VIRGINIA STATE CRIME COMMISSION

2017 Annual Report:

Admissibility of Prior Inconsistent Statements

Admissibility of Prior Inconsistent Statements

Executive Summary

During the Regular Session of the 2017 General Assembly, Senator Janet D. Howell introduced Senate Bill 1445 that proposed amending the rules of evidence in Virginia to permit the admission of prior inconsistent statements of a non-party witness as substantive evidence under certain circumstances in criminal cases.[1] Currently, such statements are only admissible to impeach the credibility of the witness.[2] The Crime Commission examined this potential amendment to the rules of evidence and ultimately endorsed Senate Bill 1445 as introduced.

Staff found that Virginia's rules of evidence could be amended to allow for the admission of prior inconsistent statements of a non-party witness as substantive evidence in criminal cases, provided that the witness who made the prior statement testifies at the trial or hearing and is subject to cross-examination. Subject to those conditions, no legal impediments exist to amending Virginia law to allow for the admission of prior inconsistent statements of non-party witnesses as substantive evidence. Senate Bill 1445 satisfies the Confrontation Clause of the U.S. Constitution by requiring that the witness who made the prior statement be present at trial and subject to cross-examination.

In a review of the rules governing the admissibility of prior inconsistent statements of non-party witnesses in other jurisdictions, staff found that 47 states, the District of Columbia, and the Federal Rules of Evidence allow for the admission of such statements as substantive evidence in some manner. Only three states, New York, North Carolina, and Virginia, limit the use of prior inconsistent statements solely to impeaching the credibility of the non-party witness.

Crime Commission members reviewed study findings at the December meeting and were presented with two policy options to consider - amend the exisiting law or maintain the status quo. By a majority vote, members endorsed SB 1445 to amend existing law to allow for the admission of prior inconsistent statements of non-party witnesses as substantive evidence in criminal cases.

Legislation was introduced by Senator Janet D. Howell (Senate Bill 135) and Delegate Robert B. Bell (House Bill 841) during the Regular Session of the 2018 General Assembly.[3] Senate Bill 135 was passed by indefinitely in the Senate Courts of Justice Committee. House Bill 841 was left in the House Courts of Justice Committee.

Background and Methodology

During a criminal trial, a non-party witness may recant or deny a statement they made prior to trial.[4] Under current Virginia law, a prior statement by a non-party witness that is inconsistent with the witness's testimony at a hearing or trial is admissible only for impeachment of the witness's credibility.[5] Any inconsistencies between the witness's prior statements and statements at trial are matters to be taken into consideration by the trier of fact when weighing and evaluating the credibility of the witness's in-court testimony, but are inadmissible to prove the truth of the matter previously asserted.[6]

During the Regular Session of the 2017 General Assembly, Senator Janet D. Howell introduced Senate Bill 1445.[7] This bill proposed amending the rules of evidence in Virginia by adding a new section to the Code of Virginia (§ 19.2-268.4), which would have allowed evidence of a prior statement of a non-party witness to be admitted as substantive evidence in a criminal case. Admission of the prior inconsistent statement as substantive evidence under this bill required the following: (i) the prior statement must be inconsistent with the witness's testimony at a hearing or trial, (ii) the witness must be subject to cross-examination regarding the statement, and (iii) the prior statement must have been:

- Made by the witness under oath at a trial, hearing, or other proceeding;
- Written or signed by the witness;
- Captured using an audio recorder, video recorder, or some other similar means; or,
- Acknowledged under oath by the witness.

The Senate Courts of Justice Committee referred Senate Bill 1445 to the Crime Commission. The Executive Committee of the Crime Commission authorized a review of the subject matter of the bill. In conducting this study, Crime Commission staff reviewed the rules and case law governing the admissibility of prior inconsistent statements of non-party witnesses in all 50 states, the District of Columbia, and the federal courts.

Staff also consulted with the Virginia Association of Commonwealth's Attorneys, the Indigent Defense Commission, the Virginia Victim Assistance Network, and the Virginia Sexual and Domestic Violence Action Alliance ("Action Alliance"). Additionally, staff conferred with the State's Attorney's Office for the County of DuPage, Illinois, because Senate Bill 1445 was modeled after the Illinois rule. Finally, data regarding charges and convictions for the offenses of perjury and false statements to law enforcement officials was requested from the Virginia Criminal Sentencing Commission.

