer in time to the event they describe and, as a result, are less

truth-compelling device."); C. McCORMICK, EVIDENCE, *supra* note 3, § 251, at 744 ("The oath is on longer a principal safeguard of the trustworthiness of testimony."). However, the United States Supreme Court, in *Green*, noted that because the witness is now under oath, he must "affirm, deny, or qualify the truth of the prior statement under the penalty of perjury [and that] the very fact that the prior statement was not given under [oath] may become the witness' explanation for its inaccuracy." 399 U.S. 149, 159 (1970). It should be noted that the *Brady* court did not specifically address the validity of the oath in its opinion. See 510 Pa. 123, 507 A.2d 66 (1986).

67. 510 Pa. at 129, 507 A.2d at 69. The court noted that subsequent cross-examination puts the witness "on the spot," requiring him to explain the discrepancies between his in-court testimony and prior statements, or to deny that he ever made the prior statements. *Id.*

68. *Id.* This portion of the *Brady* court's rationale is similar to that espoused by Judge Learned Hand. See *DiCarlo v. United States*, 6 F.2d 364 (2d Cir. 1925) (witness testified at grand jury hearing that defendants were responsible for attack on State's witness; at trial, witness testified that she could no longer testify as she had at grand jury hearing). As to the fact-finder's opportunity to observe the witness' demeanor, Judge Hand stated:

The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

Id. at 368.

69. 510 Pa. at 132, 507 A.2d at 71. The court noted that Traxler was also questioned about the validity of each statement, and that her entire testimony comprised 200 pages of the trial transcript. *Id.* at 133, 507 A.2d at 71. The court also noted that the out-of-court declarations were rendered under circumstances which assured that they were "voluntary, knowing and understanding." *Id.* Specifically, the court noted that both Traxler's mother and her attorney had been present when the statement was made. *Id.* at 131, 507 A.2d at 70.

70. *Id.* at 133, 507 A.2d at 71. The court noted that "the jury had more than adequate opportunity to observe the witness' demeanor, hear her testimony and explanations and assess her credibility." *Id.*

susceptible to fabrication, coercion or external influence.⁷¹

From its examination of the surrounding circumstances, the court concluded that continued adherence to the orthodox rule would do significant damage to the integrity of the fact-finding process and keep relevant information from the jury.⁷²

In rejecting the traditional rule, however, the *Brady* court emphasized that Traxler's statements were "rendered under highly reliable circumstances assuring that they were voluntary, knowing and understanding."⁷³ Thus, although the *Brady* court's holding requires only that the witness testify in court subject to cross-examination concerning the prior statement,⁷⁴ the decision implies that the court will examine the reliability of the statements before admitting them as substantive evidence.⁷⁵

In dissent, Justice Flaherty and Justice Zappala were concerned that the prior statements may not be adequately presented and explained in the subsequent legal proceeding, where they are being offered for their substantive value.⁷⁶ The Justices stated that such concerns also raise questions as to the value and trustworthiness of the statements, especially where they are sought as the sole proof of guilt in criminal cases.⁷⁷

71. *Id.* at 130, 507 A.2d at 69; see also FED. R. EVID. 801 advisory committee's note (inconsistent statement more likely to be true because made nearer in time to actual event and less likely to be influenced by circumstances of controversy); C. McCORMICK, EVIDENCE, *supra* note 3, § 251, at 745 ("An additional persuasive factor against the orthodox rule is the superior trustworthiness of earlier statements, on the basis that memory hinges on recency.").

72. 510 Pa. at 130-31, 507 A.2d at 70. The *Brady* court, quoting Justice Roberts' dissent in *Commonwealth v. Gee*, noted that "[a]n evidentiary rule which forces the searcher to ignore relevant clues whose reliability can be tested by cross-examination serves no purpose." *Id.* (quoting *Gee*, 467 Pa. at 146, 354 A.2d at 886 (Roberts, J., dissenting)).

73. *Id.* at 133, 507 A.2d at 71. For a description of the circumstances under which Traxler testified, see *supra* notes 69-70.

74. 510 Pa. at 131, 507 A.2d at 70. The court seemed to suggest that at least one factor in determining the reliability of an out-of-court statement is whether it was "voluntary, knowing and understanding." *Id.* The *Brady* court also noted that Traxler's prior statement was corroborated by other evidence in the case. *Id.* at 126 n.1, 507 A.2d at 67 n.1. Thus, corroboration could also be a factor for Pennsylvania courts to consider in determining whether a witness' prior inconsistent statements possess sufficient indicia of reliability to be admissible as substantive evidence. For a discussion of corroboration in the context of prior inconsistent statements, see *infra* notes 148-52 and accompanying text.

75. See 510 Pa. at 131, 507 A.2d at 70.

76. *Id.* at 136-37, 507 A.2d at 73 (Flaherty, J., dissenting). Justice Flaherty argued that the Commonwealth must prove each element of a crime with evidence presented during the actual trial and not with evidence consisting of prior out-of-court statements. *Id.* at 137, 507 A.2d at 73 (Flaherty, J., dissenting).

77. *Id.* (Flaherty, J., dissenting). Justice Flaherty argued that the modern rule as announced by the *Brady* majority works to "bootstrap" the guilt of the accused. *Id.* (Flaherty, J., dissenting); see also Comment, *supra* note 34, at 1496 (substantive admissibility of prior inconsistent statements is of particular concern in criminal trials; determination of weight to be given such statements re-

The Pennsylvania courts have applied the *Brady* rule in only one subsequent decision.⁷⁸ In *Wilson v. Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole*,⁷⁹ petitioner was charged with violating the provisions of his parole agreement.⁸⁰ While on parole, petitioner was arrested and charged with aggravated assault and related offenses.⁸¹ At petitioner's parole violation hearing, the alleged victim, who had initiated the original assault charges, testified that petitioner never struck her.⁸² This testimony was contrary to a prior statement given at petitioner's preliminary hearing.⁸³ The Board examiner subsequently relied on the victim's prior recorded statements rather than on her live testimony in finding that petitioner had violated his parole agreement.⁸⁴ Petitioner charged that the examiner's decision was based solely on improperly admitted hearsay and that, if the victim's prior statements were stricken, the record would contain no evidence to support the revocation.⁸⁵ After examining the supreme court's decision in *Brady*, the Pennsylvania Commonwealth Court determined that, "the re-

quires consideration of two competing policies—trustworthiness of prior statements and need for evidence).

Concern over the trustworthiness and reliability of a witness' prior inconsistent statements was also expressed by the Advisory Committee on Federal Rule of Evidence 801 and the United States Supreme Court in *Green*. For a discussion of Federal Rule of Evidence 801, see *supra* notes 32-44 and accompanying text. For a further discussion of *Green*, see *supra* notes 12-31 and accompanying text.

78. See *Wilson v. Commonwealth of Pa., Pa. Board of Probation and Parole*, 97 Pa. Commw. 202, 509 A.2d 1335 (1986). Additionally, in *Commonwealth v. Gioan*, the Pennsylvania Supreme Court vacated a Superior Court decision and remanded the case to that court for reconsideration in light of the *Brady* decision. *Gioan*, 511 Pa. 342, 342-43, 513 A.2d 983, 983 (1986) (per curiam).

79. *Wilson*, 97 Pa. Commw. 202, 509 A.2d 1335 (1986).

