

Due Process and the Sufficiency of Prior Inconsistent Statements as Evidence for Criminal Convictions

This comment examines whether prior inconsistent statements, when they are the sole or chief evidence of the prosecution, are of sufficient weight to effect criminal convictions under California and federal due process standards. Analysis of the decisions in this area reveals that the applicable due process standards are ambiguous. Accepting these necessarily vague standards, the comment suggests criteria for determining when prior inconsistent statements are sufficient in and of themselves under the due process clause to support a criminal conviction. These criteria require case-by-case examination of the trustworthiness of the circumstances that surround the statement.

INTRODUCTION

Prior inconsistent statements long have been admissible to impeach the testimony of witnesses at trial.¹ Recent California and federal statutory changes permit prior inconsistent statements to be used substantively as well, i.e., as proof of the matter asserted in the statement.² This liberal use of prior inconsis-

¹ See generally C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 251, at 601 (2d ed. 1972) [hereinafter cited as McCORMICK]; 3A J. WIGMORE, WIGMORE ON EVIDENCE at § 1018, at 996-98 (Chadbourn rev. 1974) [hereinafter cited as 3A WIGMORE].

² The Federal Rules of Evidence permit the substantive use of prior inconsistent statements given under oath:

A statement is not hearsay if—

- (1) 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.

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

tent statements in criminal trials raises important constitutional issues. While the substantive use of prior inconsistent statements does not violate a criminal defendant's constitutional confrontation clause rights,³ criminal convictions based solely or chiefly on such statements may not comport with constitutional due process requirements.⁴

This comment examines whether prior inconsistent statements, when they are the sole or chief evidence of the prosecution, are of sufficient weight to effect criminal convictions under California and federal due process standards. Analysis of the decisions in this area reveals that the applicable due process standards are ambiguous. Accepting these necessarily vague standards, this comment suggests criteria for determining when such statements are sufficient, under the due process clause, to convict. These criteria require case-by-case examination of the trustworthiness of the circumstances surrounding the statement.

I. SUBSTANTIVE USE OF PRIOR INCONSISTENT STATEMENTS

A prior inconsistent statement is one that is at odds with the witness' present testimony at trial.⁵ Historically, prior inconsis-

The California Evidence Code provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing." CAL. EVID. CODE § 1235 (West 1966).

Courts have upheld the constitutionality of these statutory changes. See *California v. Green*, 399 U.S. 149 (1970); *People v. Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971).

³ In *California v. Green*, 399 U.S. 149 (1970), the United States Supreme Court upheld the constitutionality of California Evidence Code § 1235, which permits the substantive use of prior inconsistent statements. The Court held that:

The subsequent opportunity for cross examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing.

Id. at 168.

⁴ In *California v. Green*, 399 U.S. 149 (1970), the Court held that the admission of prior inconsistent statements as substantive evidence was not constitutionally prohibited. It did not, however, address the *sufficiency* of such statements for conviction. For a discussion of this issue, see *California v. Green*, 399 U.S. 149 (1970); notes 30-31 and accompanying text *infra*.

⁵ McCORMICK, *supra* note 1, at § 34, at 67, 3A WIGMORE, *supra* note 1, at § 1017, at 993. See also CAL. EVID. CODE § 1235 Law Revision Commission Comment (West 1966).

tent statements were admissible only to impeach.⁶ Thus, they were admissible only to discredit a witness' trial testimony, never to help convict a defendant of a crime. This historical prohibition against the substantive use of prior inconsistent statements was grounded in their hearsay status:⁷ they are hearsay because at the time the declarant made the statement, he was not under oath, subject to cross-examination, or in the presence of the trier of fact.⁸

The modern trend is to permit the substantive use of prior inconsistent statements, as an exception to the hearsay rule.⁹ This exception clearly rejects the notion that this hearsay is inherently untrustworthy.¹⁰ The United States Supreme Court has

⁶ McCORMICK, *supra* note 1, at § 251, at 601; 3A WIGMORE, *supra* note 1, at § 1018, at 995-96, 998. The Law Revision Commission Comment to California Evidence Code § 1235 describes the former rules of evidence dealing with prior inconsistent statements:

[W]hen a prior statement of a witness that is inconsistent with his testimony at the trial is admitted in evidence, it may not be used as evidence of the truth of the matters stated. Because of the hearsay rule, a witness' prior inconsistent statement may be used only to discredit his testimony given at the trial.

CAL. EVID. CODE § 1235 Law Revision Commission Comment (West 1966).

Most federal courts also admitted prior inconsistent statements only to impeach. See HOUSE COMM. ON THE JUDICIARY, NOTES TO RULE 801(d)(1), H.R. REP. NO. 650, 93d Cong., 1st Sess. 13 (1973), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7087, NOTE TO RULE 801(d)(1) [hereinafter cited as HOUSE REPORT].

⁷ McCORMICK, *supra* note 1, at § 251 at 601.

⁸ *Id.*

⁹ *Id.* at § 251, at 601, 603; 4 J. WEINSTEIN & M. BERGER, FEDERAL RULES OF EVIDENCE, § 801(d)(1)(a)[09], at 801-111, 801-116 (1981) [hereinafter cited as J. WEINSTEIN]; 3A WIGMORE, *supra* note 1, § 1018, at 996. See also *California v. Green*, 399 U.S. 149, 159-61 (1970).

¹⁰ See generally sources cited at note 9 *supra*.

The Law Revision Commission Comment to California Evidence Code § 1235 states the following reasons for permitting the substantive use of prior inconsistent statements:

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent 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 and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and

upheld the substantive use of prior inconsistent statements, rebutting point-by-point the argument that such statements should be excluded from evidence. The Court has stated that "as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under penalty of perjury."¹¹ Therefore, the declarant's out-of-court statement "for all practical purposes regains most of the lost protection" when the witness is present and testifying at trial.¹² The Court has noted that the inability to cross-examine the witness at the time he made the prior statement is not of "crucial significance as long as the defendant is assured a full and effective cross-examina-

can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, [s]ection 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

CAL. EVID. CODE § 1235, Law Revision Commission Comment (West 1966).

