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Commonwealth v. Lively: Pennsylvania Imposes Limitations on the Substantive Admissibility of Prior Inconsistent Statements of Non-Party Witnesses to Ensure Statement Reliability

Jeanine M. Kasulis

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I. Introduction

Often in criminal trials, a crucial witness gives testimony on the stand that is contradictory to a statement the witness made on some previous occasion. These contradictory out-of-court statements are called prior inconsistent statements. Generally, hearsay rules ban the substantive use of these contrary out-of-court statements. Thus, without an evidentiary rule immunizing prior inconsistent statements from the effect of the hearsay rules, a party "who has had the misfortune of having his [or her] crucial witness persuaded, suborned, seduced, or intimidated into changing his [or her] story" is left with very little recourse.

Until recently, Pennsylvania litigants found their recourse in the Brady rule. As set forth in the Pennsylvania Supreme Court's landmark evidentiary decision, Commonwealth v. Brady, the Brady rule permitted prior inconsistent statements of non-party witnesses to be introduced as substantive evidence at trial if the witness testified in court and was available for cross-examination. However, the Pennsylvania Supreme Court


2. Id. Inconsistencies can range from minor discrepancies between the witness' in-court and out-of-court statements to denials that the out-of-court statement was ever made. In Pennsylvania, the similarities between the in-court and out-of-court statements "must be substantial enough to cast doubt on a witness's testimony" for the statement to be considered "inconsistent." Commonwealth v. Bailey, 469 A.2d 604, 611 (Pa. 1983). The Federal Rules of Evidence do not provide an explicit test for "inconsistency."

3. See Fed. R. Evid. 802 (stating that out-of-court statements offered for truth of matter asserted are not admissible except as provided by evidentiary rule or statute).


5. Commonwealth v. Brady, 507 A.2d 66, 67 (Pa. 1986). The Brady rule stated that prior inconsistent statements "may be used as substantive evidence where the declarant is a witness at trial and available for cross-examination." Id. For a discussion of the Brady decision, see infra notes 55-62 and accompanying text. For an in-depth discussion of the Brady decision, see generally Jennifer Hilliard, Note, Substantive Admissibility of a Non-Party Witness' Prior Inconsistent Statements: Pennsylvania Adopts the Modern View, 32 Vill. L. Rev. 470 (1987).

6. Brady, 507 A.2d at 67. Prior to Brady, prior inconsistent statements could be used only to impeach witnesses. See, e.g., Commonwealth v. Waller, 444 A.2d 653, 656 (Pa. 1982) (noting Pennsylvania law permits introduction of prior inconsistent statements solely for impeachment purposes); Commonwealth v.
recently revisited the issue of prior inconsistent statement admissibility in Commonwealth v. Lively.\footnote{610 A.2d 7, 8 (Pa. 1992).}

In Lively, appellant Kevin Lively was convicted of first-degree murder\footnote{Id. at 8.} for fatally wounding a man who had smashed the rear window of Lively's automobile.\footnote{Kevin Lively was also convicted of possession of an instrument of crime. \textit{Id.}} Part of the substantive evidence the jury considered in convicting Lively were the prior inconsistent statements of three Commonwealth witnesses who testified at Lively's trial.\footnote{Id. at 10. Kevin Lively was tried twice before he was convicted for Tyrone Miller's murder. \textit{Id.} On April 13, 1986, Kevin Lively caught Tyrone Miller vandalizing Lively's automobile. \textit{Id.} Angered, Lively grabbed a gun from the trunk of his car and began chasing Miller and firing shots at him. \textit{Id.} Although Lively followed Miller for a distance, none of the shots Lively fired actually hit Miller. \textit{Id.} The next day, however, Lively had a second encounter with Miller and, this time, Lively shot Miller in the back. \textit{Id.} Miller died from the gunshot wound. \textit{Id.}} The Commonwealth introduced two of these statements through the testimony of local police officers, who detailed their recollections of conversations they had allegedly had with the witnesses.\footnote{Id. at 10.} The trial court admitted all three statements as substantive evidence and all three contributed, in whole or part, to Kevin Lively's murder conviction and life sentence.\footnote{Lively, 610 A.2d at 10. (noting that jury was permitted to consider “these various alleged unrecorded non-verbatim prior statements” as substantive evidence). On appeal, Lively contended that his constitutional right to due process had been violated because the prosecution had based its entire case on prior inconsistent statements admitted as substantive evidence. \textit{Id. at 11 n.2} (citing Appellant's Brief at 2-3). However, because the Pennsylvania Supreme}

Gee, 354 A.2d 875, 880 & n.5 (criticizing Pennsylvania’s adherence to orthodox rule, which restricts use of prior inconsistent statements to impeachment); Commonwealth v. Tucker, 307 A.2d 245, 248 (Pa. 1973) (same).


8. \textit{Id.} at 8. Kevin Lively was also convicted of possession of an instrument of crime. \textit{Id.}

9. \textit{Id.} On April 13, 1986, Kevin Lively caught Tyrone Miller vandalizing Lively's automobile. \textit{Id.} Angered, Lively grabbed a gun from the trunk of his car and began chasing Miller and firing shots at him. \textit{Id.} Although Lively followed Miller for a distance, none of the shots Lively fired actually hit Miller. \textit{Id.} The next day, however, Lively had a second encounter with Miller and, this time, Lively shot Miller in the back. \textit{Id.} Miller died from the gunshot wound. \textit{Id.}

10. \textit{Id.} Lively was tried twice before he was convicted for Tyrone Miller's murder. \textit{Id.} His first trial, in the Court of Common Pleas of Philadelphia County, ended when the court granted the defense's motion for mistrial on the basis of prosecutorial misconduct. \textit{Id.} Subsequently, before his second trial, Lively made an unsuccessful attempt to avoid retrial by asserting a double jeopardy claim. \textit{Id.} After his motion to dismiss failed, Lively was retried, convicted, and sentenced for first degree murder and possession of an instrument of crime. \textit{Id.} On appeal, the Superior Court affirmed Lively's sentence. \textit{Id.} at 9.

11. \textit{Id.} at 9. The Commonwealth introduced the first prior inconsistent statement, that of Diane Rucker, through the testimony of Officer Fleming. \textit{Id.} Officer Fleming testified at trial about an alleged telephone conversation he had had with witness Diane Rucker in which she had identified Lively as Tyrone Miller's killer. \textit{Id.} at 10. The conversation was neither recorded nor reduced to a signed writing. \textit{Id.} On the stand, Ms. Rucker denied ever having had such a conversation with Officer Fleming. \textit{Id.} at 9.

Detective Rocks testified about the substance of the second prior inconsistent statement, that made by witness John Moody. \textit{Id.} at 10. The Commonwealth introduced John Moody's alleged prior inconsistent statement in the form of a memorandum that Detective Rocks had prepared. \textit{Id.} at 10. This memorandum consisted of Detective Rocks' recollection of statements Moody had allegedly made during an interview with Mr. Rocks. \textit{Id.} For further discussion of the prior inconsistent statements the Commonwealth used as substantive evidence in Lively, see infra notes 88-101 and accompanying text.

12. \textit{Lively, 610 A.2d at 10.} (noting that jury was permitted to consider “these various alleged unrecorded non-verbatim prior statements” as substantive evidence). On appeal, Lively contended that his constitutional right to due process had been violated because the prosecution had based its entire case on prior inconsistent statements admitted as substantive evidence. \textit{Id. at 11 n.2} (citing Appellant's Brief at 2-3). However, because the Pennsylvania Supreme
On appeal, the Pennsylvania Supreme Court reversed Kevin Lively's murder conviction and imposed limitations on its holding in Brady. Specifically, the Lively court held that a prior inconsistent statement of a non-party witness "may be used as substantive evidence only when the statement is given under oath at a formal legal proceeding; or the statement had been reduced to a writing signed and adopted by the witness; or a statement that is a contemporaneous verbatim recording of the witness' statements."  

This Note begins with a general discussion of the hearsay dangers that prior inconsistent statements pose when they are introduced as substantive evidence in criminal trials. Part II summarizes the contentions of two major groups of commentators concerning the reliability of prior inconsistent statements. This section also discusses the constitutional issues associated with the introduction of these statements as substantive evidence at trial. Next, Parts III and IV trace the evolution of Pennsylvania law concerning the admissibility of prior inconsistent statements as substantive evidence. This discussion begins in Part III with an analysis of the Brady decision and the lower court decisions following Brady, and ends in Part IV with an analysis of the Lively decision. Part V discusses the guidelines the federal and state courts have adopted to assess the reliability of prior inconsistent statements and exclude unreliable statements from evidence.  

Finally, this Note suggests that the Lively decision will be a valuable guide to the Pennsylvania lower courts as an evidentiary "checklist,"

Court determined that the introduction of the prior inconsistent statements of two of the Commonwealth's witnesses constituted reversible error, the Supreme Court did not address Lively's constitutional claims. Id. at 11. For a discussion of the constitutional issues associated with the introduction of prior inconsistent statements, see infra notes 33-49 and accompanying text.

14. Id.
15. For a discussion of the hearsay dangers associated with introducing prior inconsistent statements as substantive evidence at trial, see infra notes 27-31 and accompanying text.
16. For a discussion of the viewpoints of the "orthodox" and "modern" rule proponents regarding prior inconsistent statements, see infra notes 27-32 and accompanying text. For a discussion of the constitutional issues implicated by the use of prior inconsistent statements as substantive evidence at trial, see infra notes 33-49 and accompanying text.
17. For a discussion of the Brady decision, see infra notes 55-62 and accompanying text.
18. For a discussion of the lower court decisions applying the Brady rule, see infra notes 63-84 and accompanying text.
19. For a discussion of the Lively decision, see infra notes 85-118 and accompanying text.
20. For a discussion of Federal Rule of Evidence 801(d)(1)(A), which governs substantive admissibility of prior inconsistent statements in the federal courts, see infra notes 132-42 and accompanying text. For a discussion of the rules of evidence other jurisdictions have adopted, see infra notes 143-58 and accompanying text.
leading to greater consistency in lower court decisions and ensuring that only statements possessing superior indicia of reliability will be considered as substantive evidence in criminal trials. However, this Note also suggests that the Lively court left certain evidentiary questions concerning the admissibility of prior inconsistent statements unanswered. The Pennsylvania Supreme Court should address these additional issues to avoid confusion and further ensure that only reliable prior inconsistent statements are admissible at trial.

II. BACKGROUND

A. Guaranteeing the Reliability of Prior Inconsistent Statements: The Orthodox Rule Versus the Modern Rule

Hearsay is generally defined as an out-of-court assertion offered in evidence to prove the truth of the matters asserted therein. American courts have never categorically rejected all hearsay evidence. There once was a time when parties could use hearsay evidence at trial without condition. However, today hearsay evidence must fall within an enumerated list of carefully circumscribed exceptions to be admissible in court. Jurisdictions generally allow exceptions to the hearsay rule when “the proffered evidence has satisfied both a guarantee of trustworthiness and a requirement of necessity.”