This study focused on the rules governing the admissibility of prior inconsistent statements by non-party witnesses. The prior statements of a witness who is a party to the proceeding, i.e. the criminal defendant, are currently admissible in Virginia as substantive evidence.[8] The study did not include an examination of other considerations, such as the rules of discovery in other jurisdictions or whether any of the jurisdictions followed the single witness doctrine found in Virginia law.[9] It should further be noted that the Code of Virginia was recently amended to permit the admission of prior statements as substantive evidence at criminal hearings and trials for specific offenses when the victim of the crime is under the age of thirteen and certain conditions are met.[10]

Rules Governing the Admissibility of Prior Inconsistent Statements

Staff conducted a review of the rules governing the admissibility of prior inconsistent statements of non-party witnesses for all 50 states, the District of Columbia, and the federal government. Two competing rules exist regarding the admissibility of prior inconsistent statements of non-party witnesses: the common law rule[11] and the modern rule.[12] New York,[13] North Carolina,[14] and Virginia[15] follow the common law rule. Under this rule, prior inconsistent statements of a non-party witness are inadmissible hearsay if offered to prove the truth of the matter asserted in the statement.[16] The prior statement may be admitted to impeach the credibility of the witness, but the trier of fact cannot consider the prior statement as substantive evidence.[17] Various rationales exist for deeming these prior out-of-court statements too unreliable to be admitted as substantive evidence, including the following: (i) the trier of fact was unable to observe the demeanor of the witness at the time the statement was made, (ii) the trier of fact could not evaluate the circumstances under which the statement was made, (iii) the witness was not under oath at the time of the statement, and (iv) the witness was not available to be cross-examined at the time of the statement.[18]

Variations of the modern rule are observed in 47 states, the District of Columbia, and the Federal Rules of Evidence. The degree to which prior inconsistent statements of non-party witnesses are admissible in these jurisdictions varies based upon the circumstances under which the statement was made. Under this rule, prior inconsistent statements of non-party witnesses are admissible as substantive evidence when the declarant testifies, is subject to cross-examination, and other circumstances prescribed by the jurisdiction are satisfied.[19] Numerous reasons have been cited for the adoption of the modern rule, including the following: (i) the prior statement was made closer in time to the event in question, when "memories are fresher and when there is less likelihood the statement is the product of corruption, false suggestion, intimidation or appeals to sympathy,"[20] (ii) the witness must testify and during cross-examination can repudiate or explain any variances between his prior statement and his testimony at trial, (iii) the trier

of fact has the opportunity to observe the witness's demeanor and explanation for any discrepancies between his prior statements and his testimony when determining the credibility of that witness, (iv) the common law rule requires the court to give confusing instructions to the jury, and (v) the oath sworn by the witness is not as strong of a guarantee of trustworthiness as it has been in the past.[21]

Admissibility of Prior Inconsistent Statements under the Federal Rule of Evidence

Rule 801 of the Federal Rules of Evidence was enacted in 1975.[22] Under this rule, the prior statement of a witness is not hearsay if it "is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."[23] The District of Columbia[24] and the following 23 states have adopted a rule similar to this Federal Rule: Alabama,[25] Arkansas,[26] Florida,[27] Idaho,[28] Indiana,[29] Iowa,[30] Maine,[31] Michigan,[32] Minnesota,[33] Mississippi,[34] Nebraska,[35] New Hampshire,[36] New Mexico,[37] North Dakota,[38] Ohio,[39] Oklahoma,[40] Oregon,[41] South Dakota,[42] Texas,[43] Vermont,[44] Washington,[45] West Virginia,[46] and Wyoming.[47]

Admissibility of Prior Inconsistent Statements in Addition to the Federal Rule

Nine states have expanded the number of occasions when prior inconsistent statements of non-party witnesses are admissible as substantive evidence beyond the criteria set forth in Federal Rule. Such occasions include when the prior statement was made under the following circumstances:

(i) written by the witness;
(ii) written on a form signed by the witness;
(iii) sworn to in an affidavit under penalty of perjury;
(iv) audio recorded;
(v) video recorded;
(vi) recorded using some other reliable medium; or,
(vii) acknowledged by the witness in his testimony.