The use of prior inconsistent statements for criminal convictions is especially significant in light of the broad meaning California and federal courts give to the word "inconsistent." See, e.g., *People v. Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), where the California Supreme Court held that under normal circumstances, a witness' statement that he "does not remember" his prior statement describing an event is not inconsistent with that prior statement. *Id.* at 988, 479 P.2d at 1002, 92 Cal. Rptr. at 498. However, where the witness is attempting a "deliberate evasion" of the response by taking refuge in an "I don't remember" response, it is equivalent to a denial. *Id.* at 989, 479 P.2d at 1002, 92 Cal. Rptr. at 498. Under these circumstances, the witness' prior statement is admissible. *Id.* at 989, 479 P.2d at 1002-03, 92 Cal. Rptr. at 498-99. This broad definition permits a greater number of convictions based on prior inconsistent statements as the primary evidence. See also *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460, 463 (3d Cir. 1977), for a discussion of a similar definition given by federal courts to the term "inconsistent."

¹¹ *California v. Green*, 399 U.S. 149, 158 (1970).

¹² *Id.* The Court also stated that "[i]f the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness." *Id.* The Court explained that the "very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy—an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth." *Id.* at 159.

tion at trial."¹³ While conceding that some demeanor evidence is lost by admitting such statements,¹⁴ the Court has held that enough evidence is retained to prevent a violation of the defendant's confrontation clause rights.¹⁵ This is because "[t]he witness who now relates a different story necessarily assumes a position as to the value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement."¹⁶

In 1965, California amended its evidence code to permit the substantive use of prior inconsistent statements.¹⁷ This statute allows into evidence prior inconsistent statements that are unsworn, as well as sworn statements made at a hearing or trial.¹⁸ California decided to permit the substantive use of this evidence for largely the same reasons as those stated by the Supreme Court.¹⁹ In addition, the California legislature determined that such evidence provides "desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."²⁰

¹³ *Id.* at 159. The "main danger" in permitting subsequent cross-examination is that over time, "the witness' '[f]alse testimony is apt to harden and become unyielding to the blows of truth.'" *Id.* However, this danger "disappears when the witness has changed his testimony so that, far from 'hardening,' his prior statement has softened to the point where he now repudiates it." *Id.* "This difference, . . . may actually enhance the defendant's ability to attack the prior statement. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event." *Id.* at 160.

¹⁴ *Id.* at 160, 161.

¹⁵ *Id.* at 160.

¹⁶ *Id.* Further, "[t]he jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story." *Id.*

¹⁷ CAL. EVID. CODE § 1235 (West 1966), set forth in note 1 *supra*.

¹⁸ The California Evidence Code requires only that the prior statement be inconsistent. CAL. EVID. CODE § 1235 (West 1966), set forth in note 1 *supra*. In contrast, the Federal Rules of Evidence require the prior statement be both inconsistent and made under oath at a "trial, hearing, or other proceeding, or in a deposition." FED. R. EVID. 801(d)(1)(a), set forth in note 1 *supra*. California courts, however, often distinguish between the value of sworn over unsworn statements. See notes 64-74 and accompanying text *infra*.

¹⁹ See CAL. EVID. CODE § 1235, Law Revision Commission Comment (West 1966), set forth in note 10 *supra*.

²⁰ *Id.*

The revised Federal Rules of Evidence also permit prior inconsistent statements to be used substantively.²¹ However, unlike the California statute, the federal rules do not permit the substantive use of unsworn prior inconsistent statements. Under the federal rules, a declarant must have made the prior statement "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."²² Congress limited the substantive use of prior inconsistent statements for two reasons. First, a statement made in a judicial proceeding precludes any dispute as to whether the statement was made.²³ Second, an oath given in the context of a formal proceeding provides "firm additional assurances of the reliability of the prior statements."²⁴

²¹ FED. R. EVID. 801(d)(1)(a), set forth in note 1 *supra*.

²² *Id.* Though the statement must be sworn, it need not be made in court. This provision permits the substantive use of a prior inconsistent statement made under oath "at a trial, hearing, or other proceeding." *Id.* (emphasis added). See *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976), for an example of an "other proceeding."

²³ Opposing the substantive use of unsworn prior inconsistent statements, the House Committee on the Judiciary stated:

The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, . . . provide[s] firm additional assurances of the reliability of the prior statement.

HOUSE REPORT, *supra* note 6, at 13, 1974 U.S. CODE CONG. & AD. NEWS at 7087.

Additionally, the original House proposal would have required the prior statement to be subject to cross-examination at the time it was made. A Senate/House compromise deleted such a requirement from Rule 801(d)(1)(a). See FED. R. EVID. 801(d)(1)(a), set forth in note 1 *supra*; HOUSE CONFERENCE COMM. ON THE JUDICIARY, NOTES TO RULE 801(d)(1)(a), H.R. REP. NO. 1597, 93d Cong., 2d Sess. 10 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7098, 7104. See also *United States v. Castro-Ayon*, 537 F.2d 1055, 1057 (9th Cir. 1976) for a discussion of the compromise.

²⁴ See note 23 *supra*. The Senate Committee on the Judiciary proposed rules that would have permitted both sworn and unsworn prior statements to be admitted as substantive evidence. In response to the House committee's objection to the substantive use of unsworn statements, the Senate committee stated:

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one

The liberal admissibility of prior inconsistent statements raises significant due process issues where a conviction is based solely or chiefly on such statements.²⁵ Clearly, the evidence supporting a criminal conviction must meet a minimum level of sufficiency, to ensure the defendant due process of law. Both federal and California due process standards require evidence to be sufficient to convince "any rational trier of fact" of the defendant's guilt, "beyond a reasonable doubt."²⁶ It is difficult, how-

(former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what he said before, they are still deciding from what they see and hear in court. [Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925)].

SENATE COMM. ON THE JUDICIARY, NOTES TO RULE 801(d)(1)(a), S. REP. NO. 1277, 93d Cong., 2d Sess. 16 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7062, NOTE TO RULE (d)(1)(a) [hereinafter cited as SENATE REPORT].

The Supreme Court Advisory Committee would also have permitted unsworn prior inconsistent statements to be used substantively.

The logic of [the reasoning for prohibiting the substantive use of unsworn prior inconsistent statements] is troublesome. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges v. Wixon*, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath.

28 U.S.C. § 801(d)(1)(a) NOTES OF S. CT. ADVIS. COMM. ON PROPOSED RULES (1977) [hereinafter cited as S. CT. ADVIS. COMM. NOTES].

²⁵ See notes 30-31 and accompanying text *infra*. The most recent and important California case on this issue is *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981), where the California Supreme Court upheld a conviction based on sworn prior inconsistent statements.