80. *Id.* at 203, 509 A.2d at 1335-36. Petitioner had already been recommitted as a technical parole violator by a decision of the Pennsylvania Board of Probation and Parole. *Id.* *Wilson* was an appeal of that decision. *Id.* at 203, 509 A.2d at 1336.

81. *Id.* at 203, 509 A.2d at 1336. Those related crimes consisted of simple assault, recklessly endangering another person and possession of an instrument of crime. *Id.* At the time these offenses were committed, petitioner was on parole from a one-to-five-year sentence for theft, assault, and possession of an instrument of crime. *Id.*

82. *Id.* Petitioner had beaten the victim, his paramour at the time of the incident, with a four-foot tree branch. *Id.* The beating apparently occurred in response to a fight between the victim and another woman concerning the other woman's involvement with petitioner. *Id.*

83. *Id.*

84. *Id.* These statements were in the form of notes from the victim's testimony at petitioner's preliminary hearing and were introduced after the parole agent pleaded surprise. *Id.* at 204, 509 A.2d at 1336. The statements were then admitted as substantive evidence over the objection of petitioner's counsel. *Id.*

85. *Id.* The court noted that while hearsay evidence was admissible in parole revocation hearings, a recommitment order could not be based solely on improperly admitted hearsay. *Id.* Thus, the court reasoned that it had to accept the prior recorded testimony as direct, substantive evidence in order to base its recommitment order on such evidence. *Id.*

liability factors cited in *Brady* are equally applicable to an administrative proceeding before [a] parole Board"⁸⁶ From this the court concluded that the victim's prior recorded testimony was not hearsay and was, therefore, competent evidence on which to base a recommitment order.⁸⁷

2. *Substantive Admissibility in Other States*

Although Pennsylvania only recently rejected the orthodox rule,⁸⁸ the *Brady* decision and its supporting rationale are not unique.⁸⁹ Relying primarily on the same rationale as that employed in *Brady*,⁹⁰ forty-one states have elected to follow some version of the modern rule, and thus allow the admission of a non-party witness' prior inconsistent statements as substantive evidence.⁹¹ Only eight states and the District of

86. *Id.* at 206, 509 A.2d at 1336-37 (citing reasoning employed by Pennsylvania Supreme Court in *Brady*, both in discarding orthodox rule and instituting modern rule as Pennsylvania law). For a full discussion of *Brady*, see *supra* notes 56-77 and accompanying text.

87. *Wilson*, 97 Pa. Commw. at 206, 509 A.2d at 1337.

88. Five months after the Pennsylvania Supreme Court's decision in *Brady*, the Connecticut Supreme Court rejected the orthodox rule, citing the *Brady* decision as a factor in its decision. See *State v. Whelan*, 200 Conn. 743, 513 A.2d 86 (1986). For a discussion of *Whelan*, see *infra* notes 101, 105-07, 111-12 and accompanying text.

89. See, e.g., *State v. Whelan*, 200 Conn. 743, 750, 513 A.2d 86, 91 (1986) (subsequent cross-examination is sufficient and meaningful; jury able to observe witness in court and thus able to decide which statement to believe, and prior statements may be more reliable than in-court testimony because made closer in time to event they describe and are thus less subject to failure of memory and false suggestion); *Gibbons v. State*, 248 Ga. 858, 863, 286 S.E.2d 717, 721 (1982) (oath is no longer strong guarantee of reliability; prior statements often more reliable because made closer in time to event they describe, and requirements that jury observe declarant and that defendant have opportunity for cross-examination are satisfied where declarant testifies subject to cross-examination at trial); *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 426-27 (Mo. 1985) (en banc) (prior statement often more accurate and reliable than in-court testimony because statement made when memory was fresher; cross-examination at trial relieves most hearsay dangers, and jury able to observe declarant's demeanor at trial). For a discussion of the rationale employed by the *Brady* court, see *supra* notes 65-75 and accompanying text. For a discussion of *Whelan*, see *infra* notes 101, 105-07, 111-12 and accompanying text.

90. For a discussion of the rationale employed by the *Brady* court, see *supra* notes 65-75 and accompanying text.

91. Alaska—ALASKA R. EVID. 801(d)(1)(A), *Beavers v. State*, 492 P.2d 88 (Alaska 1971); Arizona—ARIZ. R. EVID. 801(d)(1)(A), *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973); Arkansas—ARK. UNIF. R. EVID. 801(d)(1)(i); California—CAL. EVID. CODE § 1235 (West Compact ed. 1987), *People v. Freeman*, 20 Cal. App. 3d 488, 97 Cal. Rptr. 717 (1971); Colorado—COLO. R. EVID. 801(d)(1)(A) (civil cases), COLO. REV. STAT. § 16-10-201 (1986) (criminal cases); Connecticut—*State v. Whelan*, 200 Conn. 743, 513 A.2d 86 (1986); Delaware—DEL. UNIF. R. EVID. 801(d)(1)(A) (civil cases), DEL. CODE ANN. tit. 11, § 3507(a) (1979) (criminal cases); Florida—FLA. EVID. CODE 90.801(2)(a); Georgia—*Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1983); Hawaii—HAW. R. EVID. 802.1(1); Idaho—IDAHO R. EVID. 801(d)(1)(A); Illinois—ILL. ANN. STAT. ch. 38,

Columbia still fully adhere to the orthodox rule and refuse to admit a

para. 115-10.1 (Smith-Hurd 1986) (criminal cases only); Indiana—*Watkins v. State*, 446 N.E.2d 949 (Ind. 1983), *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975); Iowa—IOWA R. EVID. 801(d)(1)(A); Kansas—KAN. CIV. PROC. CODE ANN. § 60-460(a) (West Supp. 1984), *State v. Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); Kentucky—*Nugent v. Commonwealth*, 639 S.W.2d 761 (Ky. 1982), *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); Maine—ME. R. EVID. 801(d)(1)(A); Massachusetts—*Commonwealth v. Daye*, 393 Mass. 55, 469 N.E.2d 483 (1984); Minnesota—MINN. R. EVID. 801(d)(1)(A); Mississippi—MISS. R. EVID. 801(d)(1)(A); Missouri—MO. REV. STAT. § 491.074 (West Supp. 1987) (criminal cases), *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423 (Mo. 1985) (en banc) (application of criminal rule in civil cases); Montana—MONT. R. EVID. 801(d)(1)(A); Nebraska—NEB. REV. STAT. § 27-801(4)(a)(i) (1985); Nevada—NEV. REV. STAT. ANN. § 51.035(2)(a) (Michie 1986); New Hampshire—N.H. R. EVID. 801(d)(1)(A); New Jersey—N.J. R. EVID. 63(1), *State v. Provet*, 133 N.J. Super. 432, 337 A.2d 374 (1975); New Mexico—N.M. R. EVID. 11-801(D)(1)(a); North Dakota—N.D. R. EVID. 801(d)(1)(i), *State v. Igoe*, 206 N.W.2d 291 (N.D. 1973); Ohio—OHIO R. EVID. 801(D)(1)(a); Oklahoma—OKLA. STAT. ANN. tit. 12, § 2801(4)(a)(1) (West 1980); Oregon—ORE. R. EVID. 801(4)(a)(A); Pennsylvania—*Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986); South Carolina—*State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63, *cert. denied*, 460 U.S. 1103 (1982); South Dakota—S.D. CODIFIED LAWS ANN. § 19-16-2(1) (Rule 801(d)(1)(A)) (1979); Texas—TEX. R. EVID. 801(e)(1)(A); Utah—UTAH R. EVID. 801(d)(1)(A); Vermont—VT. R. EVID. 801(d)(1)(A); Washington—WASH. R. EVID. 801(d)(1)(i); West Virginia—W. VA. R. EVID. 801(d)(1)(A); Wisconsin—Wis. R. EVID. 908.01(4)(a)(1), *Vogel v. State*, 96 Wis. 2d 372, 291 N.W.2d 838 (1980); Wyoming—WYO. R. EVID. 801(d)(1)(A); *see also* Annotation, *Use or Admissibility of Prior Inconsistent Statements of Witness as Substantive Evidence of Facts to Which They Relate in Criminal Case—Modern State Cases*, 30 A.L.R.4th 414 (1984) (collecting cases on substantive admissibility of prior inconsistent statements of witnesses in criminal proceedings).