Of these nine states, six observe the circumstances set forth in the Federal Rule and also provide for additional conditions under which the prior statements of a non-party witness are admissible. Those six states include the following: Hawaii,[48] Illinois,[49] Maryland,[50] Massachusetts,[51] New Jersey,[52] and Pennsylvania.[53] The remaining three states have enacted unique rule structures, including the following:

- Connecticut: the prior statement must have been (i) in writing or recorded by audio, video or some other reliable medium, (ii) authenticated as that of the witness, and (iii) the witness has personal knowledge of the contents of the statement.[54]
- Louisiana: in order for the prior statement to be admissible, additional evidence must exist to corroborate the matter asserted in the prior statement.[55]
- Tennessee: the prior statement must have been given under oath, in writing, or audio or video recorded; and, before admitting the statement, the court must conduct a hearing outside of the presence of the jury and find by a preponderance of the evidence that the statement was made under "circumstances indicating trustworthiness."[56]

Broad Admissibility of Prior Inconsistent Statements

Fifteen states have adopted a broad rule allowing for the admissibility of any prior inconsistent statement of a non-party witness as substantive evidence regardless of the circumstances under which the statement was made. For example, the rule in Alaska provides that "a statement is not hearsay if the declarant testifies at the trial or hearing and the statement is inconsistent with the declarant's testimony."[57] The states which have adopted this form of the rule include the following: Alaska,[58] Arizona,[59] California,[60] Colorado,[61] Delaware,[62] Georgia,[63] Kansas,[64] Kentucky,[65] Missouri,[66] Montana,[67] Nevada,[68] Rhode Island,[69] South Carolina,[70] Utah,[71] and Wisconsin.[72]

Policy and Implementation Questions

Various questions were raised in regard to amending Virginia's rules of evidence to allow for the admission of the prior inconsistent statements of non-party witnesses as substantive evidence in a criminal case.[73] Those questions included the following:

- Does the admission of a prior inconsistent statement of a non-party witness as substantive evidence violate the Confrontation Clause of the U.S. Constitution?
- What qualifies as a "prior inconsistent statement?"
- How would the admission of prior inconsistent statements of non-party witnesses impact criminal defendants and victims of crime?

Does the admission of a prior inconsistent statement of a non-party witness as substantive evidence violate the Confrontation Clause of the U.S. Constitution?[74]

Senate Bill 1445 satisfies the Confrontation Clause because it requires that a non-party witness *testify* at the hearing or trial and be subject to *cross-examination* in order for their prior inconsistent statement to be admitted as substantive evidence. All of the jurisdictions which have adopted a rule allowing for the admission of a prior inconsistent statement made by a non-party witness as substantive evidence have imposed these requirements.

In Crawford v. Washington, 541 U.S. 36 (2004), the U.S. Supreme Court addressed the introduction of a prior out-of-court statement in a criminal trial where the defendant was not afforded an opportunity to cross-examine the person who made the statement. The Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[75] Additionally, the Court noted that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[76] Furthermore, in California v. Green, 399 U.S. 149 (1970), the U.S. Supreme Court vacated a ruling by the California Supreme Court which held that the admission of prior inconsistent statements as substantive evidence at a trial violated the Confrontation Clause.

What qualifies as a "prior inconsistent statement"?

A prior inconsistent statement must be material and must in some way contradict a statement made by a witness prior to their testimony at a trial or hearing. Inconsistent statements can include direct contradictions, evasive answers, changes in position, silence, claims of memory loss, or an inability to recall a previous statement.