²⁶ *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); *People v. Johnson*, 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980).

Until recently, the United States Supreme Court applied a "no evidence" standard in reviewing criminal convictions. A conviction was sustained unless "entirely lacking" in evidence against the defendant. *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). This standard permitted a "mere modicum" of evidence to sustain a conviction. See *Jacobellis v. Ohio*, 378 U.S. 184, 202 (1964)

ever, to refine this broad standard to determine whether a conviction based on prior inconsistent statements meets this minimal due process requirement.²⁷ Indeed, Wigmore states that any effort to define the standard "beyond a reasonable doubt" serves only to confuse, not to illuminate, the meaning of the term.²⁸ As Wigmore says, it is impossible to define a "mode of measurement for the intensity of human belief."²⁹

(Warren, C.J., dissenting). The *Thompson* "no evidence" standard conflicted with the higher test adopted by the Court in *In re Winship*, 397 U.S. 358 (1970). *Winship* "explicitly" held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt." *Id.* at 364.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held the *Thompson* "no evidence" test to be an inadequate protection of the right of criminal defendants to be convicted by the *Winship* "reasonable doubt" standard. *Id.* at 320. In *Jackson*, the Court stated that the evidence is insufficient for a criminal conviction if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

California applies a "substantial evidence" test for determining the sufficiency of evidence for criminal convictions. *People v. Johnson*, 26 Cal. 3d at 576, 606 P.2d at 750, 162 Cal. Rptr. at 443; *People v. Bassett*, 69 Cal. 2d 122, 139, 443 P.2d 777, 778, 70 Cal. Rptr. 193, 204 (1968). The California Supreme Court states that this test is "identical" to the standard defined by the United States Supreme Court in *Jackson*. *People v. Johnson*, 26 Cal. 3d at 576, 606 P.2d at 750, 162 Cal. Rptr. at 443.

²⁷ 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2497, at 405-06, 408-09 (Chadbourn rev. 1974). McCormick agrees; "[T]he explanations [of the meaning of the term "reasonable doubt"] often need more explanation than the term explained." MCCORMICK, *supra* note 1 at § 341, at 800.

²⁸ 9 J. WIGMORE, *supra* note 27, at § 2497, at 406, 408-09.

Nevertheless, in *People v. Bassett*, 69 Cal. 2d 122, 443 P.2d 777, 70 Cal. Rptr. 193 (1968), the California Supreme Court defined "substantial evidence," discussed in note 26 *supra*, as evidence of "ponderable legal significance." 69 Cal. 2d at 139, 443 P.2d at 787, 70 Cal. Rptr. at 203. Evidence for conviction must be "reasonable in nature, credible, and of solid value." *Id.* The obvious problem is determining what evidence is of "ponderable legal significance," or of "solid value." Certainly, such terms are no more easily defined than the term "reasonable doubt."

²⁹ 9 J. WIGMORE, *supra* note 27, at § 2497, at 414.

Perhaps the best criticism of attempts to reduce the definition of "reasonable doubt" to specificity is that made by Justice Mitchell in *State v. Sauer*, 38 Minn. 438, 38 N.W. 355 (1888):

Like many other definitions of the term which have been given, it does not define, but itself requires definition. The most serious objection to it is that it is liable to be understood as meaning a doubt for which a juror could express or state a reason in words. A juror may, after a consideration and comparison of all the evidence, feel

Impossible to refine, the broad standard of proof offers little guidance for testing whether prior inconsistent statements are sufficient for criminal convictions. A better method to determine the sufficiency of such statements is to analyze federal and California case law, looking to see how courts have dealt with this issue.

II. FEDERAL AND CALIFORNIA CASE LAW

A. Federal Case Law

The United States Supreme Court has not ruled on whether prior inconsistent statements are enough to effect criminal convictions. However, where a conviction is founded "almost entirely" on such statements, the sufficiency of the evidence is doubtful.³⁰ Indeed, the Court has questioned whether a federal

a reasonable doubt as to the guilt of the defendant, and yet find it difficult to state a reason for the doubt. The term "reasonable doubt" is almost incapable of any definition which will add much to what the words themselves imply.

Id. at 439, 38 N.W. at 356.

³⁰ The Court raised this issue in *California v. Green*, 399 U.S. 149 (1970). In *Green*, the evidence against the defendant consisted largely of sworn and unsworn prior inconsistent statements of the prosecution's chief witness. *Id.* at 170 n.19. The witness, a minor named Porter, made the unsworn statements to police following his own arrest for possession of marijuana. *Id.* at 151, 152. In these statements, Porter identified Green as his source of the marijuana. *Id.* at 151. One week later, Porter testified under oath at the defendant's preliminary hearing. Once again, Porter named the defendant as his supplier. However, when called to testify at Green's trial some two months later, Porter refused to identify Green. Instead, Porter was an "evasive and uncooperative" witness. *Id.* at 151, 152. The California Supreme Court considered this evasive testimony inconsistent with Porter's prior statements. *See People v. Green*, 3 Cal. 3d 981, 988, 989, 479 P.2d 998, 1002, 92 Cal. Rptr. 494, 498 (1971). *See also* note 9 *supra*. Porter's prior inconsistent statements to the police and at the preliminary hearing were introduced under California Evidence Code § 1235, to prove the defendant's guilt. 399 U.S. at 153. Green was subsequently convicted. *Id.* On appeal to the United States Supreme Court, the Court upheld the constitutionality of California Evidence Code § 1235, which permits the substantive use of prior inconsistent statements. *Id.* at 168. The Court did not rule that the evidence against Green was sufficient for conviction. *Id.* at 164 n.15, 170, 170 n.19. While the Court raised this as a substantial issue, it remanded the case for a determination of the sufficiency of prior inconsistent statements for conviction under such circumstances. *Id.* at 170, 170 n.19. On remand in *People v. Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), the California Supreme Court, finding nothing "inherently incredible"

or state conviction based on prior inconsistent statements violates constitutional due process requirements.³¹

In *Bridges v. Wixon*,³² decided in 1945, the Supreme Court ruled on the sufficiency of prior inconsistent statements used as evidence in a deportation hearing. At issue was Harry Bridges' alleged membership in the Communist Party. The most significant evidence against Mr. Bridges was an unsworn statement implicating him as a party member.³³ At the deportation hearing, the witness to whom the prior statement was attributed denied having made it. The judge admitted the statement anyway, and it provided the basis for a ruling against Mr. Bridges.³⁴