The State of Michigan allows prior statements of identification to be used as substantive evidence, but follows the orthodox rule with regard to other types of prior inconsistent statements. *See* MICH. R. EVID. 801(d)(1). Michigan Rule of Evidence 801(d)(1) provides: "A statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving him." *Id.*

Of the 41 jurisdictions that have allowed a witness' prior statements to be used for their substantive value, only seven have done so by judicial decisions. *See State v. Whelan*, 200 Conn. 743, 513 A.2d 86 (1986) (prior written statements of witness to barroom brawl and stabbing admitted as substantive evidence to defeat defendant's claim of self-defense); *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982) (statements of witness to effect that appellant had murdered victim by cutting his throat and tying him to tree admitted as substantive evidence so long as witness subject to cross-examination); *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975) (prior written statements of defendant's wife and victim's guest given to police after murder admissible as substantive evidence where witnesses present and subject to cross-examination even though statements not made under oath); *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969) (police testimony that defendant's wife, during an emergency phone call to police, said defendant was taking advantage of her sister-in-law admissible as substantive evidence when wife later testified that she said no such thing); *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E.2d 483 (1984) (discussed at *infra* note 102 and accompanying text); *Brady*, 510 Pa. 123, 507 A.2d 66 (1986) (discussed at *supra* notes 56-77 and accompanying text); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (police officer allowed to testify to witness' prior state-

witness' prior inconsistent statements as substantive evidence.⁹²

Of the forty-one jurisdictions that have elected to follow the modern rule,⁹³ twenty have adopted a rule similar to that established in *Brady*, whereby a witness' prior statements are admissible so long as the witness is subject to cross-examination during the proceeding in which the statement is offered.⁹⁴ However, five of these twenty jurisdictions have elected to do so only in civil cases.⁹⁵ Three of these five jurisdictions have chosen to follow identical re-enactments of Federal Rule of Evidence 801(d)(1)(A) in criminal cases.⁹⁶ The other two jurisdictions,

ments that gun used in murder of three gas station attendants could be located behind appellant's trailer so long as witness testifies at trial and subject to cross-examination), *cert. denied*, 460 U.S. 1103 (1982).

For further discussion of *Whelan*, see *infra* notes 101, 105-07, 111-12 and accompanying text. For a breakdown of states in terms of the specific form of the modern rule adopted by each, see *infra* notes 94-112 and accompanying text.

92. The following nine jurisdictions still fully adhere to the orthodox rule which prohibits the use of a witness' prior inconsistent statements as substantive evidence: Alabama—*Cloud v. Moon*, 290 Ala. 33, 37, 273 So. 2d 196, 200 (1973); District of Columbia—*Turner v. United States*, 443 A.2d 542, 549 (D.C. 1982); Louisiana—*State v. Kimble*, 375 So. 2d 76, 79 (La. 1979); Maryland—*Smith v. Branscome*, 251 Md. 582, 590, 248 A.2d 455, 462 (1968); New York—*People v. Ramirez*, 51 A.D.2d 809, 810, 380 N.Y.S.2d 80, 81 (1976); North Carolina—*State v. Erby*, 56 N.C. App. 358, 361, 289 S.E.2d 86, 88 (1982); Rhode Island—*State v. Roddy*, 401 A.2d 23, 25 (R.I. 1979); Tennessee—*Martin v. State*, 584 S.W.2d 830, 833 (Tenn. Crim. App. 1979); Virginia—VA. CODE ANN. § 8.01-403 (1984). Though the State of Michigan has provided for substantive admissibility of prior statements of identification, it has not done so with regard to other prior statements and thus may be considered to follow the orthodox rule in this respect. See MICH. R. EVID. 801(d)(1). For a discussion of Michigan Rule of Evidence 801(d)(1), see *supra* note 91 and accompanying text.

93. For a list of these states, see *supra* note 91 and accompanying text. For a breakdown of states according to the type of modern rule followed, see *infra* notes 94-112 and accompanying text.

94. Alaska—ALASKA R. EVID. 801(d)(1)(A); Arizona—ARIZ. R. EVID. 801(d)(1)(A); Arkansas—ARK. UNIF. R. EVID. 801(d)(1)(i); California—CAL. EVID. CODE § 1235 (West Compact ed. 1986); Colorado—COLO. R. EVID. 801(d)(1)(A); Delaware—DEL. UNIF. R. EVID. 801(d)(1)(A); Georgia—*Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982); Indiana—*Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975); Kansas—KAN. CIV. PROC. CODE ANN. § 60-460(a) (West Supp. 1984); Kentucky—*Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); Missouri—MO. REV. STAT. § 491.074 (West Supp. 1987), *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423 (Mo. 1985) (en banc); Montana—MONT. R. EVID. 801(d)(1)(A); Nevada—NEV. REV. STAT. ANN. § 51.035(2)(a) (Michie 1986); New Mexico—N.M. R. EVID. 11-801(D)(1)(a); North Dakota—N.D. R. EVID. 801(d)(1)(i); Pennsylvania—*Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986); South Carolina—*State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63, *cert. denied*, 460 U.S. 1103 (1982); Utah—UTAH R. EVID. 801(d)(1)(A); Wisconsin—WIS. R. EVID. 908.01(4)(a)(1); Wyoming—WYO. R. EVID. 801(d)(1)(A).

95. See ARK. UNIF. R. EVID. 801(d)(1)(i); COLO. R. EVID. 801(d)(1)(A); DEL. UNIF. R. EVID. 801(d)(1)(A); N.D. R. EVID. 801(d)(1)(i); WYO. R. EVID. 801(d)(1)(A).

96. See ARK. UNIF. R. EVID. 801(d)(1)(i); N.D. R. EVID. 801(d)(1)(i); WYO. R. EVID. 801(d)(1)(A). For the text of Federal Rule of Evidence 801(d)(1)(A), see *supra* note 32.

Colorado and Delaware, have each followed different routes in adapting the modern rule for use in criminal cases.⁹⁷

Fourteen of the forty-one jurisdictions following the modern rule have adopted verbatim re-enactments of Federal Rule of Evidence 801(d)(1)(A) that are applicable to both civil and criminal proceedings.⁹⁸ However, while Texas courts apply a verbatim re-enactment of Federal Rule of Evidence 801(d)(1)(A) in civil cases,⁹⁹ they apply a variation of this rule in criminal cases.¹⁰⁰

In an effort to ensure the reliability of a witness' prior statements,¹⁰¹ six states have chosen to follow some variation or extension of either the *Brady* rule or Federal Rule of Evidence 801(d)(1)(A).¹⁰² Most noteworthy among these variations are the rules adopted by Connecti-

97. Colorado provides that a witness' prior inconsistent statements may be used substantively so long as the witness is given the opportunity to explain or deny the statement or is further able to testify, and the prior statement relates to a matter within the witness' personal knowledge. COLO. REV. STAT. § 16-10-201 (1986).

