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Evidence - Prior Inconsistent Statement of a Non-Party Witness

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EVIDENCE—PRIOR INCONSISTENT STATEMENT OF A NON-PARTY WITNESS—The Supreme Court of Pennsylvania has rejected the long established, orthodox rule and embraced the modern rule which allows, as substantive evidence, the prior inconsistent statements of a non-party witness available for cross-examination.

Commonwealth v. Brady, 510 Pa. 123, 507 A.2d 66 (1986).

In the early morning hours of September 14, 1980, Anthony Brady and his girlfriend, Tina Traxler, scaled the fence surrounding the Wilson Manufacturing plant and entered the building through a side door.[1] Once inside the building, Traxler remained in the hallway while Brady entered the company's lunchroom to pry open a dollar change machine.[2] At this time, George Hoffman, the plant security guard, confronted Traxler and grabbed her by the arm.[3] Brady returned from the lunchroom and a scuffle ensued between himself and the guard during which the guard was stabbed.[4]

The next day, Traxler appeared on her own initiative at the police station and voluntarily gave the police a statement which implicated Brady in the crimes.[5] Traxler's account of the events of that day

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1. Commonwealth v. Brady, 510 Pa. 123, 507 A.2d 66 (1986). Superior Court decision can be found at 338 Pa. Super. 137, 487 A.2d 891 (1985). *Brady*, 507 A.2d at 67. Appellee awakened Traxler at her home in Sunbury, Pennsylvania and persuaded her to take a ride with him. While driving near the area know as the Shale Pit, appellee ran the car into a ditch. Unable to extricate the car from the ditch, appellee and Traxler decided to walk home. It was at this time that they encountered the Wilson Manufacturing plant. *Id.* at 67.

2. *Brady*, 487 A.2d at 892.

3. *Id.* at 892.

4. *Id.*

5. *Id.* In the Supreme Court's opinion by Justice Larsen, the facts surrounding Traxler's statement are recounted differently. The opinion states that Traxler initially talked to the police later in the afternoon on September 14, 1980. *Brady*, 507 A.2d at 70. Traxler told police that she and Brady had walked by the Wilson Manufacturing plant without entering. *Id.* at 70. She voluntarily rode out to the plant with the police and admitted that they had entered the plant and that Brady had stabbed the security guard. *Id.* at 70.

were tape-recorded by the police.[6] Prior to trial, however, Traxler recanted her taped statement and filed an affidavit denying that she and Brady had entered the Wilson plant.[7]

At trial, Traxler was called as a witness by the Commonwealth where she denied that she and Brady ever entered the plant.[8] The court ruled that Traxler was a hostile witness and permitted the Commonwealth, over the objection of defense counsel, to cross-examine her on the prior inconsistent tape-recorded statement.[9] The court also allowed the Commonwealth to introduce the entire tape-recorded statement as substantive evidence.[10]

Despite Traxler's inconsistent statements, a jury found Brady guilty of second degree murder, burglary, and criminal mischief.[11] The Superior Court reversed and remanded for a new trial holding that it was error to introduce as substantive evidence prior inconsistent statements uttered by a non-party witness.[12] Following that decision, the Commonwealth filed a petition for allowance of appeal and was granted allocatur by the Supreme Court of Pennsylvania.[13]

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6. *Brady*, 507 A.2d at 70. Traxler's statement was recorded by the police in the presence of Traxler's mother and attorney. *Id.* Prior to making this statement, Traxler was questioned by her attorney to assure that the statement was being given knowingly, voluntarily and with an understanding of her rights. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 70-71. During cross-examination by the Commonwealth, Traxler admitted that her statement to the police was given voluntarily. *Id.* at 71.

10. *Id.* at 71. On cross-examination, defense counsel tried to discredit the tape-recorded statement by showing that Traxler had been afraid of the police and that they had asked her leading questions. *Id.* Traxler testified that she simply told the police what they wished to hear instead of the truth. *Id.*

11. *Id.* at 67. Post-verdict motions were denied, and Brady was sentenced to a term of life imprisonment on the second-degree murder conviction, a consecutive term of imprisonment of from five to ten years on the burglary conviction and a concurrent term of six months to one year on the criminal mischief conviction. *Id.* at 67. Brady then submitted forty-two (42) issues for review on appeal to the Superior Court, Philadelphia. The Superior Court, however, found it necessary to address only two. *Id.* at 67-68. In its analysis of the second issue, the Supreme Court held that the element of surprise is not an absolute requirement in allowing a party to impeach its own witness. *Id.* at 72. This rule allows the parties to reveal the truth without regard to strict technicalities. *Id.* at 72.

12. *Brady,* 487 A.2d at 892. The Superior Court held that absent these inconsistent statements, the uncontradicted evidence of defendant's guilt was insufficient to uphold the conviction. *Id.* at 893. The evidence included the fact that Brady was seen carrying a knife on the night of the murder; the blood types on Brady's shirt matched those found on the victim's clothes; and blood of Brady's type was found on the decedent's clothes. *Id.* at 893.

13. *Brady,* 507 A.2d at 67. The Commonwealth's Petition for Allowance of Appeal was granted by the Pennsylvania Supreme Court at No. 72 E.D. Appeal Docket 1985. *Brady,* 507 A.2d at 66.