Although *Bridges* involved a deportation proceeding, not a

about the witness' prior inconsistent statements, held the evidence to be sufficient for conviction. *Id.* at 991, 479 P.2d at 1004, 92 Cal. Rptr. at 500. "The evidence is not insufficient as a matter of law to support the finding of guilt: despite certain inconsistencies between Porter's preliminary hearing testimony and his declaration to Officer Wade." *Id.*

³¹ *California v. Green*, 399 U.S. 149, 164 n.15, 170, 170 n.19 (1970). In two separate footnotes, the Court expressed concern over the sufficiency of prior inconsistent statements to convict, where they represent the principal evidence against a criminal defendant. "[C]onsiderations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking." *Id.* at 164 n.15 (citations omitted). The Court also stated that the "California court deliberately put aside the issue of the sufficiency of the evidence to sustain conviction." *Id.* at 170. In a footnote to this statement, the court stated that "[t]his issue is not insubstantial. Conviction here rests almost entirely on the evidence in [the witness'] two prior [inconsistent] statements which were themselves inconsistent in some respects." *Id.* at 170 n.19.

³² 326 U.S. 135 (1945).

³³ During the Department of Immigration and Naturalization Service's (INS) investigation of Bridges, one O'Neil, a friend of the defendant, allegedly made statements implicating him as a member of the Communist Party. O'Neil did not swear to the truth of the statements, nor did he sign them. The stenographer, however, both read them into the record and verified that the statements were made. While O'Neil admitted making statements to the investigating officers, he denied making any statements concerning Bridge's membership in the Communist Party. *Id.* at 150, 151.

³⁴ The only other evidence against Bridges was the testimony of one Lundeberg, who was admittedly "hostile" to the defendant. O'Neil's unsworn prior inconsistent statement and the testimony of Lundeberg were the sole evidence supporting the finding against defendant Bridges. *Id.* at 154-56. The Court held that the statements by O'Neil were "crucial" to a finding against Bridges. *Id.* at 156. Further, "[t]he Board of Immigration Appeals significantly concluded that apart from O'Neil's unsworn statements the evidence of Bridge's membership was too flimsy to support a finding." *Id.*

criminal trial, the Supreme Court held on appeal that Mr. Bridges was entitled to constitutional due process rights.³⁵ It also found that substantive use of the unsworn prior statements violated those rights.³⁶ Such statements, said the Court, would not be admissible in a criminal trial as substantive evidence.³⁷ To do so would "allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded."³⁸

³⁵ "The [deportation] rules are designed to protect the interests of the alien and afford him due process of law." *Id.* at 152.

Here the liberty of the individual is at stake. Highly incriminating statements are used against him . . . We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of liberty not meet the essential standards of fairness.

Id. at 154.

³⁶ *Id.* at 156.

³⁷ *Id.* at 153. "The statements which O'Neil made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence." *Id.*

Rules 150.1(c) and 150.6(i) of the INS regulations, regarding admission of evidence, governed the proceeding against Bridges. *Id.* at 150. These regulations are very similar to Federal Rules of Evidence 801(d)(1)(a), which controls the admissibility of prior inconsistent statements. FED. R. EVID. 801(d)(1)(a), set forth in note 1 *supra*. The INS rules permit a prior contradictory statement, made during an investigation in a deportation proceeding, to be used substantively in the deportation proceeding itself, if the statement is in writing and the witness is both under oath and asked to sign it. When the judge admitted O'Neil's prior unsworn statement against Bridges, he clearly violated the regulations.

³⁸ *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945).

In a footnote to *California v. Green*, 399 U.S. 149 (1970), the Court stated that *Bridges* addressed federal evidentiary, not constitutional, standards:

While the Court did suggest that the use of such statements in a criminal case would run "counter to the notions of fairness on which our legal system is founded," . . . the discussion and citations appear to refer to the 'orthodox' position adopted by this Court as a matter of federal evidentiary, not constitutional, law.

Id. at 164 n.15 (citations omitted).

This explanation of *Bridges* is erroneous in one sense. The *Bridges* court did not say that *admitting* unsworn prior inconsistent statements would run "counter to the notions of fairness on which our legal system is founded." In-

In *Bridges*, the Court emphasized the danger of convictions based on *unsworn* prior inconsistent statements.³⁹ The Court indicated, however, that a signed, written statement made under oath would have provided adequate protections against mistakes in hearing, memory, or transcription.⁴⁰ Statements made "under those conditions," said the Court, "would have an important

stead, it found that using such statements "would allow men to be convicted on unsworn testimony of witnesses." *Bridges v. Wixon*, 326 U.S. 135, 154-55 (1945) (emphasis added). Clearly, the Court feared that such statements might constitute insufficient evidence for a conviction. The *Green* Court may have recognized this distinction:

While we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking, . . . we do not read *Bridges* as declaring that the Constitution is necessarily violated by the admission of a witness' prior inconsistent statement for the truth of the matter asserted. The Court's opinion in *Bridges* does not discuss the Confrontation Clause.

California v. Green, 399 U.S. 149, 164 n.15 (1970) (citations omitted).

In any event, the meaning of *Bridges* is unclear. See the Notes of the Advisory Committee on the Proposed Rules, where the Committee stated that "strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury." S. CT. ADVIS. COMM. NOTES, *supra* note 24, citing *Bridges v. Wixon*, 326 U.S. 135 (1945).

Yet, one commentator attacked Justice Douglas' fairness formulation by arguing that "[n]o attempt to justify this speciously plausible conclusion was made." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 195 (1948).

³⁹ For example, "[t]hose *unsworn* statements by O'Neil and the testimony of one Lundeberg were accepted by the Attorney General as showing that *Bridges* was a member of the Communist Party." *Bridges v. Wixon*, 326 U.S. 135, 154-55 (1945) (emphasis added). It is "apparent not only that the *unsworn* statements of O'Neil weighed heavily in the scales, but also that it took those *unsworn* statements as well as Lundeberg's testimony to resolve the doubt." *Id.* at 155 (emphasis added).

This view is open to argument. See note 38 *supra*. If the *Bridges* court prohibited O'Neil's statements because they were insufficient from an evidentiary standpoint, as opposed to a constitutional standpoint, it would explain the Court's use of the term "unsworn." That is, the Court emphasized the word "unsworn" because the statement violated the INS *evidentiary* regulations. See note 37 *supra*. This interpretation is supported by the Court's comment that deportation is not permitted "where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made." 326 U.S. at 156.