In Delaware, the prior statement of a witness who is subject to cross-examination in a criminal prosecution may be used substantively if it was made voluntarily. DEL. CODE ANN. tit. 11, § 3507(a) (1979). Subsection (b) of the Delaware rule states that the provision applies regardless of whether the prior statement and the in-court testimony are consistent. *Id.* § 3507(b).

98. See FLA. EVID. CODE 90.801(2)(a); IDAHO R. EVID. 801(d)(1)(A); IOWA R. EVID. 801(d)(1)(A); ME. R. EVID. 801(d)(1)(A); MINN. R. EVID. 801(d)(1)(A); MISS. R. EVID. 801(d)(1)(A); NEB. REV. STAT. § 27-801(4)(a)(i) (1985); N.H. R. EVID. 801(d)(1)(A); OKLA. STAT. ANN. tit. 12, § 2801(4)(a)(1) (West 1980); ORE. R. EVID. 801(4)(a)(A); S.D. CODIFIED LAWS ANN. § 19-16-2(1) (Rule 801(d)(1)(A)) (1979); VT. R. EVID. 801(d)(1)(A); WASH. R. EVID. 801(d)(1)(i); W. VA. R. EVID. 801(d)(1)(A).

99. TEX. R. EVID. 801(e)(1)(A).

100. TEX. R. CRIM. EVID. 801(e)(1)(A). Applicable to criminal proceedings, the Texas rule provides:

A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, *except a grand jury proceeding*, or in a deposition.

Id. (emphasis added).

101. See, e.g., *State v. Whelan*, 200 Conn. 743, 752-53, 513 A.2d 86, 91-92 (1986). The Supreme Court of Connecticut stated that admitting a witness' prior inconsistent statements without some restriction would allow the substantive use of oral statements made "in jest or to boast of knowledge of criminal activity in which the declarant was not actually involved." *Id.* at 753, 513 A.2d at 92. The *Whelan* court noted that such statements would be difficult for the declarant to explain and might be determinative of the defendant's guilt. *Id.*; see also HAW. R. EVID. 802.1 commentary (provisions allowing for substantive admissibility of prior written statements as well as verbatim recordings secure trustworthiness of statements as do similar provisions in federal Jencks Act, 18 U.S.C. § 3500(e)(1)-(2) (1982)). For a discussion of Hawaii Rule of Evidence 802.1(1), see *infra* notes 108-12 and accompanying text. For a discussion of the Jencks Act, see *infra* note 108.

102. See HAW. R. EVID. 802.1(1); ILL. ANN. STAT. ch. 38, par. 115-10.1 (Smith-Hurd 1986); *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E.2d 483

cut¹⁰³ and Hawaii.¹⁰⁴

(1984); N.J. R. EVID. 63(1); OHIO R. EVID. 801(D)(1)(a); State v. Whelan, 200 Conn. 743, 513 A.2d 86 (1986).

For a discussion of the Hawaii rule, see *infra* notes 108-12 and accompanying text. For a discussion of *Whelan*, see *supra* note 101 and *infra* notes 105-07, 111-12 and accompanying text.

The Illinois rule is applicable only to criminal cases, and provides for substantive admissibility of a witness' prior inconsistent statements when the witness is subject to cross-examination concerning the statement. ILL. ANN. STAT. ch. 38, para. 115-10.1 (Smith-Hurd 1986). Moreover, the prior statement must have been made under oath at a formal proceeding or involve an event to which the testifying witness has personal knowledge. *Id.* In addition, if the statement was not made at a formal proceeding, it must be written or signed by the witness, acknowledged by the witness under oath in a formal proceeding or accurately recorded by an electronic means of sound recording. *Id.*

Having adopted its approach to the modern rule by judicial decision, the Commonwealth of Massachusetts now admits a witness' prior inconsistent statement for its substantive value if it is

made under oath before a grand jury, provided the witness can be effectively cross-examined as to the accuracy of the statement, the statement was not coerced and was more than a mere confirmation or denial of an allegation by the interrogator, and other evidence tending to prove the issue is presented.

Daye, 393 Mass. at 75, 469 N.E.2d at 495-96.

Before the court can consider the admissibility of a prior inconsistent statement, counsel must first ask for a voir dire so that the witness may be reminded of the circumstances under which the prior statement was made and be given an opportunity to explain the inconsistency. *Id.* at 74 n.21, 469 N.E.2d at 495 n.21. Only after this will the judge rule on admissibility. *Id.* Massachusetts will also allow a witness' prior inconsistent statement to be admitted substantively "[w]here there is no objection [to such use] . . . and no request for a limiting instruction." Commonwealth v. Luce, 399 Mass. 479, 482, 505 N.E.2d 178, 180 (1987) (prior inconsistent statements of defendant's brother and sister admissible for substantive use where defense counsel did not object when inconsistency brought out).

Beyond these two applications of the modern rule, however, Massachusetts courts steadfastly refuse to depart from the orthodox rule. See Commonwealth v. Frisino, 21 Mass. App. Ct. 551, —, 488 N.E.2d 51, 54 (1986) (signed but unsworn prior statement held inadmissible for substantive use); Commonwealth v. Gore, 20 Mass. App. Ct. 96, —, 480 N.E.2d 1059, 1061 (1985) ("We refuse to enlarge the *Daye* exception to include probable cause hearing testimony.").

New Jersey Rule of Evidence 63(1) incorporates the provision in subsection (A) of Federal Rule of Evidence 801(d)(1) as one class of statements and adds another pertaining to statements contained in a sound recording or in a writing made or signed by the witness under circumstances lending to its reliability. N.J. R. EVID. 63(1). For the text of Federal Rule of Evidence 801(d)(1)(A), see *supra* note 32.

Ohio Rule of Evidence 801(D)(1)(a) adopts the House Judicial Committee's recommendation and provides that only those prior statements made subject to cross-examination at a trial, hearing or in a deposition may be used as substantive evidence. OHIO R. EVID. 801(D)(1)(a). For a discussion of the House Judicial Committee's recommendation regarding substantive admissibility of a witness' prior inconsistent statements, see *supra* notes 34-35.

103. State v. Whelan, 200 Conn. 743, 513 A.2d 86 (1986). For a discussion of *Whelan*, see *supra* note 101 and *infra* notes 105-07 and accompanying text.

104. HAW. R. EVID. 802.1(1). For a discussion of Hawaii Rule of Evidence 802.1(1), see *infra* notes 108-12 and accompanying text.

In *State v. Whelan*,¹⁰⁵ the Connecticut Supreme Court rejected the orthodox rule, but limited the scope of the modern rule to situations in which the declarant, who has personal knowledge of the facts stated, is subject to cross-examination concerning the prior statement.¹⁰⁶ Moreover, the *Whelan* court further required that the prior statement be reduced to a writing and signed by the declarant.¹⁰⁷

As an extension of Federal Rule of Evidence 801(d)(1)(A), Hawaii Rule of Evidence 802.1(1) provides for the substantive admissibility of a witness' prior inconsistent statements in three situations: where the prior statement was given under oath at a formal legal proceeding or in a deposition; where the statement was reduced to writing and signed or adopted by the declarant; or where the statement was a contemporaneous verbatim recording.¹⁰⁸ In addition, like other forms of the modern

105. 200 Conn. 743, 513 A.2d 86 (1986). In *Whelan*, defendant was charged with murder after stabbing another man during a barroom brawl. *Id.* at 745, 513 A.2d at 88. Defendant's claim of self-defense was defeated by evidence contained in a witness' prior written statement which was introduced outside the presence of the jury after the witness testified that he could not remember the events in question. *Id.* at 746-47, 513 A.2d at 89. The witness had given this statement to police shortly after the stabbing. *Id.* at 746, 513 A.2d at 89.

