Hofstra Law Review

Volume 5 | Issue 1 Article 4

1976

Surprise! That Damaging Turncoat Witness is Still with Us: An Analysis of Federal Rules of Evidence 607, 801 (d)(1)(A) and 403

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

*Abraham P. Ordover**

In adopting Rule 607 of the Federal Rules of Evidence,[1] Congress has abrogated the common law rule which placed severe restrictions on the ability of a party to impeach its own witness.[2] While Rule 607 permits impeachment of one's own witness,[3] Rule 801(d)(1)(A)[4] and Rule 403[5] will have a substantial impact on the operation of that Rule. The impact is apparent in the case of the turncoat witness, where the prior

---

* Professor of Law, Hofstra University School of Law. B.A., 1958, Syracuse University; J.D., 1961, Yale University.

1. 28 U.S.C.A. FEDERAL RULES OF EVIDENCE 101-1103 (1975) [hereinafter cited as FED. R. EVID.].

2. *See* note 11 *infra* and accompanying text.

3. FED. R. EVID. 607 provides:

> The credibility of a witness may be attacked by any party, including the party calling him.

For a discussion of this rule see 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[01]-607[09] (1975) [hereinafter cited as WEINSTEIN & BERGER].

4. FED. R. EVID. 801(d)(1)(A) provides:

> The following definitions apply under this article:
>
> . . . .
>
> (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, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

As originally proposed by the Supreme Court, Rule 801(d)(1) would have permitted all prior inconsistent statements to be used substantively as long as the declarant testifies and is subject to cross-examination concerning the statement. In California v. Green, 399 U.S. 149 (1970), the Supreme Court held that substantive use of a prior inconsistent statement did not violate the sixth amendment. *Id.* at 164. The Rule as amended allows substantive use of only those prior inconsistent statements which were made under oath subject to the penalty of perjury, and further requires that the declarant be subject to cross-examination concerning the statement at the subsequent trial or hearing. *Cf.* United States v. DeSisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); United States v. Cunningham, 446 F.2d 194 (2d Cir. 1971).

5. FED. R. EVID. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

inconsistent statement is the prosecution's primary tool in attacking its own witness.

Rule 801(d)(1)(A),[6] as adopted, retains that portion of the common law rule which mandates that certain prior inconsistent statements may not be introduced as substantive evidence but may be used only for the limited purpose of impeaching the credibility of the witness. A statement which qualifies for admission, albeit for a limited purpose, under 801(d)(1)(A), might then be totally barred if it fails to survive the probative value versus prejudice analysis required by Rule 403.[7] If the statement survives the scrutiny of a Rule 403 analysis, a jury charge will be required which even the most conscientious jury will be unable to follow.[8]

Thus, Rule 801(d)(1)(A) in conjunction with Rule 403 undermines the potential benefits to a prosecutor of the new Rule 607. Congress' failure to permit substantive use of all prior inconsistent statements where the declarant is presently available for cross-examination may force prosecutors, deprived of what is potentially the most relevant evidence in their case, to engage in the subterfuge of offering a statement for impeachment purposes in the hope that, despite the court's instruction to the contrary, the jury will give the statement substantive weight.[9]

The difficulty facing a prosecutor is illustrated most clearly in the turncoat witness situation—the type of case which cried out for abrogation of the common law vouching rule.[10] This frequently encountered dilemma arises in the following manner. The prosecution plans to call as its witness an individual who presumably will testify to an admission of guilt by the defendant or to other highly damaging evidence. Prior to trial, the prosecutor

---

6. *See* note 4 *supra*.

7. *See* note 5 *supra*.

8. *See* United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); Asaro v. Parisi, 297 F.2d 859, 864 (5th Cir. 1962), *cert. denied*, 370 U.S. 904 (1963). *See also* MODEL CODE OF EVIDENCE rule 503(b) (1942); 3A J. WIGMORE, EVIDENCE § 1018 (Chadbourn rev. 1970); Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239, 249 (1966). For further discussion of this topic see text accompanying notes 45-47 *infra*.