Legal scholars have long debated the prudence of admitting prior inconsistent statements of in-court witnesses as substantive evidence. Proponents of the orthodox rule, which precludes the substantive admissibility of prior inconsistent statements, argue that courts should not

21. For a discussion of the evidentiary issues the Pennsylvania Supreme Court failed to address in Lively, see infra notes 170-84 and accompanying text.

22. Federal Rule of Evidence 801(c) provides in pertinent part: “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing; offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c).

23. Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 179 (1948) [hereinafter Morgan, Hearsay Dangers]. It was not until the latter half of the sixteenth century that commentators began criticizing the use of hearsay evidence in court. Id. at 181. At that time, the Anglo-Norman “inquisitorial system of litigation” ended, the adversarial system was established, and “the rule rejecting hearsay was . . . adopted.” Id.

24. Id. at 181.

25. See FED. R. EVID. 803 (enumerating hearsay exceptions where declarant is available as witness); FED. R. EVID. 804(b) (enumerating hearsay exceptions where declarant is unavailable as witness at trial).


admit these statements as substantive evidence because the statements are not trustworthy. These proponents assert three reasons for this belief: (1) the statements were not made under oath, (2) the trier of fact did not observe the declarant's demeanor at the time the statements were made, and (3) the declarant was not subject to contemporaneous cross-examination before the trier of fact.

On the other side of the debate, however, modern rule proponents forcefully argue that where the witness is under oath and is subject to cross-examination at the present trial, these hearsay concerns do not exist. Accordingly, these proponents contend that under these conditions courts should admit prior inconsistent statements as substantive evidence. Today, the

28. See Walker J. Blakely, You Can Say That If You Want—The Redefinition of Hearsay in Rule 801 of the Proposed Federal Rules of Evidence, 35 Ohio St. L.J. 601, 623-24 (1974) (asserting that rule permitting use of prior inconsistent statements leads to abuse by those obtaining statements because declarants may be coerced into signing statements out of "fear, indifference, or ignorance"); Mark Reutlinger, Prior Inconsistent Statements: Presently Inconsistent Doctrine, 26 Hastings L.J. 361, 368 (1974) (arguing that prior inconsistent statement's greater proximity to event in question does not make statement "inherently more reliable").

29. Graham, supra note 27, at 1568 (noting assertions of orthodox proponents).

30. Id. at 1571. Recognizing the influence of these legal scholars, the Pennsylvania Supreme Court in Brady stated that "[e]ach prong of this threefold rationale has been logically and thoroughly debunked by the scholars and by the growing number of jurisdictions adopting the modern rule governing prior inconsistent statements of non-party witnesses by statute, rule or case law." Commonwealth v. Brady, 507 A.2d 66, 69 (Pa. 1986). The drafters of the federal rule of evidence governing the substantive admissibility of prior inconsistent statements agreed with the following assertions of the modern rule proponents: (1) [The] belief that the normal hearsay dangers are largely non-existent when dealing with prior inconsistent statements where the declarant is in court and may be examined and cross-examined in regard to his [or her] alleged statement; (2) that the prior statement is more likely to be true than the testimony of the witness at the trial because [it was] made nearer in time to the matter to which it relates; (3) that there is a need to protect counsel from the "turncoat" witness.


In addition, modern rule proponents point out that under the orthodox rule prior inconsistent statements are not entirely precluded from evidence, but instead are "accompanied by [a limiting] instruction to the jury to consider the prior inconsistent statement as bearing solely upon the credibility of the witness' in-court testimony." Graham, supra note 27, at 1572. Modern rule proponents assert that this scenario presents the jury with an impossible task. Id. The jury could hardly help considering the content of a statement as substantive evidence, despite a judge's limiting instruction. Id. at 1572-73; Morgan, Hearsay Dangers, supra note 23, at 195 (calling practice of admitting statements only for impeachment purposes a "pious fraud").

31. See McCormick, The Turncoat Witness, supra note 1, at 577 (stating where declarant is on stand to explain prior inconsistent statement, statement has equivalent "procedural guaranties [sic] of truth" and "superior" level of trustworthiness to in-court testimony of same witness); Morgan, Hearsay Dangers, supra note 23, at 192 (asserting that when "[d]eclarant is also a witness, it is difficult to justify classifying [his or her own prior statements] as hearsay evidence" because
modern rule has gained a stronghold in the majority of jurisdictions, including the federal courts, where prior inconsistent statements are admissible as substantive evidence if the statements meet certain criteria. 32

B. Constitutional Implications Regarding the Substantive Admissibility of Prior Inconsistent Statements

The decision to permit a fact-finder to consider certain prior inconsistent statements as substantive evidence while excluding other similar statements from such consideration involves a balancing test. 33 In any criminal trial, there is a strong interest in adjudicating a case on its merits, permitting the fact-finder to consider all the relevant evidence. 34 However, balanced against this interest is the defendant's constitutional right to a fair trial. 35 Because prior inconsistent statements may heavily influence the fact-finder's decision to convict and, therefore, directly implicate the defendant's constitutional rights, courts are naturally concerned with the reliability of the prior inconsistent statements admitted into evidence. 36

situation does not “involve in substantial degree any of the hearsay risks”); Stalmack, supra note 26, at 255-64 (rebuting rationale of orthodox rule and asserting prior inconsistent statements are sufficiently trustworthy and reliable).

32. For a discussion of the rules governing admissibility of prior inconsistent statements in the state and federal courts, see infra notes 127-58 and accompanying text.

33. See Brady, 507 A.2d at 70 (weighing hearsay concerns against “integrity of the fact-finding process”).

34. See id. The Brady court noted that “a trial is, fundamentally, a search for an objective account of the events upon which the criminal charges are based. An evidentiary rule which forces the searcher to ignore relevant clues whose reliability can be tested by cross-examination serves no purpose.” Id. (quoting Commonwealth v. Gee, 354 A.2d 875, 886 (1976) (Roberts, J., dissenting)). The Brady court further stated that continued adherence to the orthodox rule would impede the judicial process because it would serve only “to keep relevant and reliable evidence from the jury.” Id. (quoting Gee, 354 A.2d at 886 (Roberts, J., dissenting)).

35. See Brady, 507 A.2d at 73 (Flaherty, J., dissenting). Justice Flaherty stated that it is “the Commonwealth's obligation to establish ... every element of the crime with which the defendant is charged.” Id. (Flaherty, J., dissenting) (emphasis omitted). He further stated, “[i]f the Commonwealth’s case is not substantial enough to stand alone, based on reliable evidence presented here and now to the court, but instead must rely on the use of prior statements made out-of-court which are inconsistent with those presently being made in court ... , the case should fail.” Id. (Flaherty, J., dissenting) (emphasis omitted). Justice Flaherty felt that prior inconsistent statements are not trustworthy and that permitting the fact-finder to consider such statements to be considered as substantive evidence at trial “works to ‘bootstrap’ the guilt of the accused.” Id. (Flaherty, J., dissenting) (emphasis omitted).

36. See, e.g., State v. Mancine, 590 A.2d 1107, 1116 (N.J. 1991). In Mancine, the New Jersey Supreme Court noted that it is “[b]ecause of the damning nature of such evidence ... [that] we seek to assure ourselves of the voluntary, reliable nature of such a statement in any given case.” Id. For further discussion of the New Jersey court's treatment of prior inconsistent statements, see infra notes 153-58 and accompanying text.
Originally, proponents of the orthodox rule asserted that the substantive admissibility of prior inconsistent statements violated a defendant's Sixth Amendment right to confrontation. However, in *California v. Green*, the Supreme Court rejected this argument by ruling that the substantive introduction of prior inconsistent statements did not violate the Confrontation Clause. In *Green*, defendant Green was convicted of selling marijuana to a minor chiefly on the basis of out-of-court statements that the minor had made at a preliminary hearing. The trial court admitted the minor's prior inconsistent statements pursuant to California Evidence Code Section 1235, which authorized the substantive admissibility of such statements. On appeal, the California Supreme Court declared Section 1235 unconstitutional, holding that the rule violated the Confrontation Clause. The California Supreme Court reasoned that a prior inconsistent statement must be subject to contemporaneous cross-examination to satisfy the mandates of the Confrontation Clause. The United States Supreme Court disagreed. The Court reversed the California Supreme Court's decision and held that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." More recently, critics of the modern rule have raised another consti-

37. See Stanley A. Goldman, *Guilt By Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1, 6 (1986) (noting that orthodox rule proponents asserted that inability to cross-examine declarant at time prior inconsistent statement is made "would not allow adequate confrontation as the [S]ixth [A]mendment to the United States Constitution requires"). The Confrontation Clause of the Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... " U.S. CONST. amend. VI. The Confrontation Clause applies "only to criminal prosecutions." CHARLES T. MCCORMICK, EVIDENCE § 251, at 125 (3d. ed. 1984). Because the Confrontation Clause and the hearsay rule both preserve the defendant's right to confront the witnesses against him or her, legal scholars debated whether this overlap meant that a violation of a hearsay rule would also necessarily constitute a violation of the Confrontation Clause. *Id.* at 125. The United States Supreme Court's decision in *California v. Green*, 399 U.S. 149 (1970), resolved this issue by determining that, although the "hearsay rules and the Confrontation Clause are generally designed to protect similar values, ... [the Confrontation Clause is not] a codification of the rules of hearsay and their exceptions ..." *Green*, 399 U.S. at 155.

39. *Id.* at 151-53.
40. *Id.* at 152.
41. *Id.* at 153. The California Evidence Code provided that "evidence of a statement made by a witness is not made admissible by the hearsay rule if the statement is inconsistent with his [or her] testimony and is offered in compliance with Section 770." CAL. EVID. CODE § 1235 (West 1966). Section 770 required that the witness be given an opportunity to explain the prior inconsistent statement at trial. *Id.*

42. *Green*, 399 U.S. at 153.
43. *Id.* at 158.
44. *Id.*
tutional issue regarding the admissibility of prior inconsistent statements.45 These critics contend that the substantive admissibility of prior inconsistent statements has due process implications when such statements are the sole basis of conviction.46 Notably, neither the United States Supreme Court47 nor the Pennsylvania Supreme Court has decided whether prior inconsistent statements may provide the sole evidentiary support for a defendant's criminal conviction.48 Moreover, the lower federal and state courts decisions on this issue are inconsistent.49 Therefore, because there is no consistent line of legal authority

45. For a discussion of the debate concerning the sufficiency of prior inconsistent statements to support a criminal conviction, see generally Goldman, supra note 37.

46. See Goldman, supra note 37, at 36-37 (discussing due process implications where prior inconsistent statements provide sole evidentiary basis for conviction). Professor Goldman argues that prior inconsistent statements possess only "minimal guarantee[s] of trustworthiness." Id. at 8. He argues that a prosecutor's ability to cross-examine a declarant concerning a prior inconsistent statement is severely restricted. Id. at 17. This is because a "hearsay statement can never be subjected to the same degree of scrutiny through cross-examination as can live testimony." Id. Therefore, Professor Goldman concludes that prior inconsistent statements should not provide the sole basis of a criminal defendant's conviction unless "the declarant was subject to some form of cross-examination by the defendant and . . . there [is] a reasonable factual basis in the record for a trier of fact to credit the prior statement" over the present statement. Id. at 44.