106. *Id.* at 753, 513 A.2d at 92.

107. *Id.* The *Whelan* court reasoned that the declarant realized his statement would be relied upon, since oral statements are easily manufactured and difficult to rebut, whereas written statements, though "not an absolute guaranty of reliability, . . . provide significant assurance of an accurate rendition of the statement." *Id.* at 754, 513 A.2d at 93. Though concerned about the reliability of a witness' prior statements, the court did not find it necessary to restrict substantive admissibility to only those situations covered by Federal Rule of Evidence 801(d)(1)(A). *Id.* at 754 n.10, 513 A.2d at 93 n.10. In fact, in dictum, the court intimated that other statements not signed by the declarant may be admissible if they are "reliable". *See id.* at 754-55, 513 A.2d 93-94. For example, the court noted that prior tape-recorded statements possess indicia of reliability similar to that found in written statements, and thus stated that such evidence would also be admissible as substantive evidence. *Id.* at 754 n.9, 513 A.2d at 93 n.9.

108. HAW. R. EVID. 802.1(1). Hawaii Rule of Evidence 802.1 provides in pertinent part:

The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:

- (1) Inconsistent Statement. The declarant is subject to cross-examination concerning the subject matter of his statement, the statement is inconsistent with his testimony, the statement is offered in compliance with rule 613(b) [governing use of prior inconsistent statements for impeachment purposes], and the statement was:
 - (A) Given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or
 - (B) Reduced to writing and signed or otherwise adopted or approved by the declarant; or
 - (C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement.

Id. The extension of this rule beyond Federal Rule of Evidence 801(d)(1)(A) is

rule,¹⁰⁹ the Hawaii rule requires that the witness be subject to cross-examination concerning the prior statement during the proceeding in which the evidence is being offered for its substantive value.¹¹⁰

Both the *Whelan* rule and Hawaii Rule of Evidence 802.1(1) are important because they represent a middle-of-the-road approach to substantive admissibility of prior inconsistent statements. Though more rigid than the *Brady* rule, which provides for substantive admissibility so long as the witness is subject to cross-examination,¹¹¹ the rules followed in Connecticut and Hawaii do not restrict substantive admissibility to the very narrow class of statements made in a formal adversarial context

modeled after a provision of the Jencks Act. HAW. R. EVID. 802.1 commentary (citing 18 U.S.C. § 3500(e)(1)-(2) (1982)).

The Jencks Act, which governs the discovery of statements made by witnesses to federal agents, provides in pertinent part:

- (e) The term "statement", . . . in relation to any witness called by the United States, means—
- (1) a written statement made by said witness and signed or otherwise adopted or approved by him; [or]
 - (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement.

18 U.S.C. § 3500(e)(1)-(2) (1982). The basic aim of this particular provision of the Jencks Act is to assure the reliability and trustworthiness of a witness' statements. See *Palermo v. United States*, 360 U.S. 343, 344, (1959). In *Palermo*, the United States Supreme Court noted that the purpose of the Jencks Act provision is to produce a "carefully restricted and most trustworthy class of statements." *Id.* The petitioner in *Palermo* was convicted of tax evasion, primarily on the basis of his failure to report income from certain dividends. *Id.* at 343. The witness, a partner at the accounting firm where petitioner did business, testified at trial that certain relevant records had not been received by the firm until after an investigation of petitioner had been initiated. *Id.* at 344. This testimony differed from prior statements by the witness to the effect that he could not remember when the records had been received. *Id.* The witness' prior statements were made during the course of an interrogation conducted by IRS agents. *Id.* In determining that petitioner was not entitled to discovery of a memorandum which summarized the IRS interrogation, the Supreme Court noted that the above provision of the Jencks Act was enacted to ensure that the words were "the witness' own rather than the product of the investigator's selections, interpretations and interpolations." *Id.* at 350. The Court went on to note that "[i]t [is] important that the statement could fairly be deemed to reflect fully and without distortion what had been said . . ." *Id.* at 352.

109. See, e.g., *Whelan*, 200 Conn. at 753, 513 A.2d at 92; *Brady*, 510 Pa. at 131, 507 A.2d at 70; see also FED. R. EVID. 801(d)(1)(A).

For a discussion of *Brady*, see *supra* notes 56-77 and accompanying text. For a discussion of *Whelan*, see *supra* notes 101, 105-07 and *infra* notes 111-12, and accompanying text. For a discussion of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 32-44 and accompanying text.

110. HAW. R. EVID. 802.1(1).

111. *Brady*, 510 Pa. at 131, 507 A.2d at 70. The *Brady* decision can also be read to require that the out-of-court statement be deemed reliable. *Id.* at 133, 507 A.2d at 71. For a discussion of the *Brady* court's holding and rationale, see *supra* notes 56-57, 65-77 and accompanying text.

as does Federal Rule of Evidence 801(d)(1)(A).¹¹²

III. ANALYSIS

In *Brady*, the Pennsylvania Supreme Court adopted the majority view that a non-party witness' prior inconsistent statements may be used as substantive evidence.¹¹³ Although the court adopted what it considered to be the "better, more principled view" regarding the use of prior inconsistent statements,¹¹⁴ it is submitted that the *Brady* rule is overly broad and fails to adequately ensure the reliability of prior out-of-court declarations.

In *Brady*, the court noted that the facts presented "a classic case" in which to hold that a witness' prior statement is admissible for its substantive value.¹¹⁵ Because the witness' prior statement was rendered under "highly reliable circumstances" and was presented to the court in the form of a verbatim recording, the *Brady* court emphasized that there was never any concern about the reliability of the statement.¹¹⁶ Likewise, there was no concern over the reliability of the statements admitted in *Wilson*, where the witness made her prior statement during a preliminary hearing.¹¹⁷ Yet, despite the reliability of the statements in

112. FED. R. EVID. 801(d)(1)(A). For a discussion of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 32-44 and accompanying text.

113. 510 Pa. at 131, 507 A.2d at 70.

114. *Id.* at 130, 507 A.2d at 70. For a discussion of *Brady*, see *supra* notes 56-77 and accompanying text.

115. 510 Pa. at 131, 507 A.2d at 70. The Pennsylvania Supreme Court stated that to deny substantive admissibility of the witness' prior tape-recorded statement, and thus relieve the witness from having to explain or deny the statement in light of her in-court testimony, would deny the jury its "most powerful tool in evaluating [a witness'] veracity." *Id.* at 133, 507 A.2d at 71 (quoting trial court in same case).

116. The *Brady* court stated, "The out-of-court declaration was rendered under highly reliable circumstances assuring that they [sic] were voluntary, knowing and understanding." 510 Pa. at 133, 507 A.2d at 71. Moreover, the court noted that the witness was extensively questioned by both parties regarding the statement. *Id.* The court also noted that the extensive questioning gave the jury an adequate opportunity to observe the witness' demeanor and assess her credibility. *Id.* As a result, the court concluded that under such circumstances, the lower court was correct in allowing the witness' prior statement to be admitted as substantive evidence of appellee's guilt. *Id.* For a full discussion of *Brady*, see *supra* notes 56-77 and accompanying text.