Justice Larsen, writing for the majority[14] of the court, noted that the traditional rule concerning prior inconsistent statements has been the object of a great deal of criticism by the members of the court.[15] The majority indicated that in *Commonwealth v. Gee,*[16] a plurality of the Pennsylvania Supreme Court stated that the rule allowing prior inconsistent statements only to impeach the credibility of the witness has been strongly criticized as being both unrealistic and an inappropriate application of the hearsay rule.[17] The court recognized that the witness is available at trial for cross-examination and, therefore, the dangers that the hearsay rule was adopted to prevent are alleviated.[18] The majority also noted that in *Commonwealth v. Loar,*[19] the Pennsylvania Superior Court concluded that the traditional rule should be re-examined and discarded in favor of the modern rule allowing prior inconsistent statements as substantive evidence.[20]

The *Brady* court believed that the dangers of hearsay were largely non-existent where the witness testifies at trial.[21] The majority stated that the availability of cross-examination provided the fact-finder with ample opportunity to determine the truth of the statements, as well as the ability to observe the witness.[22] Additionally, the court

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14. The other members of the majority were Justices Hutchinson, McDermott and Papadakos.

15. Prior to *Brady,* the Supreme Court of Pennsylvania adhered to the orthodox rule which limits the use of such prior inconsistent statements of a non-party witness to impeachment. *Id.* at 68. Previously, only inconsistent statements of a party were admissible as substantive evidence. *Id.* at 68 note 4. The decision in *Brady,* however, effectively overrules prior decisions of this court and allows prior inconsistent statements made by a non- party witness available for cross-examination to be introduced as substantive evidence. *Id.* at 68. Effectively overruling Commonwealth v. Tucker, 452 Pa. 584, 307 A.2d 245 (1973); Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976); and Commonwealth v. Waller, 498 Pa. 33, 444 A.2d 653 (1982).

16. *Gee,* 467 Pa. 123, 354 A.2d 875 (1976).

17. *Gee,* 467 Pa. at 136 n.5, 354 A.2d at 880 note 5.

18. *Brady,* 507 A.2d at 69.

19. *Loar,* 264 Pa. Super. 398, 399 A.2d 1110 (1979) (Roberts, J., joined by Manderino, J., dissenting).

20. *Loar,* 264 Pa. Super. at 411, 399 A.2d at 1117.

21. *Brady,* 507 A.2d at 69 (*citing* California v. Green, 399 U.S. 149, 155 (1970)).

22. *Brady,* 507 A.2d at 69. As stated by the Honorable Learned Hand in DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925), "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." *Brady,* 507 A.2d at 69.

stated that the prior statement is more reliable when given at a point in time closer to the event described when memory is more precise and the opportunity for fabrication is lessened.[23]

In concluding, the court noted that the foregoing criticisms have persuaded a large number of jurisdictions to discard the traditional view.[24] The majority determined that the orthodox rule served only to keep relevant and reliable evidence from the jury.[25]

Chief Justice Nix, in his concurring opinion, agreed with the majority that prior inconsistent statements of a non-party witness should be admissible as substantive evidence, but wrote separately to express his concern over the fact that the trial court ignored controlling precedent in reaching its decision.[26] Nix stated that the Commonwealth's pre-trial application to admit the prior inconsistent statement should have been denied. This interlocutory order could then be appealed to an appellate court before the beginning of the trial, thereby preventing such a blatant disregard of binding precedent.[27]

Justice Flaherty, joined by Justice Zappala, dissented from the holding in *Brady*.[28] Flaherty noted that it is the Commonwealth's obligation to prove every element of the crime while in court.[29] The dissent argued that if the Commonwealth is unable to present sufficient evidence of guilt at trial, the case against the defendant should fail.[30] The prior statements may not be sufficiently or adequately presented or explained in the presence of the trier of fact to support a verdict of guilty.[31]

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23. *Brady*, 507 A.2d at 69 (*citing* McCormick, *Evidence* §251 (2d ed.).

24. *Brady*, 507 A.2d at 69-70.(citations omitted). *See, e.g.*, People v. Freeman, 20 Cal. App. 3d 488, 97 Cal. Rptr. 717 (1971); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982); Vogel v. State, 96 Wis.2d 372, 291 N.W.2d 838 (1980); State v. Provet, 133 N.J. Super. 432, 337 A.2d 374 (1975); State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973); Nugent v. Commonwealth, 639 S.W.2d 761 (Ky. 1982); State v. Lott, 207 Kan. 602, 485 P.2d 1314 (1971); and Smith v. State, 400 N.E.2d 1137 (Ind. Ct. App. 1980).

25. *Brady*, 507 A.2d at 70. (*quoting* Commonwealth v. Gee, *supra*, 467 Pa. at 146, 354 A.2d at 886 (Roberts J.,dissenting)). Roberts concluded that "an evidentiary rule which forces the searcher to ignore relevant clues whose reliability can be tested by cross-examination serves no purpose." *Id.* at 70.

26. *Brady*, 507 A.2d at 72.

27. *Id.* at 72-73.

28. *Id.* at 73. Justice Flaherty reasoned that the orthodox rule may in fact be "antiquated," but maintained that "many of the hard-wrought concepts which enhance our traditional definition of due process" are likewise. *Id.* at 73.

29. *Id.*

30. *Id.*

31. *Id.* Flaherty stated that uncertainty arises as to the trustworthiness and

Prior to the court's decision in *Brady,* the Commonwealth of Pennsylvania had adhered to the common law rule that prior inconsistent statements of a non-party witness were admissible only to impeach the witness' credibility.[32] Such statements were limited to impeachment and were not admissible as substantive evidence.[33] As early as 1822, in *Stahle v. Spohn,*[34] the Pennsylvania Supreme Court determined that a witness' inconsistent declarations were admissible as evidence in order to impeach the witness' credibility.[35] This case involved an action of ejectment which was initiated by the defendant in error in order to recover a house and lot of ground which he had purchased at a sheriff's sale as the property of plaintiff in error's son.[36] At trial, the plaintiff in error testified in a manner inconsistent with statements which he had previously made concerning the sale of land.[37] When confronted with the admissibility of these statements, the court found that the evidence was admissible in order to show that the witness made contradictory statements at other times and places.[38] However, the ability to impeach the witness was limited to

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value of the prior statements as substantive evidence. *Id.* at 73. In concluding, the dissent believed that "the rule announced by the majority works to 'bootstrap' the guilt of the accused." *Id.* at 73.