9. *See, e.g.*, United States v. Morlang, 531 F.2d 183, 189 (4th Cir. 1975).

10. At common law the party who calls the witness is held to vouch for such witness' credibility, and hence may not attempt to impeach the credibility of its own witness. *See, e.g.*, United States v. Jannsen, 339 F.2d 916 (7th Cir. 1964). *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 38 (Cleary ed. 1972); 3A J. WIGMORE, *supra* note 8, § 909; Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69 (1936); MCCORMICK, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947).

obtains a statement from the witness attesting to the defendant's alleged admissions. When called to testify at the trial, however, the witness denies that defendant made the alleged admission. At this point the prosecution would seek to offer the witness' pretrial statement.

Prior to the adoption of Rule 607, the pretrial statement could not be admitted unless the prosecution could convince the court that it was both surprised and affirmatively damaged by the witness' in-court testimony.[11] If admitted, the statement could only be used to impeach the credibility of the witness.[12] It could not be offered as substantive proof against the defendant without running afoul of the hearsay rule.[13]

The demonstration of surprise and affirmative damage was often difficult.[14] If the government knew prior to trial that the witness recanted the statement, no showing of surprise could be made.[15] Moreover, even if surprise could be satisfactorily proved, mere denial by the witness that defendant had made the statement was considered neutral and not affirmatively damaging.[16] Apparently, the question of damage was viewed not from the

11. *See, e.g.*, United States v. Allsup, 485 F.2d 287, 291 (8th Cir. 1973); United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973); United States v. Scarbrough, 470 F.2d 166, 168 (9th Cir. 1972); United States v. Watson, 450 F.2d 290, 291 (8th Cir. 1971), *cert. denied*, 405 U.S. 993 (1972); Goings v. United States, 377 F.2d 753, 759 (8th Cir. 1967), *appeal after remand*, 393 F.2d 884, *cert. denied*, 393 U.S. 883 (1968); Bushaw v. United States, 353 F.2d 477, 481 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966); Thomas, *The Rule Against Impeaching One's Own Witness: A Reconsideration*, 31 Mo. L. Rev. 364 (1966); Comment, *Impeaching One's Own Witness*, 49 Va. L. Rev. 996 (1963).

12. *See, e.g.*, United States v. Davis, 487 F.2d 112, 123 (5th Cir.), *cert. denied*, 415 U.S. 981 (1973); United States v. Hill, 481 F.2d 929, 932 (5th Cir.), *cert. denied*, 414 U.S. 1115 (1973); United States v. Gregory, 472 F.2d 484, 487 (5th Cir. 1973); United States v. Dobbs, 448 F.2d 1262, 1263 (5th Cir. 1971); United States v. Washabaugh, 442 F.2d 1127, 1130-31 (9th Cir. 1971); United States v. Miles, 413 F.2d 34, 37 (3d Cir. 1969); Cannady v. United States, 351 F.2d 796, 798 (D.C. Cir. 1965).

13. Ladd, *supra* note 8, at 249. If offered substantively, the prior statement would be offered to prove the truth of the matter asserted in the out-of-court statement and hence be hearsay. Common law purists gave no ground on this despite the fact that with the witness present and subject to cross-examination, oath and demeanor observation by the jury, none of the dangers of hearsay were present. If the prior statement is unsworn and not subject to the penalties of perjury, the same result obtains under the Federal Rules of Evidence. *See* Fed. R. Evid. 801(d)(1)(A).

14. *See, e.g.*, United States v. Miles, 413 F.2d 34 (3d Cir. 1969).