117. *Wilson*, 97 Pa. Commw. at 203, 509 A.2d at 1336. For a full discussion of *Wilson*, see *supra* notes 79-87 and accompanying text. *Cf. Whelan*, 200 Conn. 743, 513 A.2d 86 (1986). In *Whelan*, the Supreme Court of Connecticut adopted the modern rule but limited it to those prior statements reduced to a writing and signed by the declarant who has personal knowledge of the events described in that writing. 200 Conn. at 753, 513 A.2d at 92. In formulating this approach, the court noted that written statements, though not made during a formal proceeding, have sufficient indicia of reliability to warrant substantive admissibility. *Id.* at 754, 513 A.2d at 92-93. For a discussion of *Whelan*, see *supra* notes 101, 105-07, 111-12 and accompanying text.

Thus, it is submitted that statements made during the course of a prelimi-

Brady and *Wilson*, there will undoubtedly be situations in which proof of both the existence and the accuracy of a witness' prior inconsistent statements will not be so reliable, such as where the sole proof and content of a witness' prior statements rests with the testimony of another person.¹¹⁸ In such a situation the possibility of misinterpretation and even abuse in the form of fabrication is greatly increased.¹¹⁹

Another related problem with the *Brady* decision is that the court never explained whether, under its version of the modern rule, the declarant would be required to have personal knowledge of the facts underlying the out-of-court statement. Although the *Brady* court noted that the declarant's statement in that case was "highly reliable" because it was "voluntary, knowing and understanding," it did not explain whether its reference to "knowing" referred to a personal knowledge requirement.¹²⁰ Moreover, if the court's reference to "knowing" was meant to refer to a personal knowledge requirement, the court did not articulate whether it would require personal knowledge that the statement was made or personal knowledge of the facts underlying the statement.¹²¹ It is submitted that by not explicitly requiring the declarant to have personal knowledge of the facts stated, the *Brady* court created an

nary hearing, as in *Wilson* where the declarant was subject to contemporaneous cross-examination, possess such strong indicia of reliability that they would be admissible under the *Whelan* standard. In fact, such statements would be admissible under the stricter federal standard, which specifically limits admissibility to those statements made while the declarant was under oath at a formal proceeding. See FED. R. EVID. 801(d)(1)(A). For a full discussion of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 32-44 and accompanying text.

118. See, e.g., *Graham*, *supra* note 38, at 1589 ("[T]he most untrustworthy declaration . . . [is] the unacknowledged oral statement."); see also *Green*, 399 U.S. at 151 (only proof of witness' initial statement implicating respondent as drug dealer rested with testimony of police officer present when statement was made); *Whelan*, 200 Conn. at 752-53, 513 A.2d at 92 (prior oral statements present possibility of "error in reporting" and create "opportunity for fabrication and distortion by witnesses"). For a full discussion of *Green*, see *supra* notes 12-31 and accompanying text. For a full discussion of *Whelan*, see *supra* notes 101, 105-07, 111-12 and accompanying text.

119. See *Graham*, *supra* note 38, at 1585. *Graham* notes that "a witness' prior statement that he heard a criminal defendant make an incriminating admission . . . [is] most open to fabrication." *Id.*

120. See 510 Pa. at 133, 507 A.2d at 71. Although the declarant in *Brady* did have personal knowledge of the facts stated, the court never made this an explicit requirement. See *id.* But see *Whelan*, 200 Conn. at 753, 513 A.2d at 92 (requiring personal knowledge of facts stated); *Graham*, *supra* note 38, at 1584-86 (advocating personal knowledge requirement to exclude from substantive admissibility statements most open to fabrication); McCormick, *Turncoat Witness*, *supra* note 5, at 588 (recommending that declarant have opportunity to observe facts stated).

121. See *Brady*, 510 Pa. at 133, 507 A.2d at 71. *Graham* has suggested that requiring the declarant to possess personal knowledge of the stated facts reduces the chance for fabrication and assures the opportunity for effective cross-examination. *Graham*, *supra* note 38, at 1585. This would effectively test the reliability of the prior statement. *Id.*

ambiguity which could result in the admission of highly unreliable evidence.¹²²

Therefore, even though the *Brady* court provided some guidance for lower courts to follow in determining the reliability and accuracy of a witness' prior inconsistent statements,¹²³ it is submitted that the court should have been more specific in limiting the application of the modern rule.¹²⁴ It is submitted that such a limitation would prevent any possible abuse of the modern rule.

Concern over the reliability of a witness' prior statements has prompted many other jurisdictions to limit the modern rule.¹²⁵ Most of these limitations come in the form of statutory provisions that regulate the circumstances under which the prior statements must have been made in order to be admissible as substantive evidence.¹²⁶ Such provisions are aimed at ensuring that the statements were actually made as well as guaranteeing the accuracy and truthfulness of what was said.¹²⁷

122. See *Graham*, *supra* note 38, at 1585. For a discussion of the rationale which underlies the requirement of personal knowledge, see *supra* note 121.

123. For a discussion of the guidance given by the *Brady* court, see *supra* notes 64-77 and accompanying text.

124. See *Whelan*, 200 Conn. at 752, 513 A.2d at 92 ("Although we are impressed by the logic of the modern view favoring substantive admissibility for . . . prior inconsistent statements . . . we are unwilling to abrogate [the orthodox rule], without adequate precautions . . ."). The precautions taken by the *Whelan* court involved limiting substantive admissibility to prior *written* statements signed by the declarant. *Id.* at 753, 513 A.2d at 92. The *Whelan* court noted that, while the requirements it imposed did not provide an "absolute guaranty of reliability," they nonetheless provided "significant assurance of an accurate rendition of the statement and that the declarant realized it would be relied upon." *Id.* at 754, 513 A.2d at 93. However, the court also noted that prior tape-recorded statements, though not within the ambit of signed and written statements, possess sufficient indicia of reliability to warrant substantive admissibility. *Id.* at 754 n.9, 513 A.2d at 93 n.9 (citing *Brady*, 510 Pa. 123, 507 A.2d 66 (1986)) (dictum). For a full discussion of *Whelan*, see *supra* notes 101, 105-07, 111-12 and accompanying text.

125. For a discussion of the rules adopted by these other jurisdictions, see *supra* notes 95-102 and accompanying text. These states have either restricted admissibility by imposing the same limitation contained in Federal Rule of Evidence 801(d)(1)(A), or by adopting some other limiting provision which may either increase admissibility over that allowed by the federal standard or restrict it even further, as in the case of Michigan Rule of Evidence 801(d)(1) and Ohio Rule of Evidence 801(D)(1)(a). For the text of Federal Rule of Evidence 801(d)(1)(A), see *supra* note 32. For a list of states adopting verbatim reenactments of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 96, 98-99 and accompanying text. For a list of states adopting variations or extensions of the modern rule, see *supra* notes 100, 102 and accompanying text. For the text and a discussion of Michigan Rule of Evidence 801, see *supra* note 91. For a discussion of Ohio Rule of Evidence 801(D)(1)(a), see *supra* note 102.

126. See, e.g., HAW. R. EVID. 802.1(1). Hawaii Rule 802.1(1) provides for three specific classes of statements that are admissible for their substantive value. For a general discussion of Hawaii Rule of Evidence 802.1(1), see *supra* notes 108-12 and accompanying text.