In order for a statement to qualify as a prior inconsistent statement, it "must in fact be inconsistent with or contradictory to the present testimony."[77] "The test of whether a prior statement is sufficiently inconsistent to permit its utilization is that the statement have a reasonable tendency to discredit the direct testimony on a material matter."[78] Whether a statement is material is within the discretion of the trial court.[79] A prior statement does not need to directly contradict

a witness's testimony in order to be considered "inconsistent."[80] Inconsistent statements can include "evasive answers, silence, or changes in position."[81]

Under Virginia law, if a witness testifies that they do not recall making a prior statement, a sufficient foundation has been laid for impeachment and counsel may cross-examine the witness regarding the inconsistency.[82] Under Illinois law, a claim of memory loss regarding a prior out-of-court statement does not preclude its admission as substantive evidence.[83] The Utah rule specifically provides that a prior statement is admissible as substantive evidence if the "declarant denies having made the statement or has forgotten."[84]

How would the admission of prior inconsistent statements of non-party witnesses in criminal cases impact criminal defendants and victims of crime?

Impact to Criminal Defendants

Staff was unable to determine the impact on criminal defendants if Senate Bill 1445 had become law. It is important to note that if the rules of evidence were amended as proposed, both the Commonwealth and the defendant would be permitted to introduce prior inconsistent statements of non-party witnesses as substantive evidence.

A common question raised was whether amending the rules of evidence as proposed by Senate Bill 1445 would result in greater advantages or disadvantages to defendants due to varying discovery practices throughout the Commonwealth. The answer to this question falls within the broader, unresolved discussion of criminal discovery reform which is currently ongoing in the Commonwealth.[85] Advocates of such reform in Virginia contend that the current rules governing criminal discovery are too restrictive and that these rules, coupled with a lack of investigative resources for defendants, create a "toxic blend of ill prepared defense lawyers and inability to review for prosecutorial mistakes."[86]

Under current Virginia law, the amount of information available to the defendant through the criminal discovery process is very limited. For all jailable misdemeanors and preliminary hearings on felony offenses in the district court, the defendant is entitled to his statements and criminal record.[87] For all felonies or any misdemeanor brought by direct indictment in the Circuit Court, the defendant is entitled to his statements, written scientific reports, and the opportunity to inspect

and copy any documents, tangible items, buildings, or places, that may be material in preparing his defense.[88] The Circuit Court rule specifically provides that statements made by witnesses or potential witnesses of the Commonwealth are not subject to discovery.[89]

In practice, the amount of information provided during the criminal discovery process varies by locality, with some Commonwealth's Attorneys providing only the information required by law and others providing additional information.[90] Based on these varying discovery practices, defendants in some jurisdictions may be aware of a witness's statements before a trial or hearing, while defendants in other jurisdictions may not learn of the prior statements until the witness testifies at a trial or hearing.[91]

Virginia law currently allows for the admissibility of prior statements as substantive evidence at hearings and trials for specific offenses where the victim of the crime is under the age of thirteen.[92] This statute includes a provision that requires the party offering the statement into evidence to notify the opposing party in writing at least 14 days before the proceeding and to provide or make available copies of the statement.[93] In order to provide greater consistency throughout the Commonwealth in the use of prior inconsistent statements as substantive evidence, a similar notice provision could be included in any legislation amending Virginia's rules of evidence.

Impact to Victims of Crime

Concerns were raised about whether any change to the rules of evidence would result in more prosecutions of victims for these offenses, in essence re-victimizing the victim. No evidence was found to indicate that Senate Bill 1445 would or would not lead to more prosecutions of victims. Crime Commission staff met with various stakeholders regarding the proposed rule change.[94] No one reported that victims of crime are being routinely prosecuted in Virginia for providing inconsistent statements at trial.

Under existing Virginia law, a witness who testifies contrary to a previous statement could potentially be prosecuted for a violation of a number of criminal statutes, including the following:

- Perjury;[95]
- Giving conflicting testimony on separate occasions;[96]
- Obstruction of justice;[97] or,
- Giving false reports to law enforcement officials.[98]

Data on the number of charges and convictions for these offenses between FY15-FY17 was requested from the Virginia Criminal Sentencing Commission. Staff was unable to determine from this data whether any of the persons charged or convicted was the victim of a crime who had provided testimony that was inconsistent with a prior statement.