32. *Id.* Upon consideration of the shortcomings of the orthodox rule which ignores the fact that the oath and cross-examination requirements are supplied in the current trial thereby providing the trier of fact with ample opportunity to observe the witness' demeanor, the Supreme Court rejected that rule and embraced the modern rule as the law of the Commonwealth of Pennsylvania. *Id.* at 68-69. Pennsylvania's adherence to the orthodox rule has its origins in common law. *See,* McAteer v. McMullin, 2 Pa. 32, 33 (1845); *see also* Wertz v. May, 21 Pa. 274, 279 (1853). "It is always competent for a party to show that a witness, called to testify against him, has related the facts to which he testifies differently on former occasions, whether under oath or not." *Wertz,* 21 Pa. at 279; *see generally,* Henry, *Pennsylvania Evidence* §801 (1953).

33. *Brady,* 507 A.2d at 68. *See* Commonwealth v. Tucker, 452 Pa. 584, 307 A.2d 245 (1973); Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976); Commonwealth v. Waller, 498 Pa. 33, 444 A.2d 653 (1982).

34. Stahle v. Spohn, 8 Serg. & Rawle 317 (1822).

35. *Id.* at 325. In its analysis, the court specified that a witness may be discredited by showing that, in his examination, he did not tell the whole truth. *Id.* at 325.

36. *Id.* at 318. William Spohn, the defendant in error, brought an action of ejectment in the District Court of Lancaster County, Pennsylvania, against the plaintiff in error, Jacob Stahle. *Id.* at 318.

37. *Id.* at 319.

38. *Id.* at 325. The court concluded that to impeach the credit of a witness, evidence was admissible to prove that at different times the witness had made statements inconsistent with what he swore. *Id.* at 325.

the party against which the witness was called to testify.[39] Thus, in *Smith v. Price,*[40] the defendant in error, having called plaintiff's son as a witness, was denied the opportunity to impeach his witness as the court declared that a party who produces a witness thereby holds him out as being worthy of belief and will not be permitted to impeach his general character by disclosing contradictory statements made by him on other occasions.[41]

Subsequently, the court relaxed this restriction in the case of *Bank of Northern Liberties v. Davis.*[42] In an action of assumpsit for money had and received, the *Davis* court concluded that it is within the sound discretion of the trial judge to allow a party calling a witness to prove that the witness had made inconsistent statements at different times and in the presence of others.[43] Likewise, in *Commonwealth v. Delfino,*[44] the prosecution was permitted to cross-examine its own witness as to inconsistencies in such witness' testimony.[45] The witness had previously told the district attorney that the defendant and deceased were in his hotel early on the evening of the murder and that the defendant had left first.[46] However, at trial, the witness took the stand and testified that it was the deceased who had left the hotel first.[47] The trial court determined that it was within its sound discretion to permit the prosecutor to cross-examine his own witness.[48]

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39. Wertz v. May, 21 Pa. at 279; Cowden v. Reynolds, 12 Serg. & Rawle 281 (1825). The general rule was that a party who produced a witness held him out as being credible and was therefore prohibited from impeaching the witness' general character. 12 Serg. & Rawle at 283. The party calling the witness was prevented from introducing contradictory statements made by the witness on previous occasions. *Id.*

40. Smith v. Price, 8 Watts 447 (1839).

41. *Id.* at 448. The court determined that a party calling a witness was not entitled to contradict his testimony by introducing prior inconsistent statements "ostensibly to discredit him, but, in truth, to operate as independent evidence." *Id.* at 448.

42. Bank of Northern Liberties v. Davis, 6 Watts & Serg. 285 (1843).

43. *Id.* at 288. In *Davis,* the plaintiff called a bank cashier to the stand who testified to the genuineness of certain checks purporting to have been drawn by the plaintiff. *Id.* at 286. Subsequently, the plaintiff asked the witness whether he had previously given different testimony. *Id.* at 286. In overruling defendant's objection, the court allowed the prior inconsistent statements as the witness was found to be unwilling and hostile. *Id.* at 286.

44. Commonwealth v. Delfino, 259 Pa. 272, 102 A. 949 (1918).

45. *Id.* at 277, 102 A. at 951.

46. *Id.*

47. *Id.* The Commonwealth alleged surprise and was permitted to impeach the witness' credibility by introducing his prior inconsistent statements to the District Attorney through cross-examination. *Id.* at 277, 102 A. at 951.

48. *Id.* Allowing the district attorney to cross-examine his own witness was not error as that matter is largely within the discretion of the trial judge. *Id.*

These early cases limited the admissibility of inconsistencies to impeachment, and such statements were not to be considered as substantive evidence.[49]

Several years later in *Miller v. Stem,*[50] the Pennsylvania Supreme Court was confronted with the question of whether evidence of a witness' prior inconsistent statements should be excluded altogether.[51] In *Miller*, the plaintiff alleged that the court was remiss in failing to instruct the jury to completely discredit the evidence of the witness.[52] The lower court allowed the inconsistent statements to be introduced to impeach the witness.[53] On appeal, the Pennsylvania Supreme Court, affirming the lower court, concluded that there is no rule which demands the entire discrediting of a witness who contradicts himself.[54]

At the close of the nineteenth century, the court was once again faced with the question as to the weight to be afforded a witness' prior inconsistent statement.[55] In *Dampman v. Pennsylvania R.R. Co.,*[56] the plaintiff was a passenger on the defendant's train.[57] As the train approached the railroad station, the coach in which the plaintiff was riding was derailed and detached from the rest of the train as a result of a broken rail.[58] Immediately after the accident, the railroad's foreman stated to those present at the scene of the accident that he had previously notified the railroad company that the rail was defective.[59] On cross examination, the foreman testified that he never made such statements.[60] Over defendant's objection,

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49. Bank of Northern Liberties, 6 Watts & Serg. at 288. A witness' prior inconsistent statements were permitted solely to neutralize the testimony given at trial and were not considered as substantive evidence. *Id.* at 288.