⁴⁰ *Bridges v. Wixon*, 326 U.S. 135, 153 (1945).

safeguard—the fear of prosecution for perjury.”⁴¹ The Court implied that had the prior statement been sworn, the ruling against Mr. Bridges would have been upheld.⁴²

Federal appellate courts seldom address whether prior inconsistent statements are sufficient evidence for criminal convictions.⁴³ Since only sworn prior inconsistent statements are admissible under the federal rules, unsworn statements are never used in this way in federal courts.⁴⁴ In decisions upholding convictions based on prior inconsistent statements, courts have emphasized the need for indicia to establish the reliability of prior sworn statements—as opposed to accepting a witness’ repudiation at trial.⁴⁵ However, courts rarely define the factors used to establish the requisite indicia of reliability.

One court thought the time lapse from the crime to the date of trial indicated the reliability of a prior statement.⁴⁶ The un-

⁴¹ *Id.*

⁴² *Id.* This implication is significant. The Court compared the deportation proceedings in *Bridges* to those of a criminal trial. See note 35 *supra*. Further, the deportation proceedings that governed *Bridges* are similar to Federal Rule of Evidence 801(d)(1)(a). See note 37 *supra*. Nevertheless, the *Green* Court left open the question of the sufficiency of prior inconsistent statements to effect criminal convictions. *California v. Green*, 399 U.S. 149, 164 n.15, 170, 170 n.19 (1970). See notes 30-31 *supra*.

⁴³ Only two federal appellate court decisions deal with the sufficiency of prior inconsistent statements. See *United States v. Orrico*, 599 F.2d 113, 116-19 (6th Cir. 1979); *United States v. De Sisto*, 329 F.2d 929, 934 (2d Cir. 1964). *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975), also briefly addresses this issue. In *Morlang*, the court cited *Bridges* for the proposition that “men should not be allowed to be convicted on the basis of unsworn testimony.” *Id.* at 190. The *Morlang* court, however, was concerned with improperly admitted unsworn prior inconsistent statements used to impeach. “The introduction of such testimony, even where limited to impeachment, necessarily increases the possibility a defendant may be convicted on the basis of unsworn evidence.” *Id.*

For decisions dealing with the admissibility of prior inconsistent statements, see *United States v. Cunningham*, 446 F.2d 194, 198-99 (2d Cir. 1971); *United States v. Mingoia*, 424 F.2d 710, 713 (2d Cir. 1970); *United States v. Schwartz*, 390 F.2d 1 (3d Cir. 1968); *Di Carlo v. United States*, 6 F.2d 364 (2d Cir. 1925).

⁴⁴ FED. R. EVID. 801(d)(1)(a), set forth in note 1 *supra*.

⁴⁵ See, e.g., *United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979) (in limited circumstances, sworn prior inconsistent statements “might be sufficient . . . given strong indicia of reliability.” *Id.* at 118). See also *United States v. De Sisto*, 329 F.2d 929 (2d Cir. 1964); notes 49-51 and accompanying text *infra*.

⁴⁶ See *United States v. De Sisto*, 329 F.2d 929 (2d Cir. 1964); notes 47, 50 and accompanying text *infra*.

derlying facts showed that a witness had described the defendant to police on the day of the crime, and then picked the defendant out of a police lineup four days later. Subsequently, the witness, while under oath, positively identified the defendant at a grand jury proceeding, the defendant's first trial, and on direct examination at the defendant's second trial. The court found that the witness' failure to identify the defendant on cross-examination at the second trial did not make the prior statement unreliable, since the witness' initial identification had been made over three years before the second trial.⁴⁷

Federal appellate courts disagree on the inherent value of prior inconsistent statements. For example, the Second Circuit has held that prior inconsistent statements may be used to convict where the circumstances under which a declarant utters a prior statement makes it "perfectly rational" for a jury to credit the witness' prior statement over his trial testimony.⁴⁸ In this case, *United States v. De Sisto*,⁴⁹ the court upheld a conviction based on a witness identifying the defendant at the defendant's first trial. The court emphasized two circumstances that made the prior statement more reliable than the witness' uncertain testimony at the second trial. First, the event the witness observed had occurred three and one-half years before the witness testified at the second trial. Thus, the court found it likely that the witness' memory had faded with time.⁵⁰ Second, the circumstances of the event itself militated against the witness noticing the prominent physical characteristics of the defendant, a lapse that made the witness doubt his identification of the defendant during trial.⁵¹

⁴⁷ *United States v. De Sisto*, 329 F.2d 929, 934 (2d Cir. 1964). The witness doubted his prior identification of the defendant because he could not remember seeing the prominent tattoos on the defendant's arms. The court stated that, "[i]t could be that . . . though he had in fact recalled the marks at the line-up on September 5, 1959, he had forgotten them in the three and a half intervening years." *Id.* at 934.

⁴⁸ *Id.* "It would be perfectly rational for the jury to decide that, for these reasons or for others not requiring mention, [the witness'] identification at the first trial and on direct examination at the second was more credible than the doubt he expressed [at the second trial]." *Id.*

⁴⁹ 329 F.2d 929 (2d Cir. 1964).

⁵⁰ *Id.* at 934. See notes 46-47 and accompanying text *supra*.

⁵¹ The court stated:

The fact that [the witness], only four days after the incident, had picked De Sisto out of a line-up with the latter's tattoos in full

The Sixth Circuit takes a more rigid approach to prior inconsistent statements.⁵³ It has held that they are sufficient for conviction only in an "unusual case,"⁵³ where a "purely technical element of a crime is established solely through a prior inconsistent statement . . . such as establishing that stolen property was worth a certain amount or that it had moved in interstate commerce at some time."⁵⁴ "Such evidence" might be sufficient in

view, and had thereafter made a positive identification before the grand jury, at the first trial, and on other occasions, warranted a variety of inferences that would sustain his identification and discredit his doubts. It afforded a basis for the jury's thinking he had not in fact had an opportunity to observe these parts of De Sisto's arms during the hijacking; indeed [the witness] testified at the first trial that De Sisto had climbed onto the running board and with both hands had held onto the steel top frame of the cab—a position which would expose the insides, but not the tattooed outsides, of his arms to the driver. It could also be that with [the witness'] other preoccupations during the hijacking, the tattoo marks made no impression on him.

United States v. De Sisto, 329 F.2d 929, 934 (2d Cir. 1964).