During the study, the Action Alliance was requested to contact victim advocacy groups in states where the rules of evidence permit the admission of prior inconsistent statements as substantive evidence in an attempt to determine the impact of such rules on victims of crime.[99] The Action Alliance was unable to identify any substantial survivor impacts caused by these rules.[100] Concern was raised that the use of such statements could impact the trauma-informed process for victims; however, this issue could be addressed with training and guidance to prosecutors on trauma-informed interviewing practices and victim dynamics.[101]

Conclusion

Crime Commission members reviewed study findings at the December meeting and were presented with the following two policy options:

Policy Option 1: Amend existing law to allow for the admission of prior inconsistent statements of non-party witnesses as substantive evidence by:

- Endorsing Senate Bill 1445 as introduced; or,
- Allowing for the admission of prior inconsistent statements made under specified circumstances, which could include the following:
  - Under oath at a trial, hearing, deposition, or other proceeding;
  - Grand jury testimony;
  - Written by the witness;
  - Written form signed by the witness;
  - Audio recorded;
  - Video recorded;
  - Recorded by any similar electronic means;
  - Acknowledged under oath at trial by the witness;
  - Comprised of more than a mere confirmation or denial of an allegation by the interrogator (Massachusetts); or,
  - Any statement previously made by the witness, regardless of the circumstance under which the statement was made.

- Requiring advance notice and a copy of the statement to the opposing party before admitting the statement at the trial or hearing.

Policy Option 2: Maintain the status quo. Prior inconsistent statements would remain admissible only for impeaching the credibility of the non-party witness, unless some other exception exists under Virginia law.

By a majority vote, Crime Commission members endorsed Senate Bill 1445 (2017) as provided in Policy Option 1. Legislation for this recommendation was introduced by Senator Janet D. Howell (Senate Bill 135) and Delegate Robert B. Bell (House Bill 841) during the Regular Session of the 2018 General Assembly.[102] Senate Bill 135 was passed by indefinitely in the Senate Courts of Justice Committee. House Bill 841 was left in the House Courts of Justice Committee.

Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

Indigent Defense Commission

State's Attorney's Office for the County of DuPage, Illinois

Virginia Association of Commonwealth's Attorneys

Virginia Criminal Sentencing Commission

Virginia Sexual and Domestic Violence Action Alliance

Virginia Victim Assistance Network

APPENDIX A

Rules of Evidence Governing the Admissibility of Prior Inconsistent Statements of a Non-Party Witness

Jurisdiction	Rule
Alabama	Ala. R. Evid. Rule 801(d)(1)(A)
Alaska	Alaska R. Evid. 801(d)(1)(A)
Arizona	Ariz. R. Evid. R. 801(d)(1)(A)
Arkansas	A.R.E. 801(d)(1)
California	Cal. Evid. Code § 770
Colorado	C.R.E. 801(d)(1)
Connecticut	Conn. Code of Evidence 8-5(1)
Delaware	D.R.E. 801(d)(1)
District of Columbia	D.C. Code § 14-102(b)
Federal Rules of Evidence	Fed. R. Evid. 801(d)(1)(A)
Florida	Fla. Stat. § 90.801(2)(a)
Georgia	O.C.G.A. § 24-8-801(d)(1)(A)
Hawaii	HRS chap. 626, HRS Rule 802.1(1)
Idaho	I.R.E. Rule 801(d)(1)
Illinois	Ill. R. Evid. 801(d)(1)(A)
Indiana	Ind. R. Evid. 801(d)(1)(A)
Iowa	Iowa R. Evid. 5.801(d)(1)(A)
Kansas	K.S.A. § 60-460(a)
Kentucky	KRE Rule 801A(a)(1)
Louisiana	La. C.E. Art. 801(D)(1)(a)
Maine	Me. R. Evid. 801(d)(1)(A)
Maryland	Md. Rule 5-802.1(a)
Massachusetts	ALM G. Evid. § 801(d)(1)(A)
Michigan	MRE 801(d)(1)
Minnesota	Minn. R. Evid. 801(d)(1)
Mississippi	Miss. R. Evid. 801(d)(1)(A)
Missouri	§ 491.074 R.S.Mo.
Montana	Title 16, Ch. 10, Rule 801(d)(1), MCA
Nebraska	R.R.S. Neb. § 27-801(4)(a)
Nevada	Nev. Rev. Stat. Ann. § 51.035(2)(a) Nev. Rev. Stat. Ann. § 51.035(2)(d)
New Hampshire	N.H. Evid. Rule 801(d)(1)(A)