50. Miller v. Stem, 12 Pa. 383 (1849).

51. *Id.* at 389.

52. *Id.* The plaintiff stated that because of contradictions and discrepancies which arose between his former testimony and that given at the present trial, the witness' entire testimony should have been disallowed. *Id.* at 389.

53. *Id.* The court declared that the credit due a witness is a subject for the jury. *Id.*

54. *Id.* "There is no rule which dictates the entire discredit of a witness who varies in his statements, unless the contradiction be satisfactorily explained by himself." *Id.*

55. Commonwealth v. Wertz, 161 Pa. 591, 29 A. 272 (1894); Dampman v. Pennsylvania R.R., 166 Pa. 520, 31 A. 244 (1895).

56. *Dampman,* 166 Pa. 520, 31 A. 244 (1895).

57. *Id.* at 520, 31 A. at 244.

58. *Id.* at 520, 31 A. at 245.

59. *Id.*

60. *Id.* at 521, 31 A. at 244.

the plaintiff was permitted to discredit the foreman's testimony by calling witnesses who testified that the foreman did in fact tell them that he had notified the railroad about the faulty rail condition.[61] In upholding the common law rule, the Supreme Court determined that a witness' prior inconsistent statements were admissible as long as the evidence was restricted to the question of credibility.[62]

During the first half of the twentieth century, the orthodox rule, limiting the use of a witness' prior inconsistent statements to impeachment, remained virtually unchanged in Pennsylvania.[63] In fact, the only substantial change which occurred in the law was the decision that mandated giving limited jury instructions relating to the evidence's admissibility in order to prevent prejudicial error.[64]

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61. *Id.*

62. *Id.* at 522, 31 A. at 244. "Declarations by (a) state's witness, made immediately after the occurrence, entirely inconsistent with his testimony, are admissible to impeach him." *Id.* at 520, 31 A. at 244. *See also Wertz, supra* 161 Pa. at 597, 29 A. at 273.

63. In Scheer v. Melville, 279 Pa. 401, 123 A. 853 (1924), the defendant offered inconsistent written statements previously made by the plaintiff's witnesses. These statements were introduced for the sole purpose of contradicting that the witness' trial testimony. *Id.* at 405, 123 A. at 854. In the trial judge's instructions to the jury, he informed them that the prior written statements were to be considered only to discredit the witness' testimony. *Id.* In these instructions, Judge Simpson stated, "If you disregard those witnesses by reason of the introduction of those papers, you will disregard their testimony in your minds, but you will not substitute the statements in the signed papers as evidence, because that is not the way things are proved in a judicial trial." *Id.*

In Commonwealth v. Blose, 160 Pa. Super. 165, 50 A.2d 742 (1947), the court adhered to the traditional rule in finding that a witness' prior inconsistent statements were inadmissible for the purpose of establishing the truth of the facts asserted. *Id.* at 172, 50 A.2d at 745. Further, the court found that such statements were competent for the sole purpose of discrediting the witness, and upon request, the statements' admissibility would be limited to that purpose. *Id.*

In 1948, however, the court determined that these limiting jury instructions were not a matter within the trial court's discretion. Herr v. Erb, 163 Pa. Super. 430, 62 A.2d 75 (1948). Throughout the court's analysis, the necessity of these limiting instructions became apparent. The court held that it was prejudicial error for a judge to fail to instruct the jury that inconsistent statements were admissible only to impeach the witness and such statements were not to be considered as substantive evidence. *Id.* at 433, 62 A.2d at 77.

64. *See* Herr v. Erb, *supra* note 63 and accompanying text. *Accord,* Commonwealth v. DiPasquale, 424 Pa. 500, 230 A.2d 449 (1967), wherein the court found that trial error results even in the absence of a specific request for a charge that the prior inconsistent statements of a witness are admissible only on the issue of credibility. *Id.* at 503, 230 A.2d at 451. In Commonwealth v. Commander, 436 Pa. 532, 260 A.2d 773 (1970), the Pennsylvania Supreme Court was urged to change the long-established rule in favor of a more modern rule which would allow a witness' prior inconsistent statements to be introduced as substantive evidence. *Id.*

In *Commonwealth v. Tucker*,[65] the Supreme Court of Pennsylvania was once again confronted with the applicability of the orthodox rule. In *Tucker*, the Commonwealth of Pennsylvania was permitted to cross-examine its own witness as to inconsistent statements which he allegedly made at a previous trial.[66] The defense attorney did not object to the allowance of the right to cross-examine, but he objected to the scope of the cross-examination.[67] The court determined that the prosecutor exceeded the permissible limits of cross-examination by eliciting facts that were irrelevant to demonstrate that the witness' testimony was inconsistent.[68] Justice Nix, writing for the majority, concluded that the introduction of these facts would prejudice the defendant because of the danger that the prior statements would be considered as substantive evidence by the jury.[69]

By 1976, the orthodox rule began to receive heavy criticism.[70] In fact, the rule barring the use of prior inconsistent statements as

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at 541, 260 A.2d at 778. Though the Supreme Court declined to consider the question on appeal, as the appellant failed to raise the issue in the lower court, a footnote was dropped whereby Chief Justice Bell discussed the issue on its merits. Speaking for himself, Chief Justice Bell found "no persuasive reason to change the long and well established (by over a dozen cases) law of Pennsylvania concerning prior inconsistent statements which we have recently reiterated." (citations omitted) *Id.* at 542, 260 A.2d at 778 note 3.