15. *See, e.g.*, United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973); Doss v. United States, 431 F.2d 601, 604 (9th Cir. 1970); United States v. Miles, 413 F.2d 34, 38 (3d Cir. 1969); Bushaw v. United States, 353 F.2d 477, 480 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

16. *See, e.g.*, Goings v. United States, 377 F.2d 753 (8th Cir. 1967); Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

standpoint of the disappointment of the prosecution but rather from the perspective of the jury. At this point the jury would be unaware of the importance of the prior statement to the prosecution's case and would have no context within which to assess its impact. If, instead of denying that defendant had made the statement, the witness testified that he or she had not heard defendant's admission and that defendant was out of town at the time the statement was allegedly made, then affirmative damage could be shown.[17]

Overcoming the barriers of surprise and affirmative damage was not, however, the end of the prosecution's problem. Assuming further that the turncoat witness possessed the government's principal evidence against the defendant, admission of the prior inconsistent statement into evidence while limiting its use to impeaching the credibility of that witness could leave the prosecution in the position of having failed to make a prima facie case.[18] Since the prior inconsistent statement was not substantive proof, the jury might disbelieve the witness' in-court denial but, under traditional theory, could not draw the negative inference. That is, disbelief of the turncoat witness was not affirmative evidence of defendant's guilt,[19] and thus, defendant could be entitled to a dismissal at the close of the prosecution's case.

Under the new Federal Rules of Evidence, the requirements of surprise and affirmative damage as prerequisites to impeaching the credibility of the turncoat witness were ostensibly eliminated by Rule 607.[20] However, since Rule 801(d)(1)(A) admits as nonhearsay substantive proof only sworn prior inconsistent statements given at a proceeding under the penalty of perjury, the unsworn or informal inconsistent statement of the witness is still available only to attack the witness' credibility. Although the drafters of the Federal Rules had elected to admit all prior inconsistent statements substantively as nonhearsay, provided the declarant was under oath and available for cross-examination at trial,[21] Congress limited the drafters' proposal to sworn state-

17. C. McCormick, *supra* note 10, at 76 nn. 74 & 75. *See also* United States v. Pacelli, 470 F.2d 67 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973).

18. United States v. DeSisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); United States v. Rainwater, 283 F.2d 386 (8th Cir. 1959); Eisenberg v. United States, 273 F.2d 127 (5th Cir. 1959).

19. *See* note 8 *supra*.

20. United States v. Carter, No. 75-2216 (4th Cir. 1976); Weinstein, *Federal Rules of Evidence—A Judge's View*, 174 N.Y.L.J. 80 (Oct. 23, 1975), at 1, col. 2.

21. Committee on Rules of Practice and Procedure of the Judicial Conference of the

ments made under penalty of perjury.[22]

Admittedly, the coercion inherent in the threat of a prosecution for perjury may motivate some witnesses to be more forthright and thus may add some reliability to a statement rendered under oath. It has been manifest for a very long time, however, that the principal check on the veracity of a witness' testimony is not the oath but rather the opportunity for a searching cross-examination.[23]

While there is a distinction between prior statements given under oath at a proceeding and those uttered informally, the informality of the prior statement ought not render it automatically unrealiable as a matter of law. The question is not whether one sort of statement carries greater indicia of reliability than another but rather whether the circumstances pursuant to which the prior statement was given, coupled with a present availability of the witness for cross-examination, oath and observation, provide sufficient reliability for admissibility of the statement as substantive evidence.[24]

Yet Congress has opted for an all-or-nothing approach in Rule 801(d)(1)(A). The court is not given the discretion to weigh the reliability of the particular informal prior utterance.[25] Its use

---

United States, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 331, 335-36 (1969); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315, 413-16 (1971); RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183, 293, 295-96 (1972).

22. S. REP. No. 93-1277, 93d Cong., 2d Sess. 15 (1974); H.R. REP. No. 93-1597, 93d Cong., 2d Sess. 10 (1974).

23. *See generally* 5 B. JONES, COMMENTARIES ON EVIDENCE, § 2333 (2d ed. 1926); C. MCCORMICK, *supra* note 10, § 19; W. RICHARDSON, EVIDENCE, § 488 (10th ed. 1973); 5 J. WIGMORE, *supra* note 8, §§ 1362, 1365, 1367, 1368.