⁵³ See United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979) (permitting prior inconsistent statements to suffice only to establish a "purely technical element" of a crime). See also notes 53-55 and accompanying text *infra*.

In *Orrico*, the defendant, a manager of an insurance holding company, appealed his conviction for interstate transportation of fraudulent checks. The prosecution obtained the conviction on the basis of two pieces of evidence. The first was an equivocal statement by one of the defendant's fellow employees, introduced under the past recollection recorded exception to the hearsay rule. 599 F.2d at 117. See FED. R. EVID. 803(5). The other was a sworn prior inconsistent statement made at a grand jury hearing by the company's president. 599 F.2d at 116.

⁵⁴ The court was referring to Judge Weinstein's statement that admitting prior inconsistent statements as substantive evidence:

[W]ill theoretically enable a party to make out a prima facie case even if his only evidence is a previous inconsistent statement of this type.

It is doubtful, however, that in any but the most unusual case, a prior inconsistent statement alone will suffice to support a conviction since it is unlikely that a reasonable juror could be convinced beyond a reasonable doubt by such evidence alone.

United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979) *citing* J. WEINSTEIN, *supra* note 9, at § 801(d)(1)(a)[09], at 801-86.

⁵⁴ United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979). "But when such evidence is the only source of support for the central allegations of the charge," then insufficient evidence "for a conclusion of guilt beyond a reasonable doubt has been offered by the Government." *Id.*

these cases only if it has "indicia of reliability."⁵⁵ The Sixth Circuit has not detailed, however, the precise factors constituting the necessary indicia.

Thus, convictions founded on sworn prior inconsistent statements may be constitutionally suspect in federal courts. Where the circumstances surrounding the statements make them more reliable than the witness' trial testimony, a conviction based on prior statements may be upheld.⁵⁶ Federal courts appear to be divided, however, over the weight that should be accorded prior inconsistent statements.⁵⁷ The United States Supreme Court suggested, in *Bridges*, that unsworn prior inconsistent statements are never enough to convict as a matter of federal constitutional law.⁵⁸ This means that any state conviction based on unsworn statements also may be unconstitutional. Also, since *Bridges*, the Court has implied that convictions founded on sworn prior inconsistent statements may be unconstitutional. This hint was given in *California v. Green*,⁵⁹ in which the Supreme Court upheld the California Evidence Code section regarding the admissibility of prior inconsistent statements. The Court did not decide whether such evidence is sufficient to convict, but noted that the issue is substantial.⁶⁰

B. California Case Law

In California, both sworn and unsworn prior inconsistent statements are admissible as evidence of a defendant's guilt.⁶¹ The California Supreme Court clearly permits a sworn prior in-

⁵⁵ *Id.* The court also stated:

Assuming such statements may be admissible in a criminal case, we believe that they may supply valuable evidence for the prosecution. They may be used to corroborate evidence which otherwise would be inconclusive, may fill gaps in the Government's reconstruction of events, or may provide valuable detail which would otherwise have been lost through lapse of memory. But the government, having offered such statements as the sole evidence of a central element of the crime charged, we hold that the government has failed to sustain its burden of proving guilt beyond a reasonable doubt.

Id. at 119.

⁵⁶ See notes 48-51 and accompanying text *supra*.

⁵⁷ See notes 48-55 and accompanying text *supra*.

⁵⁸ See notes 33-42 and accompanying text *supra*.

⁵⁹ 399 U.S. 149 (1970).

⁶⁰ See notes 30-31 *supra*.

⁶¹ CAL. EVID. CODE § 1235, set forth in note 1 *supra*.

consistent statement as a basis for a criminal conviction where there is evidence to credit the prior statement over the witness' trial testimony.⁶³ It is currently unclear, however, whether unsworn prior inconsistent statements are sufficient to convict in California under any circumstances.⁶³ If the United States Supreme Court decides that convictions based on prior inconsistent statements violate the due process clause, California will be preempted from deciding the issue one way or the other.

California courts look at several factors to determine the accuracy and trustworthiness of a prior statement and, therefore, its sufficiency for conviction. Chief among the factors is whether the witness made the prior statement under oath at a previous trial or preliminary hearing. The California Supreme Court reiterated the importance of this factor in *People v. Ford*,⁶⁴ its most recent decision in the area. In *Ford*, the defendant was charged with armed robbery. The victim, Walter Lane, was the sole witness to the crime. About a week after the robbery, Mr. Lane identified the defendant by picking his photograph from a group presented to him by the police. Mr. Lane again identified the defendant as the robber at the preliminary hearing. At trial, however, Mr. Lane claimed he could not identify the defendant as the person who committed the robbery.⁶⁵ Nonetheless, the defendant was convicted on the basis of Mr. Lane's prior identification.

The California Supreme Court upheld the conviction.⁶⁶ The court emphasized that Mr. Lane's sworn prior statement provided the reliability necessary to sustain the conviction.⁶⁷ It held

⁶³ See notes 64-102 and accompanying text *infra*.

⁶⁴ See notes 69-74 and accompanying text *infra*.

⁶⁵ 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981). In *Ford*, the California Supreme Court stated that, in the prior case where it had found the evidence sufficient for conviction, it had "primarily" stressed that "the 'jury had before it a transcription of [the witness'] positive identification of defendant under oath at defendant's preliminary examination.'" *Id.* at 213, 635 P.2d at 1178, 178 Cal. Rptr. at 198. The court held that "sworn testimony subject to cross-examination in a formal judicial proceeding is sufficient to support a conviction." *Id.* at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199. See also *People v. Chavez*, 26 Cal. 3d 334, 364, 605 P.2d 401, 420, 161 Cal. Rptr. 762, 781 (1980).

⁶⁶ *People v. Ford*, 30 Cal. 3d 209, 212-13, 635 P.2d 1177, 178 Cal. Rptr. 197, (1981). "[T]he most he would say was that defendant looked like the man in the police photograph he had selected earlier." *Id.* at 213, 635 P.2d at 1177, 178 Cal. Rptr. at 197.

⁶⁷ *Id.* at 216, 635 P.2d at 1180, 178 Cal. Rptr. at 200.