127. See, e.g., H.R. REP. NO. 650, 93d Cong., 2d Sess. 13, reprinted in 1974

An example of such a statutory limitation on the modern rule is Federal Rule of Evidence 801(d)(1)(A).¹²⁸ While the rule is acknowledged to be a valid device for ensuring that only the most reliable prior statements are admitted as substantive evidence,¹²⁹ many criticize it as being too restrictive.¹³⁰ Legal commentators have noted that the federal rule denies substantive admissibility to prior statements, which, though reliable, were rendered under less formal circumstances than is acceptable under that rule.¹³¹ For example, under Federal Rule of Evidence 801(d)(1)(A), the prior statement of the witness in *Brady* would not have been admissible as substantive evidence, despite the highly reliable circumstances under which it was made.¹³² This is solely because the statement was not made under oath subject to the penalty of perjury at a formal legal proceeding as the federal rule requires.¹³³

The federal rule has also been criticized as leading to jury confusion, because statements inadmissible for use as substantive evidence under its provisions may still be used to impeach the witness' testimony.¹³⁴ In such a situation, the jury is likely to use the statements as substantive evidence despite an instruction by the court to the contrary.¹³⁵ Thus it is submitted that, while Federal Rule of Evidence

U.S. CODE CONG. & ADMIN. NEWS 7075, 7087 (requirement that statements be made under oath and subject to cross-examination during a formal proceeding ensures that statement was made; context itself provides assurances of reliability).

128. For a discussion of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 32-44 and accompanying text.

129. See Graham, *supra* note 38, at 1582-83 (federal rule enacted to limit admissibility to "situations in which the likelihood of total fabrication was practically nonexistent," yet such safeguards are "overly strict").

130. For a full discussion of such criticism, see *supra* note 44. For the text of Federal Rule of Evidence 801(d)(1)(A), see *supra* note 32.

131. See, e.g., Graham, *supra* note 38, at 1567 (federal rule "unduly restricts the types of prior inconsistent statements substantively admissible thereunder"); Ordover, *Rules Analysis*, *supra* note 3, at 69 ("informality of the prior statement ought not render it automatically unreliable"; circumstances under which statement was made and quality of subsequent cross-examination should determine whether statement is reliable enough to admit as substantive evidence).

132. For the text of FED. R. EVID. 801(d)(1)(A), see *supra* note 32. The witness in *Brady* had made her statement to police at the station house, where it was contemporaneously recorded in the presence of the witness' mother and her attorney. 510 Pa. at 131, 507 A.2d at 70. Since Federal Rule of Evidence 801(d)(1)(A) requires that the out-of-court statement be made under oath, the statement in *Brady* would not be admissible. See FED. R. EVID. 801(d)(1)(A).

133. For the text and a general discussion of Federal Rule of Evidence 801(d)(1)(A), see *supra* notes 32-44 and accompanying text.

134. See *supra* notes 4 & 52. McCormick notes that confining substantive admissibility of prior inconsistent statements to those made during the course of a formal proceeding will confuse the jury, since the use of such statements for impeachment purposes is unlimited in the federal system. C. MCCORMICK, EVIDENCE, *supra* note 3, § 251, at 747.

135. See, e.g., McCormick, *Turncoat Witness*, *supra* note 5, at 580 (instruction limiting use of statement to impeachment is "verbal ritual"; jurors unlikely to

801(d)(1)(A) achieves its purpose in guaranteeing the reliability of a witness' prior inconsistent statements, it does so at the expense of other equally reliable statements which are then relegated to use solely for their impeachment value.

Although the *Whelan* decision represents a more liberal view of substantive admissibility than Federal Rule of Evidence 801(d)(1)(A),¹³⁶ it too specifically excludes statements which possess strong indicia of reliability.¹³⁷ Like the *Brady* court, the Connecticut Supreme Court failed to give any guidance as to when, if ever, statements other than those written and signed by the declarant would be admissible.¹³⁸ Moreover, though the *Whelan* court placed much emphasis on the reliability of written statements,¹³⁹ it failed to note that written as well as oral statements are subject to "distortion."¹⁴⁰ Commentators, however, point out that

understand it, and will thus ignore it); Morgan, *supra* note 6, at 193 (despite limiting instruction, practice of restricting admissibility of prior inconsistent statements to impeachment unlikely to prevent jurors from considering evidence for its substantive value).

136. See *Whelan*, 200 Conn. at 754 n.10, 513 A.2d at 93 n.10 (unnecessary to limit substantive admissibility to statements made under oath in formal proceeding as required under federal rule).

137. See *id.* at 753, 513 A.2d at 92 (rule only permits substantive admissibility of prior written statements signed by declarant possessing personal knowledge). Though the *Whelan* court noted in dictum that prior tape-recorded statements also possess indicia of reliability and trustworthiness, it did not specifically include that category of statements in its holding. *Id.* at 754 n.9, 513 A.2d at 93 n.9.

138. See *id.*, at 754-55, 513 A.2d at 93 (noting only that statement was given voluntarily soon after events had occurred, that statement was based on personal knowledge and that statement was reliable because declarant would be subjected to prosecution for rendering false statement to police if account found to be untrue).

139. *Id.* at 754, 513 A.2d at 93. The court stated that, unlike prior oral statements which are easily fabricated, prior written statements provide "significant assurance" that the statements were accurately rendered and that declarant knew they would be relied upon. *Id.* The *Whelan* court also noted that errors in transcription are rare and that widespread methods of detecting forgery or alteration make prior written statements more reliable than prior oral statements. *Id.* at 754, 513 A.2d at 92-93.

140. See Graham, *supra* note 38, at 1573-74 n.25 (quoting *Hearings on H.R. 5464 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 302 (1974) (statement of Herbert Semmel)). Graham points out that prior written statements are subject to "inaccurate repetition, ambiguity and incompleteness" and often reflect the "subjective interest and attitude" of the examiner. *Id.* (quoting *Hearings on H.R. 5464 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 302 (1974) (statement of Herbert Semmel)). Graham notes that skilled investigators such as policemen and attorneys can often hear a witness' account of an event and then prepare a written statement which, by omitting adverse facts and changing emphasis, reflects their own interests rather than an objective account of the events at issue. *Id.* (quoting *Hearings on H.R. 5464 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 302 (1974) (statement of Herbert Semmel)). This often occurs where the statement pertains to a crime that has become controversial or has aroused public interest so that there is great pressure on the police to bring a suspect to trial and great pressure on the prosecutor to get a

oral statements still pose a greater danger of inaccuracy than written statements.¹⁴¹

It is submitted that Pennsylvania should limit its application of the modern rule in a manner similar to that provided by Hawaii Rule of Evidence 802.1(1).¹⁴² The Hawaii rule incorporates the provisions of Federal Rule of Evidence 801(d)(1)(A) as one class of statements to be admitted substantively.¹⁴³ Yet the Hawaii rule also recognizes the reliability and value of certain statements not made during formal legal proceedings; namely, written statements signed and adopted by the witness and contemporaneous verbatim recordings of the witness' statements.¹⁴⁴ By limiting the *Brady* rule in such a way, Pennsylvania courts would provide adequate assurances of reliability without unduly restricting competent evidence from substantive admissibility.¹⁴⁵

conviction. *Id.* (quoting *Hearings on H.R. 5464 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 302 (1974) (statement of Herbert Semmel)). *But see* Ordover, *Rules Analysis*, *supra* note 3, at 76 (fear that counsel will carefully draft statement is overstated because of opportunity for cross-examination at trial). The *Whelan* court noted only that while prior written statements do not provide an "absolute guaranty of reliability," they do provide "significant assurance" of reliability in rendition and notice to the declarant that the statement would be relied upon. *Whelan*, 200 Conn. at 754, 513 A.2d at 93.