24. United States v. DeSisto, 329 F.2d 929, 933-34 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

25. The belief that unsworn prior inconsistent statements are less reliable than those rendered under oath and subject to the penalties of perjury is inherent in the Congressional rejection of Rule 801(d)(1)(A) as originally proposed by the Supreme Court. It has been argued that despite the rejection of the draft rule, informal prior inconsistent utterances may nevertheless qualify for substantive use as an exception to the hearsay rule pursuant to Rule 803 (24). *See* Graham, *Examination of a Party's Own Witness*, 54 TEX. L. REV. 917 (1976). This analysis is based on classifying certain matters as nonhearsay in Rule 801 while classifying other matters as exceptions to the hearsay rule in Rule 803. To be sure, this is the fabric of the Rules which Congress enacted. Nevertheless, two items raise a question of the true intent of Congress. First, the distinction between nonhearsay and a hearsay exception breaks down almost at first glance. Admissions are categorized as nonhearsay under Rule 801 despite the fact that they are always offered for their truth, while statements offered only to show state of mind and not for their truth are received

is limited to credibility. This may impel a result quite unforeseen by the Congress inasmuch as when Rules 607 and 801(d)(1)(A) are considered in light of Rule 403, it is arguable that the prosecutor may be blocked from offering the inconsistency entirely despite Rule 607's permission to impeach one's own witness.[26] If this be the case, surprise and damage, presumably removed as a qualification by Rule 607, may not be dead. Indeed, they may remain essential ingredients in the Rule 403 probative value versus prejudice analysis.

Virtually all proffered evidence is subject to the analysis required by Rule 403.[27] Pursuant thereto, evidence, though clearly relevant, may be excluded if the court determines that its probative value is substantially outweighed by the danger of unfair prejudice. Consider, for example, the case of the turncoat witness who has made an unsworn out-of-court statement or even a sworn statement not given under penalty of perjury. When the prosecution offers to impeach by use of the statement, the probative value thereof is limited to the question of the credibility of the witness. No substantive use is permitted and the jury will be so charged. It may choose to disbelieve the testimony of the witness, but it may not draw the inference that defendant actually made an admission and use that admission substantively against defendant. Assuming that the prior inconsistent statement does contain admissions of guilt by defendant or other highly damaging evidence, the defendant may claim that the possible prejudice substantially outweighs the quite limited probative value of the evidence and thus should not be admitted.

The probative value of evidence depends directly upon the

---

as exceptions to the hearsay rule pursuant to Rule 803(3). Second, the very reliability analysis which led Congress to exclude informal utterances from Rule 801 coverage will likely lead a trial judge to reject substantive use of the statement under Rule 803(24).

That much said, however, it must be acknowledged that Congress did enact the catch-all provision in Rule 803(24). Having done so, the declared policy in Rule 801 must be weighed against that other declared policy of Rule 803(24).

26. *See* text accompanying notes 1-9 *supra*.

27. FED. R. EVID. 403 merely codifies the common law powers of the trial judge. *See, e.g.*, Construction, Ltd. v. Brooks-Skinner Bldg. Co., 488 F.2d 427 (3d Cir. 1973); Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973). *See also* Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975) (opinion by Weinstein, J.); Vockie v. General Motors Corp., Chevrolet Div., 66 F.R.D. 57 (E.D. Pa. 1975); 1 WEINSTEIN & BERGER, *supra* note 3, ¶ 403[01]; Schmertz, *Relevancy and its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1 (1974); Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 1 (1956); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952); 174 N.Y.L.J. 81 (Oct. 24, 1975), at 1, col. 1.

purpose for which the evidence is offered.[28] Evidence offered for the rather limited purpose of impeachment must be viewed differently from evidence offered substantively on an ultimate issue in the case. For instance, where the prosecution wishes to offer a prior conviction of the witness as circumstantial evidence affecting the truth and veracity of his present testimony,[29] Rule 609(a)(1)[30] grants the court the discretion to reject such evidence *unless* its probative value outweighs its prejudicial effect. Rule 609(a) thus differs from the general principle embodied in Rule 403 which excludes the evidence *only* if the possible prejudice substantially outweighs its probative value.