65. Commonwealth v. Tucker, 452 Pa. 584, 307 A.2d 245 (1973).

66. *Tucker*, 452 Pa. at 587, 307 A.2d at 246. The Commonwealth's witness, Cornell Berry, was initially arrested and charged along with Tucker for the commission of murder. During his trial, Berry placed the entire responsibility for the crime on Tucker. *Id.* at 587, 307 A.2d at 246. Following his acquittal, Berry was called by the Commonwealth as a witness at Tucker's trial. The Commonwealth anticipated that Berry's testimony would conform to statements which he made at his own trial, however, Berry testified inconsistently. *Id.* at 588, 307 A.2d at 247.

67. *Id.* at 589, 307 A.2d at 248. The Commonwealth attempted to introduce Berry's trial testimony as well as his version of the event which placed the blame on appellant. *Id.*

68. *Id.* at 590, 307 A.2d at 248. The Commonwealth was found to have exceeded the permissible scope of cross-examination by eliciting additional facts to which Berry had not testified at the present trial. *Id.*

69. *Id.* Though the court recognized and upheld the orthodox rule, Justice Nix recognized that several commentators and jurisdictions permitted the use of prior inconsistent statements as substantive evidence. *Id.* at 590, 307 A.2d at 248. The jurisdictions which adopted the modern approach found that because the witness is presently available for cross-examination, the rule would not violate the confrontation clause of the sixth amendment. (*citing* California v. Green, *supra* 399 U.S. 149, 154-55.) *Tucker*, 452 Pa. at 590 note 2, 307 A.2d at 248 n.2. Justice Nix, however, failed to adopt the modern approach. "Pennsylvania continues to adhere to the majority rule that such statements are not to be used as substantive evidence." *Id.*

70. *See* DiCarlo v. United States, 6 F.2d 364 (2d Cir. 1925);. California v.

substantive evidence was seriously questioned by four justices of the Pennsylvania Supreme Court in *Commonwealth v. Gee.*[71] In writing for the plurality,[72] Justice Eagen upheld the validity of the orthodox rule but recognized that it had been strongly criticized as being an unrealistic and inappropriate application of the hearsay rule.[73] Justice Roberts, writing for the dissent, urged the abandonment of the orthodox rule and advocated the allowance of prior inconsistent statements as substantive evidence.[74] Justice Roberts recognized that numerous jurisdictions had already adopted the modern rule and believed that Pennsylvania should follow their line of reasoning and discard the antiquated orthodox rule.[75] Roberts contended that the inconsistent statement is more likely to be true than the witness' present testimony as it was made closer in time to the event in question.[76] Additionally, the witness is presently subject to cross-examination which enables the jury to observe the witness' demeanor and credibility.[77]

Green, 399 U.S. 149, (1970); Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969). *But see,* State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939). *See generally* McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence,* 25 Texas L. Rev. 573, 575 (1947) (the orthodox doctrine is highly inconvenient, if not poisonous to the interests of a party who has had the misfortune of having his crucial witness intimidated into changing his story); Morgan, *Hearsay Dangers and the Application of the Hearsay Doctrine,* 26 Hastings L.J. 361, 365 (1974) (because the witness is available at the present hearing for cross-examination with respect to both his present and former statements, the whole purpose of the hearsay rule is satisfied).

71. Commonwealth v. Gee, 467 Pa. 123, 354 A.2d 875 (1976).

72. The plurality consisted of Justices Eagen and O'Brien. Justices Pomeroy and Nix concurred in the result while Justice Roberts filed a dissenting opinion in which Justice Manderino joined. Chief Justice Jones did not participate in the consideration or decision of this case.

73. *Gee* 467 Pa. at 136 note 5, 354 A.2d at 880 note 5.

74. *Id.* at 143, 354 A.2d at 884 (Roberts, J., dissenting joined by Manderino, J.).

75. *Id.* at 145, 354 A.2d at 885. In support of his position, Justice Roberts lists numerous jurisdictions which allow the introduction of a witness' prior inconsistent statements as substantive evidence. *See* Fed. R. Evid. 607, 801(d)(1)(A); Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969), *cert. denied,* 399 U.S. 929, (1970); Cal. Evid. Code §1235; Kan Stat. Ann.§ 60-460(a); N.J. R. Evid. 63 (1); Utah R. Evid. 63(1); Uniform R. Evid. 801(d)(1). *Gee,* 467 Pa. at 145, 354 A.2d at 885.

76. *Id.* at 144, 354 A.2d at 885.

77. *Id.* Because the witness is present and subject to cross-examination, there is ample opportunity to test him as to his former statement. "The whole purpose of the hearsay rule has been already satisfied." *Id.* at 145 note 3, 354 A.2d at 885 note 3 (*citing* 3A Wigmore, *Evidence,* §1018 at 996 (Chadbourn rev. 1970)).

The criticism expressed in *Gee* led the Pennsylvania Superior Court to re-examine and discard the existing Pennsylvania rule in favor of the modern rule allowing the use of prior inconsistent statements of a non-party witness as substantive evidence.[78] In *Commonwealth v. Loar,*[79] the defendant and co-defendant were arrested for their involvement in various thefts.[80] At the preliminary hearing, the co-defendant was called as a witness by the Commonwealth because he had previously given a statement inculpating the defendant.[81] The co-defendant, however, proceeded to deny that the defendant was involved.[82] The Commonwealth was then permitted to have the co-defendant read aloud from his prior statement.[83] Over the objection of defense counsel, the magistrate allowed the prior statement to be introduced as substantive evidence.[84] On appeal to the Superior Court, Judge Spaeth found that where the witness is in court and subject to cross-examination, the witness' prior inconsistent statement should be admissible as substantive evidence, regardless of whether such statement was sworn or unsworn.[85]

The decision in *Loar*, however, was subsequently disapproved by the Pennsylvania Supreme Court in *Commonwealth v. Waller.*[86] In *Waller*, the Commonwealth called a witness with the expectation that he would reiterate his prior testimony given at a coroner's inquest.[87]

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78. Commonwealth v. Loar, 264 Pa. Super. 398, 399 A.2d 1110 (1979).