⁶⁸ *Id.*

that a statement "made in sworn testimony subject to cross-examination in a formal judicial proceeding is sufficient to support a conviction."⁶⁸

The California Supreme Court has yet to decide whether *unsworn* prior statements will suffice under similar guarantees of trustworthiness.⁶⁹ In permitting the sufficiency of a prior inconsistent statement in the past, the court relied "primarily" on the fact that the statement was sworn, and that the jury had transcripts of that statement.⁷⁰ Such "sworn testimony at a formal, judicially conducted preliminary examination clearly provides a more substantial basis" for conviction than do extrajudicial statements.⁷¹ California courts have repeatedly found unsworn prior statements to be insufficient for conviction.⁷² However, these cases have stressed the untrustworthiness of the circumstances surrounding the unsworn statement:⁷³ the supreme court

⁶⁸ *Id.*

⁶⁹ In *People v. Chavez*, 26 Cal. 3d 334, 361, 605 P.2d 401, 418, 161 Cal. Rptr. 762, 779 (1980), the court stated that "a line of California decisions . . . have established that while a witness' out-of-court identification may be admitted against a criminal defendant, such an extrajudicial identification, standing alone, is normally insufficient to sustain a criminal conviction." *Id.* at 361, 605 P.2d at 418, 161 Cal. Rptr. at 779 (emphasis added). This statement suggests that under some circumstances, unsworn prior inconsistent statements may be sufficient for conviction.

⁷⁰ *People v. Ford*, 30 Cal. 3d 209, 213, 635 P.2d 1176, 1178, 178 Cal. Rptr. 196, 198 (1981). See note 64 *supra* for text of the court's statement.

⁷¹ *People v. Ford*, 30 Cal. 3d 209, 213, 635 P.2d 1176, 1178, 178 Cal. Rptr. 196, 198 (1981).

⁷² *In re Johnny G.*, 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979); *People v. Gould*, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960); *In re Eugene M.*, 55 Cal. App. 3d 650, 127 Cal. Rptr. 851 (2d Dist. 1976). See *In re Miguel L.*, 32 Cal. 3d 100, ___ P.2d ___, ___ Cal. Rptr. ___ (1982), discussed in note 74 *infra*.

⁷³ *People v. Gould*, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960), is the first California Supreme Court decision to rule on the sufficiency of an extrajudicial identification used to convict. *Gould* did not involve a prior inconsistent statement, but an extrajudicial identification which could not be confirmed at trial. The court held that "an extrajudicial identification that cannot be confirmed at trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime." *Id.* at 631, 354 P.2d at 870, 7 Cal. Rptr. at 278. The court went on to hold, however, that the probative value of such identifications depends upon the circumstances under which they are made. *Id.* In *Gould*, these circumstances were considered to be very unreliable. *Id.*

In re Johnny G., 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979),

has never reviewed a conviction based on an unsworn statement

involved a prior inconsistent statement. *Johnny G.* reaffirmed the holding in *Gould*, pointing out that § 1235 of the California Evidence Code deals "only with the admissibility of evidence; [it does] not determine what constitutes evidence sufficient to sustain a verdict or finding." 25 Cal. 3d at 548, 601 P.2d at 198, 159 Cal. Rptr. at 182. The court concluded: "It is thus clear that the drafters of the Evidence Code did not intend to change the *Gould* rule regarding the sufficiency of evidence to sustain a conviction." *Id.* Yet, as in *Gould*, the court in *Johnny G.* took careful note of the reliability of the circumstances surrounding the witness' statement. *Id.* These circumstances were so unreliable that the conviction could not be sustained. *Id.*

In *People v. Chavez*, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980), the court found that a sworn prior inconsistent statement was sufficient to effect a criminal conviction. However, the court distinguished *Chavez* from earlier cases where such statements were insufficient. The court explained that *Chavez*:

[C]learly differs from the forgoing decisions in a number of important respects. First, although [the witness'] identification to the various police officers during the investigation of the crime is comparable to the identifications in *Gould*, *Johnny G.* and *Eugene M.* and would not in itself be sufficient to support the firearm use finding, . . . the jury additionally had before it a transcription of [the witness'] positive identification of defendant under oath at defendant's preliminary examination.

Id. at 364, 605 P.2d at 420, 161 Cal. Rptr. at 781. It concluded that "[t]his sworn testimony at a formal, judicially conducted preliminary examination clearly provides a more substantial basis for the firearm use finding than the extrajudicial identifications in *Gould*, *Johnny G.*, or *Eugene M.*" *Id.* As has every other California case addressing this issue, *Chavez* also emphasized the importance of the surrounding factors in determining the prior statement's reliability. *Id.* at 363-64, 605 P.2d at 419-20, 161 Cal. Rptr. at 780-81. "In light of [all the surrounding circumstances], the jury had a sound basis for discounting the witness' trial testimony and giving credence to his prior testimony against the defendant." *Id.* at 364, 605 P.2d at 420, 161 Cal. Rptr. at 781.

As did *Chavez*, *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981), permitted a sworn prior inconsistent statement to be sufficient for a criminal conviction. The court held:

The pretrial identifications found wanting in *Gould* and its progeny were each made, as we stressed in *Chavez*, . . . in circumstances that cast serious doubt on their accuracy and trustworthiness.⁴ Here, by contrast, [the witness'] positive identification of defendant was made in a formal judicial proceeding, under oath and subject to cross-examination. These are traditional indicia of reliability, and satisfy the concerns underlying the *Gould* rule.

Id. at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199.

In footnote four, the court also emphasized that the circumstances surrounding the unsworn prior inconsistent statements in the earlier cases made those statements untrustworthy. It stated:

given under exceptionally reliable circumstances.⁷⁴

California courts also focus on witness motivation, or lack

In *Gould* the prior identification was made solely from a small group of photographs; in *Johnny G.* it was made on the street while the witness-victim was dazed from a vicious assault; and in *Eugene M.*, it was made under police threats to charge the witness with murder, and was confused with his narrative of another crime. *Id.* at 215 n.4, 635 P.2d at 1179 n.4, 178 Cal. Rptr. at 199 n.4.

Both *Ford* and *Chavez* cited the California appellate case of *In re Eugene M.*, 55 Cal. App. 3d 650, 127 Cal. Rptr. 851 (2d Dist. 1976). See *People v. Ford*, 30 Cal. 3d at 213, 215 n.4, 635 P.2d at 1179 n.4, 178 Cal. Rptr. at 199 n.4; *People v. Chavez*, 26 Cal. 3d at 363-64, 606 P.2d at 419-20, 161 Cal. Rptr. at 780-81. The court in *Eugene M.* found the unsworn statement insufficient to convict. 55 Cal. App. 3d at 659, 127 Cal. Rptr. at 856. The court's decision rested on two grounds. First, the circumstances surrounding the witness' prior statements suggested their "inherent untrustworthiness." *Id.* at 657-59, 127 Cal. Rptr. at 854-56. Also, the court noted that the prior statements were unsworn. *Id.* See also *People v. Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), discussed in note 30 *supra*.