47. In California v. Green, however, the Supreme Court observed that "considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking." 399 U.S. 149, 163 n.15 (1970). For a discussion of the Green decision, see supra notes 37-44 and accompanying text.

48. The issue of whether a prior inconsistent statement could provide the sole basis of conviction was raised in Lively. 610 A.2d at 9. However, the Lively court never reached the issue because it decided that the admission of two of the prior inconsistent statements constituted a sufficient basis for reversal. Id. at 11.

49. See Goldman, supra note 37, at 23 (noting that "[l]ower courts have shown little consistency in their approach to the sufficiency of convictions based solely on prior inconsistent statements"); see also State v. Mancine, 590 A.2d 1107, 1116 (N.J. 1991) (collecting cases on sufficiency of prior inconsistent statements to convict). Some jurisdictions have ruled that prior inconsistent statements cannot comprise the sole substantive evidence to support a defendant's criminal conviction. See United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979) (stating that when prior inconsistent statements are "only source of support for the central allegations of [a] charge" the conviction cannot stand); Brower v. State, 728 P.2d 645 (Alaska Ct. App. 1986) (finding Orrico reasoning persuasive in determining prior inconsistent evidence alone not sufficient to convict); State v. Moore, 485 So. 2d 1279 (Fla. 1986) (holding prior inconsistent statement cannot comprise sole basis of conviction because risk of convicting an innocent person is "too great"); Commonwealth v. Daye, 469 N.E.2d 483, 488 (Mass. 1984) (suggesting in dicta that prior inconsistent statements can provide sole support for criminal convictions); State v. White Water, 634 P.2d 636, 638 (Mont. 1981) (stating that "a conviction supported only by prior inconsistent statement should not be allowed to stand"); State v. Maestas, 584 P.2d 182 (N.M. 1978) (holding prior inconsistent statements must be supported by corroborating evidence to be sufficient to convict). Other states have held that
on this issue, the possibility of due process implications where convictions are sustained solely by prior inconsistent statements remains.

III. PENNSYLVANIA'S APPROACH TO THE SUBSTANTIVE ADMISSIBILITY OF PRIOR INCONSISTENT STATEMENTS

A. The Brady Decision

In 1986, the Pennsylvania Supreme Court reconsidered its longstanding rule that prior inconsistent statements of non-party witnesses could not be introduced as substantive evidence and thus joined the growing majority of jurisdictions that adopted the modern rule. Several significant legal events preceded the court's decision. First, in 1970, the United States Supreme Court, in California v. Green, determined that the introduction of prior inconsistent statements as substantive evidence did not violate the Confrontation Clause. Second, in 1975, Congress enacted Federal Rule of Evidence 801(d)(1)(A), which excluded certain prior inconsistent statements from the definition of hearsay. Rule 801(d)(1)(A) permitted prior inconsistent statements to be introduced as substantive evidence in the federal courts where the witness was under oath and subject to cross-examination. Finally, by 1986, at least forty-one states had reexamined their own evidence rules and had decided to follow Congress' lead by permitting prior inconsistent statements to be used as substantive evidence in their courts.

prior inconsistent statements admitted as substantive evidence can sustain a conviction because a "jury has the right to rely on such evidence as much as on any other evidence in the case." Acosta v. State, 417 A.2d 373, 377 (Del. 1980); see also Montoya v. People, 740 P.2d 992 (Colo. 1987) (permitting witness' prior inconsistent statement to provide sole evidentiary support for sexual-assault conviction); Watkins v. State, 446 N.E.2d 949 (Ind. 1983) (affirming conviction based solely on prior inconsistent statement); Mancine, 590 A.2d 1107, 1119 (N.J. 1991) (concluding that "substantive elements of a criminal charge may be proven through a prior inconsistent statement alone, provided that the statement was made under circumstances supporting its reliability and the defendant has the opportunity to cross-examine the declarant").


52. Rule 801(d)(1)(A) states:

(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.

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

53. Id.

54. See Hilliard, Note, supra note 5, at 489 (collecting statutes and cases of
Eleven years after Congress enacted Federal Rule of Evidence 801(d)(1)(A), the Pennsylvania Supreme Court formulated its own version of the modern rule in Commonwealth v. Brady. In Brady, appellee Brady was charged with stabbing and killing a plant security guard. Shortly after the stabbing, Brady's girlfriend, Tina Traxler, made a statement to the police in which she said that she was with Brady at the time of the stabbing and saw Brady murder the security guard. After Traxler recanted her statement, the trial court permitted the Commonwealth to introduce the statement as substantive evidence at Brady's trial. On appeal, the Pennsylvania Supreme Court affirmed the trial.
court’s decision, noting that *Brady* presented the “classic case to illustrate why . . . prior statements should be admitted substantively.”

In reaching its decision, the *Brady* court discussed at some length the hallmarks of reliability that persuaded it to sanction the statement’s substantive admissibility. For example, the court noted that Ms. Traxler made her statement to the police twenty-four hours after the stabbing, that the statement was tape-recorded and that Ms. Traxler’s attorney and mother were present when she made the statement. However, the court did not adopt any reliability criteria as part of its holding. Instead, the *Brady* court held that prior inconsistent statements of non-party witnesses may be admitted as substantive evidence as long as “the declarant is a witness at trial and available for cross-examination.”

### B. Aftermath of the *Brady* Decision: The Lower Courts’ Application of the *Brady* Rule

After the *Brady* decision, Pennsylvania courts faced the task of applying the broad rule in *Brady* to evidentiary issues that arose at trial. An analysis of the court decisions following *Brady* indicates that this task was a difficult one. While the *Brady* court devoted considerable attention to the “reliability” of the prior inconsistent statement at issue, it did not explicitly adopt reliability criteria as part of its holding. The resulting uncertainty among the courts concerning the status of the reliability portion of the *Brady* decision led to two distinct interpretations of *Brady*.

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59. *Id.* at 67. Before *Brady* reached the Pennsylvania Supreme Court, the Superior Court had reversed Brady’s conviction. *Id.* at 68. The Superior Court applied the “law in Pennsylvania that prior inconsistent statements of a non-party witness are not admissible as substantive evidence of the truth of the matter asserted therein” and determined that the trial court erred in admitting Traxler’s prior inconsistent statement. *Id.* (quoting Commonwealth v. Brady, 487 A.2d 891, 892 (Pa. Super. Ct. 1985). The Pennsylvania Supreme Court reversed the Superior Court’s judgment and articulated a new rule for the admission of prior inconsistent statements. *Id.* at 67.

60. *Id.* at 70-71.

61. *Id.* The *Brady* court also emphasized that Ms. Traxler was “extensively questioned by both the prosecutor and defense counsel as to the respective validity of each statement and as to the discrepancy between them.” *Id.* at 67.

62. *Id.* at 67.

63. For a discussion of the application of the *Brady* rule in the lower courts, see *infra* 66-84 and accompanying text.

64. *Brady*, 507 A.2d at 67.

65. Some courts adhered strictly to *Brady*’s holding. For a discussion of court decisions strictly adhering to the *Brady* holding, see *infra* notes 66-78 and accompanying text. These courts admitted a prior inconsistent statement as long as the declarant was a witness in court available for cross-examination.
Some courts adopted a literal approach and simply adhered to Brady's holding. These courts admitted any prior inconsistent statement as long as the declarant was available in court and subject to cross-examination. When deciding whether to admit a particular prior inconsistent statement into evidence, these courts did not consider the statement's reliability.

For example, in Plair v. Commonwealth, the parole board permitted two police officers to testify to the substance of statements allegedly made by two eyewitnesses to a shooting incident. The officers testified that Francine Donald and her daughter Tamara told the police that Wade Plair had placed a gun to Tamara Donald's head and had fired two shots.

Other courts adopted a more expansive reading of Brady and interpreted the Brady rule to require an inquiry into the reliability of the statement. For a discussion of court decisions adopting a more expansive interpretation of the Brady rule, see infra notes 79-84 and accompanying text. The Brady court, after reviewing the circumstances in which Ms. Traxler's statement was rendered, stated that in “these circumstances, the trial court did not err in allowing the prior inconsistent statement to be introduced as substantive evidence.” Brady, 507 A.2d at 71 (emphasis added).

For further examples of cases where evidentiary rulings were based solely on a strict interpretation of the Brady court’s holding, see generally O'Donnell v. Westinghouse, 528 A.2d 576, 579 (Pa. 1987) (summarily concluding that prior inconsistent statement is admissible because declarant was witness at trial and available for cross-examination); Estate of Dankulich v. Tarantino, 532 A.2d 1243, 1245 & n.6 (Pa. Commw. Ct. 1987) (ruling eyewitness’ prior inconsistent statement was admissible as substantive evidence where witness is available in court for cross-examination, and disregarding defendant’s contention that statement was not reliable); Plair v. Commonwealth, 521 A.2d 989, 990-91 (Pa. Commw. Ct. 1987) (holding prior inconsistent statement admissible if declarant is witness in judicial proceeding and available for cross-examination; other factors irrelevant to admissibility).

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66. For example, in Commonwealth v. Mott, the defendant was convicted of simple assault for knocking down and injuring a bystander while attempting to flee a supermarket during a shoplifting incident. 559 A.2d 365, 370 (Pa. Super. Ct. 1985). At the defendant’s preliminary hearing, Mrs. White, the victim, stated that “she did not know who knocked her down” in the supermarket. However, at trial, Mrs. White testified that the store manager knocked her down.

On appeal, the defendant asserted that his attorney rendered ineffective assistance of counsel when the attorney failed to object to the admission of Mrs. White’s prior inconsistent statement. Id. at 368. The Superior Court rejected the defendant’s argument. Id. The Superior Court decided that “[t]he Brady case is in no way limited to the admissibility of prior inconsistent statements that are recorded.” Id. at 369. According to the Mott court, the only relevant question regarding statement admissibility is whether the declarant is a non-party witness testifying in a trial and subject to cross-examination. Id. The Mott court noted that the Brady court had “suggested” that Ms. Traxler’s statement was reliable because the statement was made at a point in time “closer to the event which took place.” Id. (citing Brady, 507 A.2d at 69).

Useful reading for further examples of cases where evidentiary rulings were based solely on a strict interpretation of the Brady court’s holding, see generally O’Donnell v. Westinghouse, 528 A.2d 576, 579 (Pa. 1987) (summarily concluding that prior inconsistent statement is admissible because declarant was witness at trial and available for cross-examination); Estate of Dankulich v. Tarantino, 532 A.2d 1243, 1245 & n.6 (Pa. Commw. Ct. 1987) (ruling eyewitness’ prior inconsistent statement was admissible as substantive evidence where witness is available in court for cross-examination, and disregarding defendant’s contention that statement was not reliable); Plair v. Commonwealth, 521 A.2d 989, 990-91 (Pa. Commw. Ct. 1987) (holding prior inconsistent statement admissible if declarant is witness in judicial proceeding and available for cross-examination; other factors irrelevant to admissibility).