79. *Id.*

80. *Id.* at 402, 399 A.2d at 1112.

81. *Id.* at 406, 399 A.2d at 1114.

82. *Id.* The Commonwealth also presented evidence proving Ostrander's involvement in the thefts and the presence of stolen goods in defendant's house. *Id.*

83. *Id.* at 406-07, 399 A.2d at 1114-15.

84. *Id.* Defendant's counsel sought to limit the use of the statement for impeachment. *Id.* at 407, 399 A.2d at 1115.

85. *Id.* at 412, 399 A.2d at 1117. In concluding, the court stated, "An evidentiary rule which forces the searcher to ignore relevant clues whose reliability can be tested by cross-examination serves no purpose." *Id.* at 413, 399 A.2d at 1118 (*citing* Justice Roberts' dissent in *Gee*, 467 Pa. at 146, 354 A.2d at 886).

86. Commonwealth v. Waller, 498 Pa. 33, 39 note 2, 444 A.2d 653, 656 note 2 (1982). *Waller* also recognized the criteria set forth in Commonwealth v. Thomas, 459 Pa. 371, 379-80, 329 A.2d 277, 281 (1974), which must be complied with in order for a party to be allowed to cross-examine his own witness. First, the testimony of the witness must be unexpected. Second, the witness' testimony must be at variance with statements made at a previous time. Third, the testimony must be injurious to the party calling the witness and beneficial to the opposing party. Fourth, the scope of the cross-examination may not be excessive. *Waller,* 498 Pa. at 38-39, 444 A.2d at 655-56.

87. *Id.* at 40, 444 A.2d at 657.

Specifically, the Commonwealth expected the witness to testify that while enroute to the hospital, the defendant, who had a gun in his possession, pointed out his assailant to the witness and shots were exchanged.[88] At trial, however, the witness testified that he had neither heard any shots nor had he seen the defendant with a gun in his hand.[89] Over objection of defense counsel, the prosecution was permitted to cross-examine the witness as to his prior inconsistent testimony.[90] In determining the admissibility of the witness' previous testimony, the court declined to adopt the reasoning in *Loar* that prior inconsistent statements may be used as substantive evidence stating, "such has never been and is not now the law in this Commonwealth."[91] The court recognized, however, that although the prior inconsistent statements are limited to impeachment, the responses to those statements while the witness is on the stand and subject to cross-examination are substantive evidence.[92]

In *Commonwealth v. Thirkield,*[93] the court was once again called upon to review the issue of the substantive admissibility of prior statements made by a present testifying witness. In a per curiam order,[94]the court dismissed the appeal as having been improvidently granted.[95] Urging the abrogation of the traditional rule, Justice McDermott filed a dissenting opinion in which he proposed adherence to the modern rule.[96] McDermott noted that "limiting the admissibility of prior inconsistent statements to impeachment . . . severely

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88. *Id.* Appellant had been shot several times while sitting in Yancy's car. *Id.* at 36, 444 A.2d at 655. While driving appellant to the hospital, Yancey passed the location where appellant was injured and testified that he saw a man in a white coat lying on the sidewalk. *Id.* Yancey also testified that upon arriving at the hospital, appellant gave him a gun and requested that Yancey give it to the appellant's brother. *Id.*

89. *Id.* at 40, 444 A.2d 657.

90. *Id.* Thereafter, the appellant was convicted of murder of the third degree, and he appealed. *Id.* at 35, 444 A.2d at 654.

91. *Id.* at 39 note 2, 444 A.2d at 656 note 2.

92. *Id.* at 38-39, 444 A.2d at 656. If believed by the trier of fact, these responses may be considered in determining the ultimate question of guilt or innocence. *Cf.* Commonwealth v. Crow, 303 Pa. 91, 100, 154 A. 283, 286 (1931); 3A Wigmore, *Evidence* §1044 (Chadbourn rev. 1970). *Waller* 498 Pa. at 39, 444 A.2d at 656.

93. Commonwealth v. Thirkield, 502 Pa. 542, 467 Pa. 2d 323 (1983) (per curiam).

94. The per curiam order was issued by Chief Justice Roberts and Justices Nix, Larsen, Flaherty, Hutchinson and Zappala. Justice McDermott filed a dissenting opinion.

95. *Id.* at 543, 467 A.2d at 324.

96. *Id.*

impedes the truth-determining process."[97] McDermott concluded by recognizing that the weight of recent authority is indicative of this position.[98]

In light of the decisions in the previous decade, it seems apparent that the court's decision in *Brady* was expected. Criticism of the orthodox view became more prevalent among legal scholars and commentators[99] as well as among members of the Pennsylvania Supreme Court.[100] By 1986, seventeen jurisdictions had either enacted or modified applicable statutes or rules of evidence in order to permit the use of prior inconsistent statements of a non-party witness for their substantive value.[101]

Additionally, the question as to whether a witness' prior inconsistent statements were admissible as substantive evidence, was subjected to a great deal of legislative scrutiny.[102] The Proposed Federal

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97. *Id.* "When a witness is present before the fact-finder, testifies in court, and is available for cross-examination, no valid purpose is served by barring the witness' prior statements from use as substantive evidence where such statements bear sufficient indicia of reliability. *Id.* at 543, 467 A.2d at 324.