Where the evidence is relevant only to the credibility of the witness, such factors as harassment or undue embarrassment,[31] confusion of the issues,[32] misleading the jury[33] and encouragement of defendant to testify and give relevant evidence[34] must be considered in ruling on admissibility. Where, however, evidence is offered substantively, its relevance goes not merely to the general credibility of the defendant but to an ultimate issue of the prosecution's case. Although such evidence is subject to the probative value versus prejudice test of Rule 403, the courts have generally admitted evidence of this type under criteria quite different from those noted in connection with credibility. On this issue there will be greater focus on the probative value of the evidence in proving the government's case. Thus, where a prior inconsistent statement which qualifies under 801(d)(1)(A) for substantive treatment is offered, in the context of this discussion, neither confu-

28. *See generally* C. McCormick, *supra* note 10, § 185; 1 J. Wigmore, Evidence §§ 24-29(a) (3d ed. 1940).

29. *See, e.g.*, United States v. Gloria, 494 F.2d 477 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974); United States v. Rodriguez-Hernandez, 493 F.2d 168 (5th Cir. 1974); United States v. Villegas, 487 F.2d 882 (9th Cir. 1973); United States v. White, 427 F.2d 634 (D.C. Cir. 1970); United States v. Evans, 398 F.2d 159 (3d Cir. 1968).

30. Fed. R. Evid. 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

31. *See* Fed. R. Evid. 611(a)(3). *See also* Alford v. United States, 282 U.S. 687 (1931).

32. *See, e.g.*, Shepard v. United States, 290 U.S. 96 (1933).

33. *See, e.g.*, Construction, Ltd. v. Brooks-Skinner Bldg. Co., 488 F.2d 427 (3d Cir. 1973).

34. *See, e.g.*, Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

sion nor misleading of the jury can be a serious issue. Absence of surprise will not bar the statement.[35] Nor must the government show affirmative damage to its case.[36] Instead, the inherent relevance of the evidence rendered under circumstances ruled reliable by Congress will mandate the admissibility of the evidence. A showing that prejudice substantially outweighs probative value will be difficult to make.

The situation, therefore, is similar to the case where evidence of a prior conviction or bad act offered to impeach will be refused whereas the identical evidence offered substantively to show intent,[37] motive,[38] plan,[39] knowledge,[40] identity[41] and the like will be received.[42] The evidence offered substantively may have major importance in proving the government's case. It will be highly probative of defendant's guilt and will be admitted despite the high degree of prejudice inherent in the use of the statement. If, however, the evidence were offered merely to impeach the credibility of the witness, the admittedly high degree of prejudice might substantially outweigh its probative value and thus bar its admissibility.

Under the common law, the surprise and affirmative damage tests were formulated as a deterrent to prosecutorial violation of both the vouching and hearsay rules.[43] Congress has insisted on maintaining the hearsay bar to the substantive use of informal prior inconsistent statements. Given that policy declaration by Congress, where the government has advance knowledge that its witness has recanted, it is absurd to allow it to create confusion and prejudice against itself by (a) putting the witness on the stand and (b) then claiming that the confusion so created man-

35. *See, e.g.*, United States v. Jordano, 521 F.2d 695 (2d Cir. 1975). *See also* Weinstein, *supra* note 20.

36. United States v. Carter, No. 75-2216 (4th Cir. 1976).

37. United States v. Hasley, 465 F.2d 968 (9th Cir. 1972); FED. R. EVID. 404(b).

38. United States v. Johns, 466 F.2d 1364 (5th Cir. 1972); FED. R. EVID. 404(b).

39. United States v. Martinez, 466 F.2d 679 (5th Cir. 1972); FED. R. EVID. 404(b).

40. Hernandez v. United States, 370 F.2d 171 (9th Cir. 1966); FED. R. EVID. 404(b).

41. Robinson v. United States, 459 F.2d 847 (D.C. Cir. 1972); FED. R. EVID. 404(b).

42. Nor is admissibility limited to these stated issues. Any demonstrably relevant issue will do. *See, e.g.*, People v. Jackson, 39 N.Y.2d 64, 346 N.E.2d 537, 382 N.Y.S.2d 736 (1976); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