67. Plair, 521 A.2d at 990. Parolee Wade Plair was charged with violating two parole rules—one required parolees to “refrain from owning or possessing any firearms or other weapons” and another stipulated that parolees must “refrain from any assaultive behavior.” Id.
shots at Francine. However, at the parole hearing, the Donalds testified that they were not able to identify the man who had fired the shots at them and that Plair did not have a gun. Nevertheless, the parole board recommitted Plair. On appeal, Plair contended that the hearing board had erred in admitting the police officers' oral reports of the Donald's prior inconsistent statements as substantive evidence. But the Commonwealth court, upon reviewing the hearing, found no error in the admission of these statements. The Commonwealth court did not interpret Brady as imposing a duty upon a hearing board or trial court to inquire into a statement's reliability. Instead, the Plair court determined that "[t]he admissibility of a prior inconsistent statement does not depend on whether it is recorded, oral, or part of a report. These things may affect the weight of the evidence, but not the admissibility." Several courts that labored under a strict adherence to Brady's holding criticized Brady for failing to address the reliability of prior inconsistent statements. For example, in his concurring opinion in Commonwealth v. Mott, Judge Cirillo criticized the Brady court for discarding a "well-tried rule of jurisprudence." Judge Cirillo reasoned that the Brady court had ignored a concern that many jurisdictions had not—that hearsay problems arise when unreliable prior inconsistent statements are admitted at trial as substantive evidence. Similarly, in Dur-

68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id. The Plair court quoted Brady in holding that a "prior statement can be viewed as possessing superior indicia of reliability [because] it was rendered at a point in time closer to the event described . . . when memory will presumably be fresher and opportunity for fabrication lessened." Id. (quoting Brady, 507 A.2d at 69). Accordingly, the Plair court interpreted Brady as standing for the proposition that all prior statements are necessarily reliable because they are rendered closer in time to the event they describe. Id. at 991.
74. Id. at 991.
76. Id. (Cirillo, J., concurring). Judge Cirillo was generally concerned about the reliability of the prior statement. Id. (Cirillo, J., concurring). He was concerned that "errors can arise in transcription, in misstatement by the officer preparing the statement for signature, and from leading questions which create misapprehension on the part of the declarant." Id. (Cirillo, J. concurring). He also believed that, "[f]requently, witnesses in criminal cases are implicated in the criminal activity at issue . . . , and the prosecutorial authorities can induce fear, a sense of guilt, and panic, in such a way as to cause distortion of the facts." Id. (Cirillo, J., concurring) (quoting State v. Spadafore, 220 S.E.2d 655, 664 (W. Va. 1975)). Judge Cirillo felt the Brady court erred in discarding the orthodox rule. Id. It is doubtful that Judge Cirillo would have approved of the Brady court's decision to permit prior inconsistent statements to be used substantively even if the court had adopted reliability criteria in its decision. However, Judge Cirillo
The Brady decision was characterized by the Pennsylvania Superior Court as an “attempt to follow commentators who are perhaps less well-experienced in trial advocacy than the justices of the appellate courts of this Commonwealth,” noting that “not even the Federal Rules of Evidence have taken as liberal a stance” as the Brady court.

Other courts rejected a strict adherence to Brady's holding and determined that the “reliability” portion of the Brady decision was an important component of the Brady rule. Even among these courts, however, there was confusion; many differed in their interpretation of

suggests that he might look more favorably upon a rule that required the prior inconsistent statement to have been rendered under oath. Id. at 370. He noted that it is the possibility of convicting defendants “upon unsworn testimony” that makes the modern rule unfair. Id.

77. 546 A.2d 665 (Pa. Super. Ct. 1988). In Durkin, owners of a race horse, which died minutes after a veterinarian injected the horse with the drug Kymar, brought action against the veterinarian and the veterinarian's clinic. Id. at 666. At the trial, the race horse owners sought to introduce a tape-recorded statement of the veterinarian's colleague, Dr. Seeber. Id. at 666-67. In this tape-recorded statement, Dr. Seeber said that the defendant veterinarian, Dr. DeLeo, had told him in a phone call that the race horse had died of anaphylactic shock immediately after Dr. DeLeo had administered Kymar. Id. Dr. Seeber also stated that he had warned Dr. DeLeo that Kymar could cause anaphylactic shock. Id. at 667.

The trial court refused to admit Dr. Seeber's statements on “the basis that those statements were ostensibly based on inadmissible hearsay—Dr. DeLeo's supposed statements to Dr. Seeber that he did in fact administer Kymar to the horse.” Id. at 562. The race horse owners argued on appeal that Seeber's statements were admissible under the Brady rule. Id. However, the Pennsylvania Superior Court rejected the plaintiff's arguments and affirmed the trial court's decision to exclude Dr. Seeber's statements from evidence. Id. at 668. The court found that Dr. Seeber's statements were not “otherwise admissible” because they are “riddled” with double hearsay. Id.

78. Id. at 668. The federal rule that the Durkin court referred to permits the federal courts to admit prior inconsistent statements as substantive evidence only when the statements are rendered under oath at a formal legal proceeding. Fed. R. Evid. 801(d)(1)(A). Congress imposed this limitation to preclude the admission of unreliable statements. For the text of Federal Rule of Evidence 801(d)(1)(A) and the reasons for the oath limitations Congress imposed on the admissibility of prior inconsistent statements, see infra notes 132-42 and accompanying text.

what the "reliability" component required. For example, in Sopota v. Commonwealth, the Superior Court held that the "reliability" portion of the Brady decision was satisfied by a declarant's appearance on the witness stand. In contrast, the court in Commonwealth v. Mott considered the "reliability" component satisfied if the prior out-of-court statement was made closer in time to the event in question than the declarant's in-court testimony.

80. See, e.g., Grekis, 601 A.2d at 1280 (finding prior inconsistent statements were reliable because made voluntarily); Sopota, 598 A.2d at 809-810 (suggesting that prior inconsistent statement is reliable if declarant testifies on witness stand); Patterson, 572 A.2d at 1267 (concluding that declarant's prior inconsistent statements were reliable because statements were made "shortly after the crime"); Troy, 553 A.2d at 996 (finding prior statement is reliable because members of witness' family were present during its rendering and witness appeared certain of dates and times, despite witness' claim of penicillin-induced confusion during its rendering); Harris, 556 A.2d at 446 (holding that prior inconsistent statement is reliable because given under oath and subject to cross-examination); Commonwealth v. Doa, 553 A.2d 416, 422 (Pa. Super. Ct. 1989) (admitting prior inconsistent statement of identification under Brady where witness was unable to identify defendant in court because statement was made close in time to event in question).

81. 587 A.2d 805 (Pa. Super. Ct. 1991). In Sopota, defendant Daniel Sopota was convicted of voluntary manslaughter in the Court of Common Pleas of Carbon County. He appealed, asserting that the trial court erred in allowing a declarant's prior inconsistent statement to be introduced into evidence "without that person first taking the stand and recanting the substance of her earlier statement." Id. at 807.

The trial court had permitted an eyewitness' prior statement to be introduced through the testimony of a police officer, rather than through the testimony of the witness. Id. at 806. The trial court assumed that the components of Brady, which governed the substantive admissibility of prior inconsistent statements, were satisfied because the witness was "available" for cross-examination—the eyewitness had been subpoenaed and was sequestered in the hallway outside the courtroom. Id. at 806.

However, the Superior Court found that the trial court had erred in permitting the Commonwealth to introduce the witness' statement through the police officer's testimony. Id. at 809. The Superior Court reasoned that the "reliability" portion of the Brady decision was not satisfied until the witness was actually on the witness stand, thereby allowing the jury to observe the witness' demeanor. Id. Although the Commonwealth called the witness to the stand after the police officer testified about the witness' prior inconsistent statement, the court determined that this "indicia of reliability which makes a prior statement of a non-party witness admissible for its substantive value must be present when that statement is presented." Id. at 801. The court determined that the Brady "dictates" had not been met because it was the police officer who was on the stand when the witness's prior inconsistent statement was presented and not the witness. Id. Accordingly, the court remanded the case for a new trial. Id.

82. Id. at 801. The court commented that "the presence of [the witness] on the witness stand ... provided the indicia of reliability which make her original statement to the police admissible for its substantive value." Id. at 810.


84. Id. at 369. Mott refers to the two-prong test of Brady as the "only" question that must be addressed in admitting a prior inconsistent statement as
Given the confusion and criticism generated in the lower courts, the climate was ripe for a decision from the Pennsylvania Supreme Court that would give some guidance as to the appropriate interpretation of the *Brady* rule. In May of 1992, the Pennsylvania Supreme Court was presented with the perfect vehicle in which to clarify the *Brady* rule. The Pennsylvania Supreme Court, in *Commonwealth v. Lively*, imposed limitations on the *Brady* rule precluding the introduction of unreliable prior inconsistent statements into evidence.

The issue in *Lively* concerned the admissibility of three prior inconsistent statements proffered by the Commonwealth. At trial, the prosecution proffered the prior inconsistent statements of Diane Rucker, John Moody and Angelo Williamson. Each statement supported the prosecution's theory that Kevin Lively had murdered Tyrone Miller because Miller had vandalized Lively's automobile. First, the prosecution introduced Diane Rucker's statement through the testimony of a Philadelphia police officer. In her trial testimony, Diane Rucker said she never told the police officer that she saw Lively shoot Tyrone Miller. Nevertheless, the police officer testified, over the appellant's objection, to the substance of Ms. Rucker's alleged conversation with him on the day of the killing. The officer testified that Diane Rucker told him that she had seen Lively shoot Tyrone Miller.

Second, the Commonwealth introduced the prior inconsistent statement of John Moody. In his trial testimony, Moody said he did not see Lively during the first shooting incident. The Commonwealth then cross-examined Mr. Moody using a memorandum prepared by a police detective. According to the memorandum, Moody allegedly told the

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86. For a discussion of the *Brady* court's holding, see supra notes 55-62 and accompanying text.
88. *Id.* at 10.
89. *Id.* Ms. Rucker allegedly made her prior inconsistent statement during a telephone conversation with Officer Fleming. *Id.* Ms. Rucker denied having had such a conversation with the officer. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 10. Officer Fleming also testified that Diane Rucker gave him a description of Lively and Lively's car and told him where Lively lived. *Id.* at 11.
93. *Id.* at 10.
94. *Id.* John Moody also denied making such a statement to Detective Rocks and Assistant District Attorney Rosen. *Id.* Moody allegedly made the statement during an interview with them on November 20, 1986. *Id.*
95. *Id.* Detective Rocks prepared the memorandum at the direction of As-
Philadelphia police that, following the first shooting incident, Lively had “told Moody that he had shot at a guy who had broken his car window and [that] the next time he would kill Tyrone Miller.”