Jurisdiction	Rule
New Jersey	N.J. R. Evid. 803(a)(1)
New Mexico	11-801(D)(1)(a) NMRA
New York	NY CLS CPLR R 4514
North Carolina	N.C. Gen. Stat. § 8C-1, Rule 613 N.C. Gen. Stat. § 8C-1, Rule 801
North Dakota	N.D.R. Ev. Rule 801(d)(1)(A)
Ohio	Ohio Evid. R. 801(D)(1)
Oklahoma	12 Okl. St. § 2801(B)(1)(a)
Oregon	ORS § 40.450 Rule 801(4)(a)(A)
Pennsylvania	Pa.R.E. 803.1(1)
Rhode Island	R.I. R. Evid. Art. VIII, Rule 801(d)(1)
South Carolina	Rule 801(d)(1), SCRE
South Dakota	S.D. Codified Laws §19-19-801(d)(1)(A)
Tennessee	Tenn. R. Evid. Rule 803(26)
Texas	Tex. Evid. R. 801(e)(1)(A)(ii)
Utah	Utah R. Evid. Rule 801(d)(1)(A)
Vermont	V.R.E. Rule 801(d)(1)
Virginia	Va. Sup. Ct. R. 2:801(d)
Washington	Wash. ER 801(d)(1)
West Virginia	W.V.R.E., Rule 801(d)(1)(A)
Wisconsin	Wis. Stat. § 908.01(4)(a)(1)
Wyoming	W.R.E. Rule 801(d)(1)

Source: Virginia State Crime Commission staff analysis.

Endnotes

[1] Va. Sup. Ct. R. 2:803(0). The prior statements of a witness who is a party to the proceeding, i.e. the criminal defendant, are admissible as substantive evidence under current Virginia law.
[2] Va. Sup. Ct. R. 2:801(d).
[3] Both Senate Bill 135 and House Bill 841 were identical to Senate Bill 1445 as introduced in 2017.
[4] Such recantations may be more common in certain types of cases (domestic violence, gang activity, and human trafficking), but can occur in any criminal matter.
[5] Va. Sup. Ct. R. 2:801(d). *See also* Va. Sup. Ct. R. 2:613.
[6] Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 12-3, at 651 (7th ed. 2012).
[7] Delegate C. Todd Gilbert introduced House Bill 935 during the Regular Session of the 2008 General Assembly and House Bill 2363 during the Regular Session of the 2009 General Assembly, both of which were similar to Senate Bill 1445. These bills were left in the House Courts of Justice Committee during each Session.
[8] Va. Sup. Ct. R. 2:803(0).
[9] *See, e.g.*, McCary v. Commonwealth, 36 Va. App. 27, 41, 548 S.E.2d 239, 246 (2001), regarding the single witness doctrine in Virginia.
[10] Va. Code § 19.2-268.3 (2018). Under this provision, prior statements are admissible as substantive evidence if the following are established: (i) the declarant victim is under 13 years old at the time of the trial or hearing, (ii) the victim testifies at trial, or if the victim is declared to be an unavailable witness and evidence exists to corroborate the prior statement, (iii) the court conducts a hearing and finds that there is sufficient indicia of reliability of the statement, and (iv) the defendant is charged with a specified offense enumerated within the statute.
[11] The common law rule may also be referred to as the "orthodox rule."
[12] *See* Appendix A for the rules of evidence governing the admissibility of prior inconsistent statements of non-party witnesses for other jurisdictions.
[13] N.Y. CVP C.P.L.R. R 4514.
[14] N.C. Gen. Stat. § 8C-1, Rule 613; N.C. Gen. Stat. § 8C-1, Rule 801.
[15] Va. Sup. Ct. R. 2:801(d).
[16] *See* Hall v. Commonwealth, 233 Va. 369, 374, 355 S.E.2d 591, 594-95 (1987).
[17] *Id.*
[18] *Id. See also* State v. Whelan, 513 A.2d 86, 90, 200 Conn. 743, 749 (1986).
[19] *See* Gibbons v. State, 248 Ga. 858, 863, 286 S.E.2d 717, 721-22 (1982).
[20] *Id.* at 721, citing 3A Wigmore, Evidence (Chadbourn rev.) § 1018; McCormick, Handbook of the Law of Evidence, 2d ed., § 251; Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 192 *et seq.* (1948).
[21] *Id. See also* State v. Whelan, 513 A.2d 86, 90-91, 200 Conn. 743, 749-51 (1986); Nance v. State, 629 A.2d 633, 640-43, 331 Md. 549, 564-69 (1993).
[22] Pub. L. No. 93-595, § 1, 88 Stat. 1938 (1975).
[23] Fed. R. Evid. 801(d)(1)(A).
[24] D.C. Code § 14-102(b).
[25] Ala. R. Evid. Rule 801(d)(1)(A).
[26] A.R.E. 801(d)(1).
[27] Fla. Stat. § 90.801(2)(a).
[28] I.R.E. Rule 801(d)(1).
[29] Ind. R. Evid. 801(d)(1)(A).
[30] Iowa R. Evid. 5.801(d)(1)(A).