43. *See generally* Ladd, *supra* note 8, at 250; Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69 (1936); Thomas, *The Rule Against Impeaching One's Own Witness: A Reconsideration*, 31 MO. L. REV. 364 (1966); Comment, *Impeaching One's Own Witness*, 49 VA. L. REV. 996 (1963).

dates that it be permitted to impeach the witness by introducing an out-of-court statement which is highly prejudicial and which cannot be used as substantive evidence. Here the prejudice to the defendant seems to outweigh the probative value of the evidence. It is submitted that barring a Congressional amendment, part of the probative value-prejudice analysis with respect to the credibility of the witness should include the questions of surprise and affirmative damage.

To ignore the traditional analysis simply because Congress has enacted Rule 607 is unwarranted. Clearly, the prosecutor with knowledge of the witness' intent to repudiate the earlier statement could opt not to call the witness. The purpose in calling the witness to the stand is not to impeach his credibility but rather to have the jury hear the prior inconsistent statement and use it substantively.[44] The prosecutor is fully aware that it is impossible for the jury to follow an instruction not to use the statement substantively.

The logical impossibility of the situation is seen at the point where the jury believes that the out-of-court statement is true and the present testimony false. It then becomes impossible for the jury to believe the out-of-court statement implicating the defendant and yet give it no weight on the question of the defendant's substantive guilt or innocence.[45] To be sure, the jury could believe that defendant made the admission but doubt the admission's truthfulness. Even that conclusion, however, would involve use of the statement by the jury to determine defendant's guilt or innocence rather than the credibility of the impeached witness. No more glaring case of confusing and misleading the jury can be imagined.[46] In making the determination with regard to jury confusion, the fact that the government has neither been surprised nor damaged by the inconsistency will be key to a determination of the issue.

The root cause of this dilemma is the insistence on maintaining the common law rule that prior inconsistent statements of this type are hearsay when offered substantively. Hearsay is a rule of reliability and not one of absolute exclusion.[47] Reliability

44. *See, e.g.*, United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975); United States v. Dunmore, 446 F.2d 1214, 1221 (8th Cir. 1971).

45. Asaro v. Parisi, 297 F.2d 859, 864 (5th Cir. 1962), *cert. denied*, 370 U.S. 904 (1963).

46. United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975).

47. For a general discussion of the hearsay rule see 3 B. JONES, *supra* note 23, §§ 1075-93; C. MCCORMICK, *supra* note 10, §§ 244-53; W. RICHARDSON, *supra* note 23, §§ 200-08; J.

may be provided by the circumstances of trustworthiness under which the statement was made and the availability of the declarant for full cross-examination.

By characterizing formal prior inconsistent statements as nonhearsay, Congress has determined that these are per se reliable. Limiting the use of other inconsistent statements to impeach credibility is a legislative judgment that statements of this type contain hearsay dangers not present in the situation where there is a penalty of perjury. It is not a judgment that the statement is per se unreliable, for that ought to result in complete exclusion. Instead, it is a determination by Congressional fiat of relative degrees of reliability—a determination which, in other situations, is left to the discretion of the trial judge.[48] It seems apparent that there is an abundance of cases in which there may be greater reliability in the unsworn rather than the sworn statement. Where cross-examination is available, the determination of reliability seems an appropriate one for the discretion of the trial court.

The refusal of Congress to adopt the drafters' proposal, which would have permitted substantive use of all prior inconsistent statements where the opportunity for in-court cross-examination is available, was motivated by a number of expressed fears. These included the danger that pressure would be increased to secure more pretrial statements,[49] that untrue statements would be obtained for use at trial by oppressive insurance adjusters,[50] that trials would be cluttered by prior statements and that trials would proceed by the use of carefully written statements drafted in lawyers' offices.[51]

It seems certain that the trial courts have ample weapons at their disposal to deal with each of the fears expressed by the

---

WIGMORE, *supra* note 28, §§ 1360-65; Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741 (1961); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

48. For example, FED. R. EVID. 104 states that preliminary questions of admissibility of evidence are to be determined by the court, and FED. R. EVID. 803 (24) and FED. R. EVID. 804(b)(5) allow, *inter alia*, for the admission of certain hearsay statements where the court determines that "circumstantial guarantees of trustworthiness" are present. *See* 4 WEINSTEIN & BERGER, *supra* note 3, ¶ 800[03].