Finally, the Commonwealth introduced Angelo Williamson’s prior inconsistent statements. In these statements Williamson described what he had seen on the day Tyrone Miller was killed. At trial, Mr. Williamson admitted that he had made statements to the police and that he had testified at a preliminary hearing about Tyrone Miller’s murder. However, Williamson claimed that his prior statement and testimony “were untrue because they had been coerced by the Commonwealth.” The Commonwealth used these statements in its cross-examination of Mr. Williamson.

On appeal, Lively asserted that the trial court improperly extended the holding of the Brady decision by permitting the Commonwealth to introduce Ms. Rucker, Mr. Moody and Mr. Williamson’s prior inconsistent statements. Specifically, Lively contended that the witnesses’ assistant District Attorney Rosen, following an interview with John Moody. Kevin Lively objected to the cross-examination of John Moody regarding Moody’s alleged prior inconsistent statements. Id. at 11.

These statements were “given under oath at a formal legal proceeding and reduced to a writing signed and adopted by the declarant.” Id.

Where the defendant obtains a mistrial through his or her own motion, however, the double jeopardy bar will not prevent retrial unless the defendant can show that the prosecutor intentionally provoked the motion for mistrial. Id. at 8-9. Generally, the double jeopardy bar forbids reprosecution for the same crime. Id. (citing Commonwealth v. Kunish, 602 A.2d 849 (Pa. 1992); Commonwealth v. Traitz, 597 A.2d 1129 (Pa. 1991)). In Lively, the appellant alleged that the prosecutor intentionally referred to him as a “murderer” while questioning witness Diane Rucker in an effort to force mistrial. Id. at 8. Appellant Lively alleged that “the prosecutor was frustrated by his witness’s change of story and was not prepared to seek admission of the testimony under Brady.” Id. at 8. The trial court granted appellant Lively’s motion for a mistrial based on the prosecutor’s characterization of Lively as a “murderer,” but decided that the prosecutor’s conduct was unintentional. Id. at 8-9. Thus, the trial court denied Lively’s subsequent motion to dismiss on double jeopardy grounds. Id. at 8. On appeal, the Pennsylvania Supreme Court agreed, concluding that Lively’s double jeopardy claim was without merit. Id. at 9.

Appellant Lively’s second ground for appeal was that the prior inconsistent statements of Diane Rucker, John Moody and Angelo Williamson did not satisfy the “reliability” requirements of Brady. For a discussion of the court’s treatment of Lively’s second ground for appeal, see infra notes 106-18 and accompanying text.
leged statements did not possess "the hallmarks of reliability" that distinguished Tina Traxler's tape-recorded statement in *Brady*. The Pennsylvania Supreme Court agreed.

The *Lively* court began by examining the Superior Court's rationale in affirming Lively's conviction and life sentence. The Pennsylvania Supreme Court concluded that the Superior Court's interpretation of the *Brady* rule was flawed. The Superior Court found that the Superior Court incorrectly reasoned that *Brady* did not require prior inconsistent statements to be either recorded or verbatim to be admissible. The Superior Court had misinterpreted a vital component of the *Brady* decision by failing to recognize that reliability is a necessary precursor to the admissibility of prior inconsistent statements under the *Brady* rule. While the *Lively* court conceded that the *Brady* holding did not specifically refer to the need to ensure statement reliability, the *Lively* court pointed out that the *Brady* court had emphasized, and treated as persuasive, the highly reliable circumstances under which Ms. Traxler had rendered her prior inconsistent statement.

Reliability, the *Lively* Appellant Lively raised two additional issues on appeal. *Lively*, 610 A.2d at 10. However, the *Lively* court never reached these issues because it determined that the trial court committed reversible error in admitting Diane Rucker and John Moody's statements as substantive evidence. *Id.* at 11. First, Lively argued that the prosecution's entire case against him rested on prior inconsistent statements admitted as substantive evidence. *Id.* at 11 n.2. The contradictory nature of this evidence, Lively argued, demanded "an arrest of judgement for insufficiency" or a new trial. *Id.* Second, Lively raised an ineffective assistance of counsel claim. *Id.* Lively claimed his attorney failed to cross-examine a police witness about supposed eyewitness testimony, called a police officer to the stand to testify "for no rational purpose" and purposely elicited prejudicial hearsay about Lively during cross-examination of a witness. *Id.*

103. *Id.* at 9; see also *Brady*, 507 A.2d at 71. For a discussion of the characteristics of Tina Traxler's statement in *Brady*, which contributed to the statement's reliability, see supra notes 60-61 and accompanying text.


105. *Id.* at 10-11.

106. *Id.*

107. *Id.* at 10.

108. *Id.* The *Brady* court had held that prior inconsistent statements of non-party declarants are admissible "where the declarant is a witness at trial and available for cross-examination." *Brady*, 507 A.2d at 67. For a discussion of the *Brady* decision, see supra notes 55-62 and accompanying text.

109. *Lively*, 610 A.2d at 10. The Pennsylvania Supreme Court emphasized that "the important components of the *Brady* rule are that otherwise admissible prior inconsistent statements be given under highly reliable circumstances and the non-party declarant be subject to cross-examination in the proceeding where the prior statement is to be admitted." *Id.* at 9-10 (emphasis added).

110. *Id.* at 9. For a discussion of the circumstances surrounding Ms. Traxler's statement that the *Brady* and *Lively* courts considered "highly reliable and trustworthy," see supra note 60-61 and accompanying text.
court stressed, was a vital component of the *Brady* rule. Finally, the *Lively* court determined that "to ensure that only those hearsay declarations that are demonstrably reliable and trustworthy are considered as substantive evidence," a prior inconsistent statement must meet one of the following conditions to be admissible as substantive evidence at trial: (1) the statement must have been given under oath at a formal legal proceeding; (2) the statement must have been reduced to a signed writing adopted by the declarant; or (3) the statement must have been recorded contemporaneously with its rendering.

Applying this new admissibility test in assessing the reliability of the prior inconsistent statements of the three Commonwealth witnesses in *Lively*, the Pennsylvania Supreme Court concluded that two of the statements, those of Diane Rucker and John Moody, were not rendered under "highly reliable" circumstances. Accordingly, the *Lively* court decided that the trial court committed reversible error in admitting Diane Rucker and John Moody's prior inconsistent statements as substantive evidence. Neither Ms. Rucker's nor Mr. Moody's statements satisfied any of the reliability criteria for admissibility. In contrast, the court held that Angelo Williamson's prior inconsistent statements were properly introduced. Mr. Williamson's statements satisfied the reliability criteria because Mr. Williamson had rendered the statements under oath at a formal legal proceeding and had signed and adopted the statements. Based on these findings, the *Lively* court reversed the Su-

111. *Lively*, 610 A.2d at 10.
112. *Id.* at 10. To support its holding, the Pennsylvania Supreme Court cited Hilliard, *Note*, supra note 5. In her article, Ms. Hilliard suggested that the Pennsylvania Supreme Court should limit the broad rule adopted in *Brady* "so as to admit only those statements which bear sufficient indicia of reliability" and thereby reduce "the chances of abuse through fabrication and even misinterpretation of such statements." *Id.* at 503. Hilliard asserted that oral prior inconsistent statements pose a danger of "inaccuracy." *Id.* at 501. She recommended that the Pennsylvania Supreme Court adopt the same limitations on the substantive admissibility of prior inconsistent statements that Hawaii has adopted. *Id.* For the text of Hawaii's rule of evidence governing substantive admissibility of prior inconsistent statements, see infra note 147 and accompanying text.
114. *Id.*
115. *Id.* The *Lively* court noted that "Ms. Rucker's alleged prior inconsistent statements were not given under oath at a formal proceeding . . . [nor] had such statements been reduced to a signed writing or recorded verbatim contemporaneously with the making of the statements." *Id.* at 11. In addition, after reviewing the admissibility of John Moody's prior inconsistent statement, the court concluded that "[a]lthough Mr. Moody's alleged prior statements were reduced to a writing, it was not signed or adopted by him." *Id.* Furthermore, the court noted that because the memorandum was not prepared until after the detective's interview with Mr. Moody, it could not be considered "a contemporaneous verbatim recording of Mr. Moody's statements." *Id.*
116. *Id.* at 11.
117. *Id.*
D. The Law After Lively

On the same day as the Lively decision, the Pennsylvania Supreme Court applied the Brady rule and the newly formulated Lively rule in Commonwealth v. Burgos.\(^\text{119}\) In Burgos, appellant Jerry Burgos was convicted of first degree murder and sentenced to death for the strangulation death of his pregnant wife, Nilsa Burgos.\(^\text{120}\) Although Burgos cited numerous errors on appeal, the Pennsylvania Supreme Court focused on the trial court's admission of two prior inconsistent statements made by the Burgos' six-year-old son, Jerry Michael Burgos.\(^\text{121}\)

At his father's trial, Jerry Michael Burgos testified for the Commonwealth about a fire that occurred on the night of his mother's death.\(^\text{122}\) At the conclusion of Jerry Michael's testimony, the Commonwealth introduced two prior inconsistent statements he had allegedly made during interviews with the police.\(^\text{123}\) The police had not recorded either of Jerry Michael Burgos' two prior statements contemporaneously and Jerry Michael did not give either of the statements under oath.\(^\text{124}\) Furthermore, the prosecution introduced Jerry Michael's prior inconsistent statements through the testimony of a police officer rather than through cross-examination of Jerry Michael.\(^\text{125}\) The Burgos court held that the introduction of the boy's prior inconsistent statements as substantive evidence constituted prejudicial error because the statements failed to satisfy the Lively admissibility criteria and that their use at trial violated the

\(^{118}\) Id.


\(^{120}\) Id. at 12-13. In addition to murder, Burgos was convicted of two counts of arson, endangering property and corpse abuse. Id. at 11. Burgos reported a fire at his home in the early morning hours of May 31, 1988. Id. at 13. Neighbors called the fire department. Id. When the firefighters arrived at the Burgos home, they saw Burgos throwing rocks through the house's front windows. Id. This fed the fire. Id. After the firefighters put the fire out, they found Nilsa Burgos' charred remains in the back bedroom of the house. Id. Later, an autopsy revealed that Mrs. Burgos "had been manually strangled to death prior to the time of the fire." Id. Forensic scientists also discovered a gasoline-like substance on the victim's flesh. Id. at 14.

\(^{121}\) Id. After reviewing the facts of the case, the Burgos court concluded that the evidence was sufficient to support Burgos' conviction. Id. However, because Jerry Michael Burgos' prior inconsistent statements had been introduced as substantive evidence at trial in contravention of the Brady and Lively admissibility criteria, the court remanded the case for a new trial. Id. at 14-15.

\(^{122}\) Id. at 14.

\(^{123}\) Id. According to the court, "no interested adult" was present on the behalf of the child at either interview. Id.