[31] Me. R. Evid. 801(d)(1)(A).
[32] MRE 801(d)(1).
[33] Minn. R. Evid. 801(d)(1).
[34] Miss. R. Evid. 801(d)(1)(A).
[35] R.R.S. Neb. § 27-801(4)(a).
[36] N.H. Evid. Rule 801(d)(1)(A).
[37] 11-801(D)(1)(a) NMRA.
[38] N.D.R. Evid. Rule 801(d)(1)(A).
[39] Ohio Evid. R. 801(D)(1).
[40] 12 Okl. St. § 2801(B)(1)(a).
[41] ORS § 40.450 Rule 801(4)(a)(A).
[42] S.D. Codified Laws §19-19-801(d)(1)(A).
[43] The Texas rule is substantially similar to the Federal Rule; however, Texas specifically precludes the admissibility of a prior statement given at a grand jury proceeding. Tex. Evid. R. 801(e)(1)(A)(ii).
[44] V.R.E. Rule 801(d)(1).
[45] Wash. ER 801(d)(1).
[46] W.V.R.E., Rule 801(d)(1)(A).
[47] W.R.E. Rule 801(d)(1).
[48] HRS chap. 626, HRS Rule 802.1(1).
[49] Ill. R. Evid. 801(d)(1)(A). Senate Bill 1445 was substantially modeled upon this rule.
[50] Md. Rule 5-802.1(a).
[51] ALM G. Evid. § 801(d)(1)(A). The Massachusetts rule further requires that the prior statement be "more than a mere confirmation or denial of an allegation by the interrogator."
[52] N.J. R. Evid. 803(a)(1).
[53] Pa.R.E. 803.1(1).
[54] Conn. Code of Evidence 8-5(1).
[55] La. C.E. Art. 801(D)(1)(a).
[56] Tenn. R. Evid. Rule 803(26)(B)-(C).
[57] Alaska R. Evid. 801(d)(1)(A).
[58] *Id.*
[59] Ariz. R. Evid. R. 801(d)(1)(A).
[60] Cal. Evid. Code § 770.
[61] C.R.E. 801(d)(1).
[62] D.R.E. 801(d)(1).
[63] O.C.G.A. § 24-8-801(d)(1)(A).
[64] K.S.A. § 60-460(a).
[65] KRE Rule 801A(a)(1).
[66] § 491.074 R.S.Mo. The rule in Missouri is exceptionally broad as it provides that a prior inconsistent statement "shall be received as substantive evidence."
[67] Title 16, Ch. 10, Rule 801(d)(1), MCA.
[68] Nev. Rev. Stat. Ann. § 51.035(2)(a); Nev. Rev. Stat. Ann. § 51.035(2)(d).
[69] R.I. R. Evid. Art. VIII, Rule 801(d)(1).
[70] Rule 801(d)(1), SCRE.
[71] Utah R. Evid. Rule 801(d)(1)(A).
[72] Wis. Stat. § 908.01(4)(a)(1).
[73] Because Senate Bill 1445 was substantially modeled upon the rule in Illinois (Ill. R. Evid. 801(d)(1)(A)), this analysis focused primarily on Virginia law, Illinois law, and rulings from the U.S. Supreme Court.