49. Dow, *KLM v. Tuller: A New Approach to Admissibility of Prior Statements of a Witness*, 41 NEB. L. REV. 598, 607 (1962).

50. Report, New Jersey Supreme Court, Comm. on Evidence 135 (1963).

51. 4 Calif. L. Rev'n Comm'n, Reports, Recommendations and Studies, Tentative Recommendation Relating to the Uniform Rules of Evidence—Hearsay Evidence 307, 313 (1962).

opponents of the Advisory Committee's recommendation. Given modern discovery techniques and the substantial pretrial process, it is inconceivable that lawyers and their agents will be taking a greater number of pretrial statements of witnesses than they do presently. The reality of pretrial discovery and other proceedings virtually mandates that statements be taken from all possible witnesses in advance of trial. The wide use of pretrial depositions, interrogatories, notices to admit, verification and authentication of documents at pretrial conferences, for example, leave counsel no room to ignore witnesses' statements.[52] Moreover, since pretrial statements may be used to impeach the credibility of the witness at trial, the wise practitioner memorializes all possible pretrial statements. Permission to use such statements substantively cannot expand the taking of pretrial statements inasmuch as all possible statements are taken anyway.

Similarly, permitting substantive use of all prior inconsistent statements where the declarant is available for cross-examination provides no greater motivation for the use of fraudulent statements than now exists. If an attorney is prepared to perpetrate fraud or to suborn perjury by use of a prior statement to impeach credibility, something that can be done now, the same attorney would be prepared to perpetrate a fraud to obtain substantive evidence. There is no perfect check on the use of perjured or fraudulent evidence. Cross-examination is our best tool to uncover such unpleasantries. Substantive use of the prior statement is founded upon the availability of cross-examination of the declarant. It is cross-examination at trial which supplies the reliability check, not the purported formality of the pretrial deposition statement.

The fear that the trial will become cluttered with pretrial inconsistent statements is unrealistic. If the prior statement is consistent with the trial testimony, its admissibility is quite limited by Rule 801(d)(1)(B).[53] If it is inconsistent, it will be used

52. These discovery techniques, pioneered in the Federal Rules of Civil Procedure, have now been given counterparts in the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 15, 16, & 17.

53. FED. R. EVID. 801 provides, in relevant part:

The following definitions apply under this article:

. . . .

(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,

precisely as it is presently used; only the effect will be changed. The witness will be confronted with his prior inconsistency as he is now. The jury will, however, be permitted broader use of the prior statements thus obviating the problems now faced in the rule against negative inferences—a rule which is impossible for the jury to follow.

The final expressed danger is that counsel will carefully draft the witness' statement in the quiet of his office and offer the statement as the witness' direct testimony. With the exception of cases involving expert witnesses, the fear is seemingly overstated. Preparation of witnesses in counsel's office is a widespread, necessary and proper practice. Lawyers generally prefer to have the jury view the demeanor of their witnesses during direct testimony delivered spontaneously at trial. Where expert witnesses are involved, however, it may be preferable to have their direct testimony predrafted.[54] In either case, live cross-examination should overcome all of the objections raised.

The prior inconsistent statement of the turncoat witness is likely to be part of the most relevant evidence in the prosecution's case. If on the basis of a Rule 403 analysis the court is persuaded that the jury ought to hear the evidence, the prior statement should be admitted without the confusing, cumbersome and hopeless posturing involved in limiting the use to which the jury may put the evidence. If the jury should hear it at all, it should hear it substantively.

---

and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

54. For a discussion of this subject see Ordover, *The Use of Written Direct Testimony in Jury Trials: A Proposal*, 2 HOFSTRA L. REV. 67 (1974).