\(^{124}\) Id. In fact, Trooper Ritter testified that the police altered Jerry Michael Burgos' statements after they interviewed him in order to register a "more intelligent form." Id.

\(^{125}\) Id. at 14-15.
“purpose” of Brady.\textsuperscript{126}

\textsuperscript{126} Id. The court’s reference to the “purpose” of Brady no doubt refers to Brady’s objective of permitting the introduction of prior inconsistent statements as substantive evidence only where the “usual dangers of hearsay are largely nonexistent.” Brady, 507 A.2d at 69 (citing California v. Green, 399 U.S. 149, 155 (1970)). The “usual dangers of hearsay” are threefold: (1) the declarant’s prior inconsistent statement was not made under oath; (2) the fact-finder was unable to observe declarant’s demeanor at the time the statement was made; and (3) the declarant was not subject to contemporaneous cross-examination before the fact-finder. Graham, supra note 27, at 1568. Jerry Michael Burgos’ prior inconsistent statements implicated all three of these “hearsay dangers.” When Jerry made his out-of-court statements he was not under oath, he was not subject to contemporaneous cross-examination and the fact-finder was not able to observe his demeanor. Burgos, 610 A.2d at 14. Normally, the prosecution fulfills these requirements in the courtroom by cross-examining the declarant. Such cross-examination “defuses hearsay concerns and provides the fact-finder with ample opportunity to determine the truth.” Brady, 507 A.2d at 69 (citing Commonwealth v. Thirkield, 467 A.2d 323, 324 (Pa. 1983)) (McDermott, J., dissenting). However, the “hearsay concerns” regarding Jerry Michael Burgos’ statements were never “defused” because the prosecution never cross-examined Jerry Michael about these statements. Burgos, 610 A.2d at 14. Instead, the prosecution introduced Jerry Michael’s prior inconsistent statements through the direct testimony of two police officers. Id.

In light of the Pennsylvania Supreme Court’s recent decision in Lively, its rationale in remanding Burgos is most intriguing. First, the Burgos court pointed out that Jerry Michael Burgos’ two prior inconsistent statements were not “otherwise admissible” because they were “not given under highly reliable circumstances.” Burgos, 610 A.2d at 14. The Burgos court cited the newly-announced Lively admissibility criteria in defining the scope of “reliability” required for the substantive admissibility of a prior statement. Id. at 14; see Lively, 610 A.2d at 10 (discussing admissibility criteria). For a discussion of the Lively court’s admissibility criteria, see supra note 112 and accompanying text. However, the Burgos court stressed two additional points of error regarding the admission of Jerry Michael Burgos’ prior inconsistent statements at trial. Burgos, 610 A.2d at 14-15.

First, the court expressed concern about the circumstances under which Jerry Michael Burgos made the statements. Id. at 14. The court noted that Jerry Michael Burgos’ original statement “was obtained in the presence of two police officers and two representatives of the Commonwealth with no interested adult present on behalf of the child.” Id. This is not the first time the court has made an inquiry into the events surrounding the rendering of a declarant’s out-of-court statement. For instance, in Brady the court discussed, at some length, the atmosphere in which Ms. Traxler gave her prior inconsistent statement, stressing that the circumstances indicated that Ms. Traxler made her statement “knowingly, voluntarily and with [full] understanding of her rights and options.” Lively, 610 A.2d at 10. For a discussion of the circumstances surrounding the rendering of Tina Traxler’s statement, see supra notes 60-61 and accompanying text. In contrast, however, the Lively court neither expressed concern nor inquired into the coercive circumstances Angelo Williamson claimed existed at the time he made his prior inconsistent statement. Lively, 610 A.2d at 10. Rather, the Lively court summarily concluded that Angelo Williamson’s statement was properly admitted because it was contemporaneously recorded and given under oath. Id. at 11.

The second point of error the Burgos court emphasized was that the prosecution did not introduce Jerry Michael Burgos’ prior inconsistent statements during the child’s cross-examination. Burgos, 610 A.2d at 14. The court reasoned that by introducing Jerry Michael’s two prior inconsistent statements
IV. METHODS FOR ENSURING STATEMENT RELIABILITY IN OTHER JURISDICTIONS

Although Pennsylvania has only recently adopted specific limitations on the substantive admissibility of prior inconsistent statements, the federal courts and twenty-seven states have been limiting the admissibility of such statements due to reliability concerns for a number of years. For example, Federal Rule of Evidence 801(d)(1)(A) limits the introduction of prior inconsistent statements as substantive evidence to statements made under oath. Twenty-two states have adopted the federal rule essentially verbatim. Five states, including Pennsylvania, have adopted a less restrictive approach. These states impose various restrictions on the admissibility of prior inconsistent statements, but permit the introduction of statements not made under oath if the statements possess sufficient indicia of reliability. The standards Pennsylvania adopted in Lively are identical to the standards presently employed in Hawaii.

A. Federal Approach to Ensuring Reliability of Prior Inconsistent Statements

Federal Rule of Evidence 801(d)(1)(A) governs the admissibility of prior inconsistent statements of non-party witnesses in the federal courts through the testimony of Trooper Ritter instead of through cross-examination of Jerry Michael, the jury "was impermissibly deprived of the opportunity to observe the child's demeanor and hear his testimony and explanations regarding the discrepancy." Id. The Burgos court's concern that prior inconsistent statements be subject to rigorous cross-examination is not unusual, given that the Lively court cited the availability of a witness for cross-examination as an "important component" of the Brady rule. Lively, 610 A.2d at 9-10. Nonetheless, like Jerry Michael Burgos' prior inconsistent statement in Burgos, Diane Rucker's statement in Lively was introduced through the testimony of a police officer. Lively, 610 A.2d at 10. However, the Lively court determined that the trial court improperly admitted Diane Rucker's statement because the statement was not made under oath or recorded, and not because the statement was not introduced through the cross-examination of Diane Rucker. Id at 11.

127. For the text of Federal Rule of Evidence 801(d)(1)(A), which governs the substantive admissibility of prior inconsistent statements in the federal courts, see supra note 52. For a list of states that follow the federal rule and limit admissibility to statements that have been rendered under oath, see infra note 144. For further discussion of the substantive admissibility of prior inconsistent statements in other states, see Hilliard, Note, supra note 5, at 489-96.


129. For a listing of the states that have adopted the federal rule verbatim, see infra note 144.

130. The five states adopting such an approach are Pennsylvania, Hawaii, Connecticut, Illinois and New Jersey. For the limitations imposed by the Pennsylvania Supreme Court in Commonwealth v. Lively, see supra note 112 and accompanying text. For the text of the evidence rules in Hawaii, Illinois, Connecticut and New Jersey, see infra notes 147-50.

131. For the governing rule of evidence in Hawaii, see infra note 147.
132 Rule 801(d)(1)(A) provides that prior inconsistent statements are admissible as substantive evidence only if the statements were given under oath at a prior trial, hearing or other legal proceeding.  

The present formulation of Rule 801(d)(1)(A) is the product of a compromise between the House and Senate. Both houses of Congress fiercely debated the wisdom of imposing limitations on the admissibility of prior inconsistent statements as substantive evidence. The Advisory Committee drafted the original version of the rule. This version, which the Senate had advocated, permitted all prior inconsistent statements to be introduced as substantive evidence at trial. However, the House was extremely dissatisfied with this version of the rule because of concerns about the reliability of prior inconsistent statements. Therefore, the House Judiciary Committee recommended including an oath requirement. Congress ultimately incorporated this recommendation into the final version of Rule 801(d)(1)(A) to exclude unreliable statements.

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132. For the language of Federal Rule of Evidence 801(d)(1)(A), see supra note 52.
134. Graham, supra note 27, at 1575.
135. Id.
136. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 293 (1972). The rule drafted by the Advisory Committee and submitted by the Supreme Court provided in pertinent part:

(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. ...  

138. See H.R. Rep. No. 650, 93d Cong., 1st Sess. 13 (1973). The current rule expressly permits the use of statements given under oath at a prior trial, hearing or deposition. Fed. R. Evid. 801(d)(1)(A). However, the Rule also allows courts to admit statements made under oath at “other proceeding[s].” Id. The Ninth Circuit has interpreted this provision to permit the use of testimony given before a grand jury, even though such testimony may not have been subject to cross-examination. See United States v. Castro-Ayon, 537 F.2d 1055, 1057 (9th Cir. 1976), cert. denied, 493 U.S. 983 (1989). Roger Park, in an article addressing hearsay issues, suggests that courts permitting the substantive use of grand jury testimony that has not been subject to cross-examination and excluding statements rendered in an informal setting, do so because “witness testimony in a grand jury proceeding is likely to be accurately recorded and will not be fabricated by the in-court witness.” Roger Park, A Subject Matter Approach To Hearsay Reform, 86 Mich. L. Rev. 51, 80 (1987).
140. For the text of Federal Rule of Evidence 801(d)(1)(A), see supra note 52.
In formulating Rule 801(d)(1)(A), Congress was predominantly concerned with developing criteria that would ensure that a prior inconsistent statement was not fabricated and that "subtle influence, coercion, or deception ha[d] not impaired its reliability." In deciding to establish an evidentiary rule that distinguished between reliable and unreliable statements, Congress implicitly rejected the alternate solution of permitting the introduction of all statements and allowing the trier of fact to evaluate reliability.

B. State Court Approaches to Ensuring Reliability of Prior Inconsistent Statements

Although many scholars have criticized Federal Rule of Evidence 801(d)(1)(A) as being overly restrictive and excluding many statements that possess indicia of reliability, twenty-two states have adopted the Rule essentially verbatim. Eleven states have adopted the Senate's version of the Rule and authorize their courts to admit prior inconsistent statements as substantive evidence as long as the witness appears at