141. *See, e.g.*, Graham, *supra* note 38, at 1573-74 n.25 (quoting *Hearings on H.R. 5464 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 302 (1974) (statement of Herbert Semmel)) (problems in accuracy and incompleteness "more acute" in prior oral statements); McCormick, *Turncoat Witness*, *supra* note 5, at 588 (danger of "error or falsity" less where prior written statements sought to be admitted as substantive evidence).

142. For the text and a general discussion of Hawaii Rule of Evidence 802.1(1), see *supra* notes 108-12 and accompanying text. Though Pennsylvania has codified some of its rules of evidence, most remain uncodified. *See* 42 PA. CONS. STAT. ANN. §§ 6101-44 (1982 & Supp. 1986) (codified rules of evidence). Thus, a change in the *Brady* rule could be brought about by judicial modification in the Pennsylvania Supreme Court or by legislative enactment.

143. *See* HAW. R. EVID. 802.1(1)(A). This is one of three classes of prior statements that the Hawaii legislature has deemed reliable enough to be admissible as substantive evidence. For the text and a general discussion of Hawaii Rule of Evidence 802.1(1), see *supra* notes 108-12 and accompanying text.

144. *See* HAW. R. EVID. 802.1(1)(B)-(C). Subsection (1)(B) provides for the admissibility of written statements which have been signed, adopted or approved by the declarant. *Id.* 802.1(1)(B). Such statements, according to the Supreme Court of Connecticut, are reliable enough to warrant their admissibility as substantive evidence of their content. *Whelan*, 200 Conn. at 754, 513 A.2d at 92-93 (1986) ("Errors in transcription are rare and methods of detecting and establishing forgery or alteration are widely available."). Similarly, subsection (1)(C) of the Hawaii rule provides for the admissibility of substantially verbatim, contemporaneous recordings of a witness' statements. *See* HAW. R. EVID. 802.1(1)(C). This was the type of statement involved in *Brady*, where the court noted that the witness' statements had been rendered under highly reliable circumstances. 510 Pa. at 133, 507 A.2d at 71. For a full discussion of *Brady*, see *supra* notes 56-77 and accompanying text.

145. *See* HAW. R. EVID. 802.1 commentary (provisions of rule guarantee trustworthiness of statements and also allow jury to "determine where the truth lies").

Under the Hawaii rule, evidence like that admitted in *Green*, where the sole proof and representation of the witness' prior oral statement rested with the testimony of a police officer, would not be admissible for its substantive value.¹⁴⁶ Under this rule, however, evidence like that in *Brady*, where the witness' statements were tape-recorded in the presence of her attorney, would be admissible as substantive evidence even though they were not made under oath subject to the penalty of perjury as required by Federal Rule of Evidence 801(d)(1)(A).¹⁴⁷

In addition to limiting the application of the modern rule in a manner similar to Hawaii Rule of Evidence 802.1(1), Pennsylvania should also consider requiring that the prior statement be corroborated by other evidence in the case.¹⁴⁸ It is submitted that the degree of such corroboration, or whether the statement contains sufficient indicia of reliability so as not to require corroboration and its attendant guarantee of trustworthiness, should be left to the court's discretion in light of the particular facts of the case before it.¹⁴⁹ Corroboration would be especially appropriate where the witness denies that an oral out-of-court statement was made,¹⁵⁰ or where the witness asserts that a written or

146. See HAW. R. EVID. 802.1(1). For a discussion of the Hawaii rule, see *supra* notes 108-12 and accompanying text. The witness' initial statement was given to a police officer at the station house. *Green*, 399 U.S. at 151. The statement was not rendered during a formal proceeding, where the witness would have been under oath subject to the penalty of perjury; it was not reduced to a writing which was signed or otherwise adopted by the witness; and it was not contemporaneously recorded or transcribed. See *id.* at 151-52. Because the statement fails to comply with any of the above three requirements for admissibility under Hawaii Rule of Evidence 802.1(1), it would not be admitted for its substantive value. See HAW. R. EVID. 802.1(1).

147. See HAW. R. EVID. 802.1(1)(C). For the text of Hawaii Rule of Evidence 802.1(1), see *supra* note 108.

148. See *Brady*, 510 Pa. at 126 n.1, 507 A.2d at 67 n.1. Although the *Brady* court noted that the statements at issue were corroborated by physical evidence and other testimony, it is not clear how much weight the court gave to this factor in holding that the statements were admissible for their substantive value. See *id.*

149. See *id.* The *Brady* court, in analyzing the facts and reliability of the witness' tape-recorded statement, noted that "significant" portions of the statement were corroborated by other evidence in the case. *Id.* Though the *Brady* court apparently considered this factor in determining that the statement was sufficiently reliable to warrant its admissibility as substantive evidence, the Connecticut Supreme Court, in *Whelan*, noted that corroboration could present problems where less reliable oral statements are offered for substantive admissibility. *Whelan*, 200 Conn. at 753, 513 A.2d at 92. The *Whelan* court noted that oral statements "made in jest or to boast of knowledge of criminal activity in which the declarant was not actually involved" are difficult to explain and might be determinative of guilt where other evidence of guilt is present. *Id.* Thus, in determining whether to admit a statement for its substantive value, the court's ability to consider, at its discretion, the impact of corroborating evidence and its potential dangers becomes important.

150. Cf. *Graham*, *supra* note 38, at 1590-91. Corroborating evidence in this instance allows the proponent of the statement to prove to the court, and ultimately the jury, that the statement was actually made. *Id.*

recorded out-of-court statement was either forged or altered in some way.¹⁵¹ It is submitted that this would further ensure both the reliability and truthfulness of the witness' prior statement without imposing a rigid exclusion of certain classes of evidence.¹⁵²

IV. CONCLUSION

Although the Pennsylvania Supreme Court's decision in *Brady* substantially modernized the commonwealth's approach to the substantive admissibility of a non-party witness' prior inconsistent statements, there are concerns about reliability which can only be addressed through a limitation of the rule adopted in that case. It is submitted that by limiting the rule so as to admit only those statements which bear sufficient indicia of reliability, the chances of abuse through fabrication and even misinterpretation will be greatly reduced. At the same time, it is submitted that evidence vital to the fact-finder's search will not be withheld due to the mere technicality that the statements were made outside of a formal adversarial proceeding.

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151. *See id.* While it is admitted that under the rule that this Note suggests should be adopted in Pennsylvania, it would be difficult for a witness to deny making a prior statement, the witness can still allege that the prior statement is incorrect. *See id.* For a discussion of the proposed rule, see *supra* notes 142-49 and accompanying text. For a discussion of the problems associated with prior written statements, see *supra* note 140 and accompanying text.

152. For a discussion of the *Brady* court's use of corroborating evidence, see *supra* note 149 and accompanying text. It is submitted that a discretionary corroboration requirement would allow the courts to consider such evidence only when relevant to the issue of reliability without requiring a *per se* exclusion of uncorroborated prior statements. For a discussion of the *Whelan* court's reservations about corroborating evidence, see *supra* note 149.