[74] U.S. Const. amend. VI.
[75] Crawford v. Washington, 541 U.S. 36, 68-69 (2004).
[76] *Id.* at footnote 9.
[77] Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 12-3[a], at 652 (7th ed. 2012).
[78] People v. Williams, 147 Ill. 2d 173, 244, 588 N.E.2d 983, 1011 (1991).
[79] *Id.*
[80] People v. Martinez, 348 Ill. App. 3d 521, 532, 810 N.E.2d 199, 210 (2004).
[81] *Id. See also supra* note 77, § 12-3[d], at 658 (7th ed. 2012).
[82] Smith v. Commonwealth, 15 Va. App. 507, 511, 425 S.E.2d 95, 98 (1992).
[83] *See* People v. Hampton, 387 Ill. App. 3d 206, 899 N.E.2d 532 (2008).
[84] Utah R. Evid. Rule 801(d)(1)(A).
[85] On April 4, 2018, the Virginia State Bar Criminal Discovery Reform Task Force presented its proposed amendments to Rules 3A:11 and 3A:12 of the Rules of the Supreme Court of Virginia, which included reciprocal disclosure of witness lists and expert witness information, exchanging witness statements, sharing police reports and witness statements with defense counsel, and subpoenas. *See* Virginia State Bar (2018, January 17). *Progress in Criminal Discovery Reform*. Available at http://www.vsb.org/site/news/item/criminal_discovery_reform. *See also* Virginia State Bar (2018, March 6). *Supreme Court of Virginia Seeks Comments on Criminal Discovery Reform.* Available at http://www.vsb.org/site/news/item/SCV_comments_criminal_discovery. A copy of the proposed amendments to Rules 3A:11 and 3A:12 is available at http://www.vsb.org/docs/prop-rule-3A11.pdf.
[86] Douglas A. Ramseur, *A Call for Justice: Virginia's Need for Criminal Discovery Reform*, 19 Rich. J. L. & Pub. Int. 247, 248-49 (2016).
[87] Va. Sup. Ct. R. 7C:5(c).
[88] Va. Sup. Ct. R. 3A:11(b).
[89] Va. Sup. Ct. R. 3A:11(b)(2). While these statements are not subject to discovery, any exculpatory material in the statements must be disclosed pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Additionally, if a witness testifies and the government is aware of a prior statement made by the witness which is inconsistent with his testimony, the government must disclose that information to the defense pursuant to Giglio v. United States, 405 U.S. 150 (1972).
[90] *See* Jenia I. Turner and Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash & Lee L. Rev. 285 (2016).
[91] Pursuant to Giglio v. United States, 405 U.S. 150 (1972), if a witness testifies and the government is aware of a prior statement made by the witness which is inconsistent with his testimony, the government must disclose that information to the defense.
[92] Va. Sup. Ct. R. 3A:11(b).
[93] *See supra* note 89.
[94] Stakeholders included the Virginia Association of Commonwealth's Attorneys, the Indigent Defense Commission, the Virginia Victim Assistance Network, and the Virginia Sexual and Domestic Violence Action Alliance.
[95] Va. Code § 18.2-434 (2018).
[96] Va. Code § 18.2-435 (2018).
[97] Va. Code § 18.2-460(D) (2018).
[98] Va. Code § 18.2-461 (2018).

[99] Virginia Sexual and Domestic Violence Action Alliance, personal communication, October 17, 2017. The states suggested for examination included Illinois, Louisiana, Missouri, New Mexico, Pennsylvania, and Tennessee.

[100] Virginia Sexual and Domestic Violence Action Alliance, personal communication, November 30, 2017.

[101] *Id.*

[102] Both Senate Bill 135 and House Bill 841 were identical to Senate Bill 1445 as introduced.