141. Graham, supra note 27, at 1582.
142. Id.
143. See, e.g., id. at 1566 ("[R]ule 801 (d)(1)(A) as enacted denies substantive admissibility to some prior inconsistent statements for which there are strong guarantees of reliability"); Abraham P. 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, 74 (1976) (noting that "there is an abundance of cases in which there may be greater reliability in the unsworn rather than the sworn statement"); Stalmack, supra note 26, at 251 (criticizing restrictions in Rule 801(d)(1)(A) as "compromising step backward" from the Senate's less restrictive proposal).
144. ARK. R. EvID. 801(d)(1)(i) (requiring prior statement be given under oath only if offered in criminal proceeding); FLA. EvID. CODE 90.801(2)(a) (prior inconsistent statement admissible if given under oath at formal legal proceeding); IDAHO R. EvID. 801(d)(1)(A) (same); KENT. R. EvID. 422A.0801A. (1)(A) (KRE 801-A) (same); ME. R. EvID. 801(d)(1)(A) (same); Mich. R. EvID. 801(d)(1)(A); MINN. R. EvID. 801(d)(1)(A) (same); MO. R. EvID. 801(d)(1)(A) (same); Miss. R. EvID. 801(d)(1)(A) (same); NEB. REV. STAT. § 27-801(4)(a)(i) (1989) (same); N.H. R. EvID. 801(d)(1)(A) (same); N.D. R. EvID. 801(d)(1)(i) (requiring prior statement be given under oath only if offered in criminal proceeding); OHIO R. EvID. 801(D)(1)(a) (providing, in addition to oath requirement, that statement must be "subject to cross-examination by the party against whom the statement is offered" at trial, hearing or other proceeding); OKLA. STAT. ANN. 12 § 2801 4(a)(1) (prior inconsistent statement admissible if given under oath at formal legal proceeding); ORE. EvID. Code 801(4)(a)(A) (same); S.D. CODIFIED LAWS ANN. § 19-16-2.1(I) (Rule 801(d)(1)) (1987) (same); TEX. R. EvID. 801(e)(1)(A) (excluding use of grand jury testimony in criminal trials); WYO. R. EvID. 801(d)(1)(A) (requiring witness give statement under oath only if offered at criminal proceeding); W. VA. R. EvID. 801(d)(1)(A) (prior inconsistent statement admissible if given under oath at formal legal proceeding); WASH. R. EvID. 801(d)(1)(i) (same); VT. R. EvID. 801(d)(1)(A) (same); see also Hooper v. States, 585 So. 2d 137, 140 (Ala. 1990), cert. denied, 111 S.Ct. 2857 (1991) (commenting that "the federal rule [801(d)(1)(A)] is a good rule, that it does not substantially prejudice the rights of a defendant to a fair trial, and that it fosters a search for the truth").
Five states and the District of Columbia currently preclude the substantive use of these statements and follow the orthodox rule, which permits courts to admit prior inconsistent statements solely for impeachment purposes.

In developing criteria that define the circumstances in which prior inconsistent statements may be introduced as substantive evidence, five states have taken a middle ground. These states neither strictly prohibit the substantive use of prior inconsistent statement nor permit all statements to be admitted substantively. In addition to Pennsylvania, Hawaii, New Jersey, Illinois and Connecticut each require

145. See Alaska R. Evid. 801(d)(1)(A) (prior inconsistent statement admissible if witness testifies at trial and is subject to cross-examination); Ariz. R. Evid. 801(d)(1)(A) (same); Cal. Evid. Code § 1235 (same); Colo. R. Evid. 801(d)(1)(A) (same); Del. Uniform R. Evid. 801(d)(1)(A) (same); Mont. R. Evid. 801(d)(1)(A) (same); Nev. Rev. Stat. Ann. § 51.0352(a) (Michie 1986) (same); N. M. R. Evid. 11-801 D(1)(a) (same); R.I. R. Evid. 801(d)(1)(A) (same); Wis. R. Evid. 908.01(4)(a)(1) (same); Utah R. Evid. 801(d)(1)(A) (Michie 1992) (same); Kan. Stat. Ann. § 60-460 (a) (same).

146. N.Y. R. Evid. § 60.35 (restricting use of prior inconsistent statements to impeachment purposes): State v. Taylor, 593 So. 2d 431, 432 (La. Ct. App. 1992) ("evidence of a prior inconsistent statement . . . is admissible solely to attack the credibility of a witness"); Outlaw v. United States, 604 A.2d 873, 880 (D.C. 1992) ("a prior inconsistent statement goes only to the issue of credibility and cannot be viewed as substantive evidence of the defendant's guilt"); State v. Miller, 408 S.E.2d 846, 850 (N.C. 1991) (when "party calling a witness is genuinely surprised by the witness' change of his or her version of facts, impeachment by prior inconsistent statements is proper . . . [but such statements] may not be admitted as substantive evidence"); State v. Duke, 1991 WL 270210 at *2 (Tenn. Crim. App. 1991) (hostile witnesses may be questioned about prior inconsistent statements for purpose of testing credibility of witness, but not as substantive evidence); Bruce v. State, 569 A.2d 1254 (Md. 1990) (holding that party may request limiting instruction that prior inconsistent statements are admissible only to impeach witnesses' testimony); Hall v. Commonwealth, 1991 WL 270210 at *2 (Tenn. Crim. App. 1991) (hostile witnesses may be questioned about prior inconsistent statements for purpose of testing credibility of witness, but not as substantive evidence); Bruce v. State, 569 A.2d 1254 (Md. 1990) (holding that party may request limiting instruction that prior inconsistent statements are admissible only to impeach witnesses' testimony); Hall v. Commonwealth, 355 S.E.2d 591, 595 (Va. 1987) (prior inconsistent statements "are to be considered only insofar as they may affect the credibility of the witness, and may not be considered as proof of the truth of their content"). For a discussion of the "orthodox rule," see supra notes 28-29 and accompanying text.

147. Hawaii Rule of Evidence 802.1(1) provides:

Hearsay Exception; Prior Statements by Witnesses.

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 the declarant's statement, the statement is inconsistent with the declarant's 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[.]
additional assurances of reliability beyond the availability of the witness

Haw. R. Evid. 802.1(1). The commentary to Hawaii Rule of Evidence 802.1 states that Hawaii adopted these reliability safeguards to parallel a provision of the Jencks Act. Id.

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[.]


The objective of these particular provisions of the Jencks Act is to ensure the reliability and trustworthiness of a witness’ statement. Hilliard, Note, supra note 5, at 495 n.108 (citing Palermo v. United States, 360 U.S. 343, 349 (1959)).

148. Subsection (a) of New Jersey Rule of Evidence 63(1) provides, in pertinent part:

A statement is admissible if previously made by a person who is a witness at a hearing, provided it would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with the requirements of Rule 22(a) and (b) [governing use of prior inconsistent statements for impeachment purposes]; however, when the statement is offered by the party calling the witness it shall be admissible only if, in addition to the foregoing requirements, it
   (i) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or
   (ii) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in deposition.

N.J. R. Evd. 63(1).

149. The Illinois rule governing the admissibility of prior inconsistent statements reads, in pertinent part:

In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement; and

(c) the statement—
   (1) . . . [is] made under oath at a trial, hearing, or other proceeding, or
   (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
      (A) the statement is proved to have been written or signed by the witness, or
      (B) the witness acknowledged under oath the taking of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or
      (C) the statement is proved to have been accurately recorded.
at trial before admitting prior inconsistent statements as substantive evidence.

The rule governing substantive admissibility of prior inconsistent statements in Hawaii is virtually identical to the rule adopted in Lively: Hawaii requires that a prior statement be given under oath, reduced to a signed writing, or be recorded contemporaneously with its rendering before the statement can be introduced as substantive evidence.\textsuperscript{151} Illinois and Connecticut also have rules similar to the rule adopted in Lively, except that Illinois and Connecticut impose an additional limitation—the statement must narrate or describe an event about which the declarant has personal knowledge.\textsuperscript{152}

Among the five states comprising the middle ground, New Jersey has the most restrictive rule.\textsuperscript{153} Concerned with reliability, the New Jersey courts have imposed a two-step process for evaluating the reliability of prior inconsistent statements.\textsuperscript{154} First, the judge must conduct a pretrial evidentiary hearing to assess the reliability of the statement.\textsuperscript{155} Second, the declarant must be subject to in-court cross-examination concerning the statements.\textsuperscript{156} During the pretrial evidentiary hearing the judge evaluates the reliability of the statement according to a list of fifteen factors.\textsuperscript{157} The list includes such factors as the existence of cor-

\textsuperscript{by a tape recorder, videotape recording, or any other similar electronic means of sound recording.}  
\textsuperscript{150} Connecticut has formulated its rule regarding the substantive admissibility of prior inconsistent statements through judicial decision. State v. Whelan, 513 A.2d 86, 92 (Conn.), cert. denied, 479 U.S. 994 (1986). Connecticut permits the use of written prior inconsistent statements if the statement is "signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross examination." \textit{Id.} Connecticut courts have interpreted this rule to permit substantive admissibility of tape recorded statements. \textit{See} State v. Alvarez, 579 A.2d 515, 522 (1990) (holding tape-recorded statements admissible as substantive evidence at trial). \textsuperscript{151} For the text of the Hawaii rule of evidence governing admissibility of prior inconsistent statements, see \textit{supra} note 147. For the text of Pennsylvania’s rule as adopted in Lively, see text accompanying \textit{supra} note 112. \textsuperscript{152} For the rules governing the substantive admissibility of prior inconsistent statements in Connecticut and Illinois, see \textit{supra} notes 149-50. \textsuperscript{153} For the text of New Jersey’s rule, see \textit{supra} note 148. \textsuperscript{154} \textit{See} State v. Mancine, 590 A.2d 1107, 1115 (N.J. 1991) (setting forth requirements for substantive admissibility of prior inconsistent statements). \textsuperscript{155} \textit{Id.} \textsuperscript{156} \textit{Id.} \textsuperscript{157} \textit{Id.} The New Jersey courts evaluate the following factors in assessing the reliability of prior inconsistent statements:

(1) the declarant’s connection to and interest in the matter reported in the out-of-court statement, (2) the person or persons to whom the statement was given, (3) the place and occasion of giving the statement, (4) whether the declarant was then in custody or otherwise a target of the investigation, (5) the physical and mental condition of the declarant at the time, (6) the presence or absence of other persons, (7) whether the declarant incriminated himself or sought to exculpate himself by his
roboring evidence and the physical and mental condition of the declarant when the statement was made.\textsuperscript{158}

V. \textbf{Analysis}

In \textit{Commonwealth v. Lively}, the Pennsylvania Supreme Court imposed limitations on the substantive admissibility of prior inconsistent statements to “ensure that only those hearsay declarations that are demonstrably reliable and trustworthy are considered as substantive evidence.”\textsuperscript{159} The \textit{Lively} court’s new criteria for the substantive admissibility of prior inconsistent statements will undoubtedly exclude many of the unreliable prior inconsistent statements that were admissible under the \textit{Brady} rule. However, the \textit{Lively} court stopped short of its goal of ensuring that only trustworthy statements are admissible at trial by failing to provide sufficient guidance to the lower courts in evaluating statement reliability and failing to adopt a personal knowledge requirement.

Under the \textit{Lively} rule, prior inconsistent statements are admissible if the declarant is available in court for cross-examination and the prior statement is rendered under oath, reduced to a signed writing, or recorded contemporaneously with its making.\textsuperscript{160} Therefore, under the \textit{Lively} rule only substantiated, verifiable statements may be introduced as substantive evidence at trial.\textsuperscript{161} Thus, statements meeting the \textit{Lively} criteria are necessarily more reliable than the unsubstantiated statements that were admissible under \textit{Brady}. Under the \textit{Brady} rule Pennsylvania courts were permitted to admit any prior inconsistent statement as substantive evidence as long as the declarant testified in court and was available for cross-examination.\textsuperscript{162}

For example, under the \textit{Brady} rule, oral prior inconsistent statement, (8) the extent to which the writing is in the declarant’s hand, (9) the presence or absence, and the nature of, any interrogation, (10) whether the offered sound recording or writing contains the entirety, or only a portion [or a] summary, of the communication, (11) the presence or absence of any motive to fabricate, (12) the presence or absence of any express or implicit pressures, inducement or coercion for making the statement, (13) whether the anticipated use of the statement was apparent or made known to the declarant, (14) the inherent believability of the statement, and (15) the presence or absence of corroborating evidence.