98. *Id. See* Fed. R. Evid. 801(d)(1); Cal. Evid. Code §1235; Kan. Stat. Ann. § 60-460(a); 3A Wigmore, *Evidence* §1018 (Chadbourn rev. 1970); McCormick, *Evidence* §251 (1972). *See also* the able opinion of now President Judge Spaeth, in Commonwealth v. Loar, 264 Pa. Super. 398, 399 A.2d 1110 (1979).

99. *Brady*, 507 A.2d at 68. *See e.g.*, McCormick, *Evidence* (2d ed.) §251; 3A Wigmore, *Evidence*, §1018 (Chadbourn rev. 1970).

100. *Brady*, 507 A.2d at 68. *See* Commonwealth v. Gee, *supra* at 467 Pa. 136 n.5, 354 A.2d 875 (plurality opinion of Eagen, J., joined by O'Brien, J.) and at 467 Pa. 143-46, 354 A.2d 875 (dissenting opinion of Roberts, J., joined by Manderino, J.); Commonwealth v. Thirkield, 502 Pa. 542, 467 A.2d 323 (dissenting opinion of McDermott, J.).

101. 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). "A growing minority of jurisdictions have departed from the so-called 'orthodox' rule" and have decided, through both cases and statutes, "to permit the use of prior inconsistent statements of a witness . . . for their substantive value, and not merely for impeachment purposes." *Id.* at 426. Those states which have adopted the modern view include Alaska, Arizona, California, Colorado, Delaware, Georgia, Indiana, Kansas, Kentucky, Montana, New Jersey, New Mexico, South Carolina, Wisconsin and Wyoming. *Id.* at 426-33. Two additional states, Pennsylvania and Utah, are now among the growing minority of jurisdictions which have adopted the modern view. *See, Brady,* 507 A.2d 66; Utah R. Evid. 613.

102. *See generally*, 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 (1977). In this article, Graham traces the development of the Federal Rules of Evidence which concern the use of prior inconsistent statements as substantive evidence, specifically Rules 801(d)(1)(A), 613 and 607. Additionally, Graham proposes that the Rules be amended in order for them to be more consistently applied to a witness' prior inconsistent statements.

Rules of Evidence[103] were drafted by the Advisory Committee and approved by the United States Supreme Court.[104] As drafted, Rule 801(d)(1)(A) provided that all prior statements inconsistent with the testimony given by a witness during trial were excluded from the category of hearsay and admissible as substantive evidence.[105] When drafting Rule 801(d)(1)(A), the Advisory Committee specifically stated that the absence of an oath, cross-examination and observation of demeanor at the time that the prior statement was made could be supplied by the later examination at trial.[106]

Congress' consideration of proposed Rule 801(d)(1)(A) commenced in the House Committee on the Judiciary.[107] The committee's final version of the rule, which eventually passed the House, required that in order for the prior inconsistent statement to be admissible as substantive evidence, the statement must have been given under oath at a trial, hearing or deposition and subject to cross-examination and the penalty of perjury.[108]

After the House adopted its version of Rule 801(d)(1)(A), consideration of the matter moved to the Senate Committee on the Judiciary.[109] The Senate Committee recommended that the Rule be

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103. Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1972). For earlier drafts of this proposed rule, *see* Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315 (1971), and Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969).

104. 56 F.R.D. at 184.

105. 56 F.R.D. at 293. As drafted by the Advisory Committee and submitted by the United States Supreme Court, Rule 801(d)(1)(A) provided for substantive use of all prior inconsistent statements:

> (d) *Statements which are not hearsay.* A statement is not hearsay if
> (1) *Prior statement by witness.* 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. . .

56 F.R.D. at 293.

106. Advisory Committee Note to Proposed Rule 801, 56 F.R.D. 183, 295 (1972).

107. *See* H.R. Rep. No. 650, 93d Cong., 1st Sess. 13 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7075, 7086 (hereinafter, House Report).

108. House Report, *supra* at 13. The version of Rule 801(d)(1)(A) which passed the House stated:

> . . . inconsistent with his testimony and was given under oath subject to cross- examination, and subject to the penalty of perjury at a trial or hearing or in a deposition . . .

House Report, *supra* at 13.

109. *See* S. Rep. No. 1277, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7062 (hereinafter, Senate Report).

reinstated as originally proposed by the Advisory Committee, concluding that the requirements of oath and cross-examination were unnecessary since those elements were present when the witness testified at trial.[110] The Senate accepted the recommendation of its committee,[111] and the conflicting House and Senate proposals were referred to the Conference Committee. The report of the Conference Committee,[112] incorporating the House version of the Rule, was then accepted by Congress.[113]

Many distinguished authorities in the field of evidence have come to doubt the efficacy of the distinction between admitting the prior inconsistent statement for its impeachment value only, and admitting it for its substantive value as well.[114] The underlying basis of the orthodox rule is a lack of trustworthiness of a witness' out-of-court inconsistent statements.[115] The supporters of the orthodox rule believe that such out-of-court statements are hearsay since their value rests upon the credibility of an out-of-court declarant who, at the time the statement was made, was not under oath, was not subject to cross-examination, and was not in the presence of the trier of fact.[116]

"Each prong of this threefold rationale has been logically and thoroughly debunked by scholars and by the growing number of

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110. Senate Report, *supra* at 15-16.

111. Senate Report, *supra* at 15-16. *See also,* note 104 and accompanying text.

112. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 10 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7098, 7104.

113. Fed. R. Evid. 801(d)(1)(A). As enacted by Congress, Rule 801(d)(1)(A) reads:

> (d) *Statements which are not hearsay.* A statement is not hearsay if:
> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
> (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . .

114. The desirability of the modern rule, allowing as substantive evidence a prior inconsistent statement of a witness available for cross-examination, has been thoroughly debated in literature. Graham, *supra* at 1565, 1568 note 10. *See generally* Falknor,*The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43 (1954); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence,* 25 Texas L. Rev. 573 (1947); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv. L. Rev. 177 (1948); Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine,* 26 Hastings L.J. 361 (1974); and Silbert, *Federal Rule of Evidence 801(d)(1)(A),* 49 Temp. L.Q. 880 (1976).

115. McCormick, *supra* at §251.

116. 3A Wigmore, *supra* at §1018.

jurisdictions."[117] In *California v. Green,*[118] the court stated that "the usual dangers of hearsay are largely non-existent where the witness testified at trial."[119] As stated by Justice McDermott in his dissenting opinion in *Thirkield,*[120] the fact-finder is provided an ample opportunity to determine the truth as the requirements of oath and cross-examination are supplied in the current trial.[121]

As expressed in earlier decisions, the Pennsylvania Supreme Court was concerned with the fact that the cross-examination was not contemporaneous with the out-of-court declaration.[122] As observed in *California v. Green,* however, the most successful contemporaneous cross-examination could hardly expect to accomplish any more than has already been accomplished by the fact that the witness is now telling an inconsistent story.[123] The fact that the out-of-court declarant is now available for cross-examination, assures the trier of fact an ample opportunity to observe the declarant while questioned as to

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117. *Brady* 507 A.2d at 69 "[A] growing number of jurisdictions have adopted the modern rule governing prior inconsistent statements of a non-party witness by statute, rule of evidence or case law." *Id.* at 69.

118. California v. Green, 399 U.S. 149 (1970).

119. California v. Green, 399 U.S. at 155. The United States Supreme Court determined that the admissibility of prior inconsistent statements as substantive evidence did not violate the constitutional right to confrontation. 399 U.S. at 167-68. The Court reasoned that the right of confrontation was satisfied if the witness was present in the courtroom and appeared on the witness stand, under oath and subject to cross-examination, with the jury having an opportunity at that time to observe his demeanor. *Id.* at 158.

120. Commonwealth v. Thirkield, 502 Pa. 542, 467 A.2d 323 (McDermott, J., dissenting).

121. *Thirkfield,* 467 A.2d at 324. "Indeed, the cross-examination to which a recanting witness is subjected will likely be meaningful and vigorous since the witness is already 'on the spot' in having to explain the discrepancies between earlier statements and direct testimony, or deny that the earlier statements were made at all." *Brady,* 507 A.2d at 69.

122. *Id. See e.g.,* State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939). The orthodox position can be best exemplified by the opinion of Judge Stone in the Minnesota Supreme Court case of State v. Saporen. In *Saporen,* the defendant was convicted of carnal knowledge and abusing a female child under the age of eighteen. The trial court allowed the prosecution to introduce prior inconsistent statements of a witness as substantive evidence. 285 N.W. at 899-900. In reversing the trial court's decision, Judge Stone held that "[t]he chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot." *Id.* at 901. "False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interests may be, and often is, to maintain falsehood rather than truth." *Id.*

123. California v. Green, 399 U.S. at 159.

the discrepancies between his prior statement and direct testimony.[124] In rejecting the orthodox position, Judge Learned Hand declared:

> 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 sees 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.[125]

Two final arguments have arisen in opposition to the orthodox position. The first is that there is no guarantee that a limiting instruction will assure that the jury will consider the evidence solely as a means to impeach the witness' credibility, and not as substantive evidence.[126] The second argument is that a prior inconsistent statement, "because of its greater relative proximity in time to the event in question,. . . is inherently more reliable."[127]

"The foregoing criticisms . . . have eroded the foundations of the orthodox view prohibiting the use of prior inconsistent statements of a non-party witness as substantive evidence, and have persuaded a growing number of jurisdictions to discard the outmoded rule"[128] in favor of the modern rule. The dissent in *Brady* seems to be of the opinion that the court has taken a long step backwards by its decision.[129] When viewed in a historical context, however, it seems

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124. *Brady*, 507 A.2d at 69. "The trier of fact may bring to bear his or her sensory observations, experience, common sense and logic upon the witness to assess credibility and to determine the truth and accuracy of both the out-of-court declarations and the in-court testimony." *Id.*

125. DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925), *cert. denied,* 268 U.S. 706 (1925).

126. Reutlinger, *supra* at 367. As a practical matter, it is hard to conceive of the situation in which a jury would be able to draw such fine lines. If the jury considers the statement in court false and the extrajudicial statement true, it is expecting a good deal of jurors not experienced in such fine distinctions simply to reject all of the evidence. Stalmack, *Prior Inconsistent Statements: Congress Takes a Compromising Step Backward in Enacting Rule 801(d)(1)(A)*, 8 Loy. Chi. L.J. 251, 266 (1977).

127. Reutlinger, *supra* at 368. "[N]ot only is the witness' recollection more accurate at a time closer to the event in question, but there has been less of an opportunity at that time for improper influence to have encouraged the witness to falsify his story. *Id.* at 368. "The greater the lapse of time between the event and the trial, the greater chance of exposure of the witness to each" of a number of adverse influences, including "distorted memory, corruption, false suggestion, intimidation or appeal to sympathy." McCormick, *supra* at 578.

128. *Brady,* 507 A.2d at 69.

129. *Brady*, 507 A.2d at 73 (Flaherty, J., dissenting, joined by Zappala, J.).

clear that Pennsylvania has finally realized that the orthodox position has become outdated and no longer serves any necessary or useful purpose.

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