\textit{Id.}  

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Commonwealth v. Lively}, 610 A.2d 7, 10 (Pa. 1992). For a discussion of the limitations the \textit{Lively} court imposed on the substantive admissibility of prior inconsistent statements, see supra note 112 and accompanying text.

\textsuperscript{160} \textit{Lively}, 610 A.2d at 10. For a discussion of the exact holding in \textit{Lively}, see text accompanying supra note 112.

\textsuperscript{161} For example, statements given under oath will be supported by a transcript of the legal proceeding. Likewise, a tape cassette or a written statement will provide verifiable evidence of the witness’ tape-recorded or signed and adopted statements.

ments that were not supported by extrinsic evidence could be introduced as substantive evidence at trial. Yet, commentators have noted that oral statements are the type of prior statement "most likely not to have been made and most likely, if made, to have been unfairly obtained or inaccurately reported." Permitting the substantive use of oral prior inconsistent statements "increases the temptation and opportunity for fabrication and distortion by witnesses called to report [them]."

By requiring a prior inconsistent statement to be recorded, reduced to a signed writing, or given under oath at a legal proceeding, where a record of the proceeding is likely to have been maintained, the Lively court has wisely excluded statements that depend on the testimony of third parties for their sole proof and content.

In addition to the risk that an unsubstantiated oral statement may have been inaccurately reported or fabricated, there is also a risk that an oral statement may contain an exaggerated or distorted version of the truth. The Lively rule illustrates, however, that this risk may be alleviated. A declarant who makes his or her statement under oath, or signs a written copy of his or her statement, or is told that his or her statement is being recorded, should be suitably impressed with the seriousness of the occasion and deterred from rendering an exaggerated statement that he or she could be required to explain later.

Furthermore, the Lively decision provides an invaluable "checklist" to the lower courts for evaluating the reliability of prior inconsistent statements. After Brady, the Pennsylvania lower courts reached inconsistent decisions regarding the status of the "reliability" portion of the Brady decision. The Lively decision should clear up this area of confusion. The decision emphasized that the reliability of a prior inconsistent statement is a vital component to the Brady admissibility rule and provided a list of the types of prior inconsistent statements that courts

163. Id. at 67. The Brady court did not adopt any reliability criteria as part of its holding. Id. Instead, the Brady court held that any prior inconsistent statement was admissible as substantive evidence as long as the declarant was available in court for cross-examination. Id. For a further discussion of the Brady decision, see supra notes 50-84 and accompanying text.

164. Graham, supra note 27, at 1588; McCormick, Turncoat Witness, supra note 1, at 588.


166. See Whelan, 513 A.2d at 92. The Connecticut Supreme Court has reasoned that admitting unsubstantiated oral statements presents the risk that the statements a witness may have "made in jest or [made] to boast of knowledge of criminal activity in which the declarant was not actually involved" could be considered as substantive evidence by the fact-finder. Id. at 92. These statements would be "inordinately difficult for the declarant to explain and might be critical in convincing the trier of the defendant's guilt." Id.

167. For the exact language of the Lively rule, see text accompanying supra note 112.

168. For a discussion of the varying interpretations of the Brady court's holding, see supra notes 66-84 and accompanying text.
may admit at trial.\textsuperscript{169}

However, despite the \textit{Lively} court's commendable efforts to guarantee that Pennsylvania courts admit only reliable statements as substantive evidence and to ensure that the courts have clear-cut guidance for judging statement reliability, the \textit{Lively} decision suffers from two shortcomings. First, the \textit{Lively} decision did not explicitly adopt a personal knowledge requirement. Second, while the \textit{Lively} decision addresses the types of prior inconsistent statements that may be admitted as substantive evidence, the decision fails to articulate a test for evaluating the circumstances under which the prior statements were rendered. If the Pennsylvania Supreme Court had adopted a personal knowledge requirement and "reliability of circumstances" criteria, the court could have effectively furthered its goal of excluding unreliable prior inconsistent statements from evidence.

At least two states and two commentators have advocated imposing a personal knowledge requirement on the substantive admissibility of prior inconsistent statements.\textsuperscript{170} A personal knowledge requirement would serve to exclude from evidence all prior inconsistent statements that merely narrate a third person's statements, unless the witness also had personal knowledge of the subject matter of the third person's statements.\textsuperscript{171} Thus, the personal knowledge requirement would provide for a more fruitful line of cross-examination, because "only a witness with personal knowledge of the subject matter of a prior inconsistent statement can be cross-examined about whether the statement is truthful."\textsuperscript{172}

In addition to imposing a personal knowledge requirement, the \textit{Lively} court should also have formulated a list of criteria for the lower courts to use in determining whether the circumstances under which a declarant rendered his or her prior inconsistent statement were free from coercion. In \textit{Lively}, the court carefully examined the circumstances under which Ms. Traxler made her prior inconsistent statement in \textit{Brady}.\textsuperscript{173} The court decided that because Ms. Traxler's mother and attorney were present when Ms. Traxler made her statement, and because Ms. Traxler's attorney had advised her of "her rights and options," Ms. Traxler's statement was highly reliable.\textsuperscript{174} However, none of the admis-


\textsuperscript{170.} See, e.g., Graham, supra note 27, at 1584-1588 (suggesting advisability of adopting personal knowledge requirement and discussing Professor McCormick's proposal for admissibility of prior inconsistent statements, which includes personal knowledge requirement). For the text of Illinois and Connecticut's rules of evidence, both of which require the element of personal knowledge, see supra notes 149-50.

\textsuperscript{171.} Graham, supra note 27, at 1585.

\textsuperscript{172.} Id. The personal knowledge requirement would also "exclude[] from evidence those statements most open to fabrication." Id. at 1585.

\textsuperscript{173.} Lively, 610 A.2d at 9.

\textsuperscript{174.} Id.
sibility criteria adopted in Lively addresses the circumstances under which a prior inconsistent statement was rendered. Instead, the Lively criteria are aimed at ensuring that prior statements are supported by extrinsic proof. Even statements supported by extrinsic proof, however, may lack reliability.

For example, a prior inconsistent statement that is supported by extrinsic proof might still have been "the product of coercion or pressure exerted by the police, or other interested parties." The risk that prior inconsistent statements might be the product of coercion prompted the New Jersey courts to develop a fifteen-factor test for assessing the reliability of prior statements and the circumstances under which the statements were made. Like Pennsylvania, a prior inconsistent statement must be recorded, reduced to a signed writing or given under oath to be admissible as substantive evidence in the New Jersey courts. But in New Jersey, a judge must also evaluate the reliability of a prior inconsistent statement according to a "reliability of circumstances" checklist. This checklist includes some of the following factors: the declarant's motivation to fabricate; the presence or absence of any pressures, inducement or coercion; whether the declarant was in custody; whether the declarant was a target of the investigation; the mental and physical condition of the declarant; and whether the statement was supported by corroborating evidence. The New Jersey Supreme Court has asserted that imposing a "totality of the circumstances" test on the admissibility of prior inconsistent statements is essential to ensuring the "voluntary, reliable nature" of the prior inconsistent statements admitted at trial. Imposing such a requirement in Pennsylvania would undoubtedly have a similar effect.

The Pennsylvania Supreme Court may already have implicitly adopted a "reliability of circumstances" requirement. Although the Lively court never explicitly adopted such a requirement, the court in Burgos treated the "unreliable" circumstances under which six-year-old Jerry Michael Burgos rendered his prior inconsistent statements as an

175. For a discussion of the limitations the Lively court imposed on the substantive admissibility of prior inconsistent statements, see supra notes 85-118 and accompanying text.
176. Lively, 610 A.2d at 9.
178. See State v. Mancine, 590 A.2d 1107, 1116 (N.J. 1991) (imposing fifteen-factor inquiry into circumstances in which prior inconsistent statement was rendered due to "specter of illicit coercion" and "damning nature" of such statements). For a discussion of New Jersey's fifteen factor inquiry, see supra note 148.
179. Mancine, 590 A.2d at 1115.
180. Id. at 1116.
181. Id.
182. Id.
important factor in its decision to reverse Burgos' conviction. However, given the Pennsylvania Supreme Court's brief treatment of the "reliability of circumstances" test in Burgos, the status of this inquiry remains unclear. Given the potentially damaging nature of prior inconsistent statements and the "specter of illicit coercion" that surrounds them, courts should be obligated to consider the circumstances surrounding the rendering of a witness' statement.

VI. Conclusion

By imposing limitations on the substantive admissibility of prior inconsistent statements, the Lively court sought to ensure that Pennsylvania courts only admit reliable prior inconsistent statements as substantive evidence. To achieve this goal, the court set forth a new rule limiting the types of prior inconsistent statements that may be introduced as substantive evidence at trial. Under the Lively rule, Pennsylvania courts may admit three types of prior inconsistent statements: 1) statements given under oath at formal legal proceedings; 2) statements reduced to writings signed and adopted by the declarant; and 3) statements recorded verbatim contemporaneously with their rendering.

The Lively decision accomplishes two important tasks. First, the Lively rule excludes many potentially unreliable prior inconsistent statements from evidence. Whereas the Brady rule permitted the substantive use of unsubstantiated oral statements, the Lively rule limits the types of prior inconsistent statements that may be introduced as substantive evidence to those supported by extrinsic evidence. Second, by explicitly setting forth the three types of prior inconsistent statements admissible as substantive evidence, the Lively court has provided an invaluable evidentiary checklist for the lower courts.

However, the Lively court did not go far enough in accomplishing either of these two important tasks. The Pennsylvania Supreme Court should further restrict the substantive admissibility of prior inconsistent statements by imposing a personal knowledge requirement. Declarants who lack personal knowledge of the subject matter of a prior inconsistent statement cannot be effectively cross-examined about the truth of

184. Mancine, 590 A.2d at 1116.
185. For a discussion of the Lively rule, see supra notes 85-118 and accompanying text.
187. For a comparison of the Brady and Lively rules, see supra notes 160-65 and accompanying text.
188. For a discussion of the reasons for adopting a personal knowledge requirement, see supra notes 171-73 and accompanying text.
the statement. Additionally, the court should impose an obligatory inquiry into the circumstances under which a prior inconsistent statement was rendered and should clearly articulate the criteria a court should utilize when evaluating those circumstances. Such an inquiry would ensure the voluntary, reliable nature of witnesses' prior inconsistent statements. Together, these additional limitations on substantive admissibility would further the court's goal of ensuring that only statements possessing strong indicia of reliability are admitted at trial.

Jeanine M. Kasulis

189. For a discussion of the “circumstances” inquiry implemented by the New Jersey courts, see supra notes 153-58 and accompanying text.