⁷⁴ As this comment went to press, the California Supreme Court reversed a conviction based on an unreliable, unsworn prior inconsistent statement. In *In re Miguel L.*, 178 Cal. Rptr. 190 (2d Dist. 1982), a minor was convicted of burglary. The California Supreme Court granted hearing, and remanded the case for reconsideration in light of *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981). On reconsideration, the Court of Appeals reaffirmed its previous decision. *In re Miguel L.*, 180 Cal. Rptr. 883 (1982).

In *Miguel*, the sole evidence against the defendant was a taped, unsworn statement made to the police by the defendant's accomplice. The witness' counsel was present when he made the prior statement. At trial, the witness denied the truth of his prior statement, and both affirmed and denied that he had made it. The witness also said that he did not want to "put the rap" on somebody else. The police officer who took the witness' prior statement testified that the witness' veracity was fairly good. *In re Miguel L.*, 32 Cal. 3d 100, 110, 635 P.2d ___, ___, ___ Cal. Rptr. ___, ___ (1982).

On appeal, the defendant claimed that evidence of an unsworn prior inconsistent statement is not enough to effect a conviction. Further, the defendant claimed that the witness' prior statement was unreliable, because the police induced the witness to make the statements, and they were out to "get" him.

In reversing the conviction, the supreme court stated: "[t]he present case does not fall within the *Chavez-Ford* exception to the *Gould* rule. No evidence other than [the] prior unsworn statements, which were repudiated at trial, tends to connect [defendant] to the . . . burglary. These statements do not satisfy the requirements of the *Gould* rule since they lack the traditional indicia of reliability possessed by sworn testimony which has been subjected to cross-examination in a formal judicial proceeding. Such formal procedures are necessary in order to test the veracity, recollection, and possible bias of the witness, as well as the effect of official conduct toward the witness." *Id.* at 107, ___ P.2d at ___, ___ Cal. Rptr. at ___.

thereof, to tell the truth during trial. The relationship between the witness and the defendant is scrutinized to determine if it caused repudiation of a prior statement.⁷⁶ For example, the court has found motivation for a witness' repudiation where the declarant, the sole witness to an assault, was a member of a rival gang who preferred to settle his dispute with the defendant "in the streets" instead of by trial.⁷⁶ Courts may strain to find such a relationship even where evidence is tenuous—such as a brief conversation between the defendant and the witness.⁷⁷ As Chief Justice Bird bluntly stated, the court examines the relationship between the defendant and the witness to determine if the declarant had a "reason to lie."⁷⁸

⁷⁶ *People v. Ford*, 30 Cal. 3d 209, 214-15, 218, 218 n.1, 635 P.2d 1176, 1178-79, 1181, 1180 n.1, 178 Cal. Rptr. 196, 198-99, 201, 200 n.1 (1981); *People v. Chavez*, 26 Cal. 3d 334, 364, 605 P.2d 401, 420, 161 Cal. Rptr. 762, 781 (1980).

⁷⁶ The *Chavez* court stated:

[T]he evidence revealed that from the outset of the investigation [the witness] had indicated his unwillingness to testify in court because no one had been hurt by the shooting, and on the witness stand [the witness] forthrightly conceded that he had told the district attorney just days before the trial that he did not want to testify because he felt that the whole matter "should be settled in the streets" rather than in court.

People v. Chavez, 26 Cal. 3d 334, 364, 605 P.2d 401, 420, 161 Cal. Rptr. 762, 781 (1980).

The witness in *Chavez* made similar statements to an investigating officer. *Id.* at 342, 605 P.2d at 406, 161 Cal. Rptr. at 767. Further, the witness only "reluctantly" testified at the defendant's preliminary hearing. *Id.* at 343, 364, 605 P.2d at 406, 420, 161 Cal. Rptr. at 767, 781.

⁷⁷ In *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981), the court stated that, as in *Chavez*, the jury could easily have inferred that "the reason for the witness's failure to make a positive identification at trial was simply that in the interim, he had become reluctant to testify against this defendant. Indeed, the evidence reveals that defendant and his wife had a discussion with the witness prior to trial." *Id.* at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199.

⁷⁸ *Id.* at 218, 635 P.2d at 1181, 178 Cal. Rptr. at 201 (Bird, C.J., dissenting).

In her dissent, Chief Justice Bird challenged the majority's statement that the jury could have inferred that the witness had a motive for repudiating his preliminary hearing testimony:

Mr. Lane was a neutral citizen, a victim of a crime. His credibility was unimpeached. He asserted at trial that he was unable to identify [the defendant] at all stages of the proceedings. The witness had no motive to lie and every reason to assist the judicial system in apprehending the man who robbed him.

Id. The Chief Justice noted that the "discussion" between the defendant, the

The circumstances surrounding prior statements must also be examined for evidence of trustworthiness. Such statements are inherently untrustworthy, for example, when a witness is physically unable to perceive accurately. Thus, when a witness has been assaulted, and is still dazed from the attack, his answers to police inquiries are unreliable, and consequently insufficient for a criminal conviction.⁷⁹

There are other factors that affect a witness' ability to identify the perpetrator of a crime. In *Ford*,⁸⁰ the witness had "ample opportunity" to identify the defendant during the course of a robbery.⁸¹ The defendant had passed within three feet of the witness, walking down the sidewalk before committing the crime.⁸² The witness also observed the defendant before and during the robbery, and as the defendant left the scene.⁸³ The witness subsequently identified the defendant in both sworn and unsworn statements, but repudiated his identification at trial.⁸⁴ The implicit assertion in the *Ford* holding is that the witness' repudiation could be discounted in light of his "ample opportunity" to identify the defendant during the crime.⁸⁵

The declarant's repudiation of a prior statement may itself provide evidence of the trustworthiness of the prior statement. In *Ford*,⁸⁶ the witness gave two different explanations for repu-

defendant's wife, and the witness consisted merely of a brief encounter "in the most innocuous terms." *Id.* at 218 n.2, 635 P.2d at 1181 n.2, 178 Cal. Rptr. at 201 n.2.

⁷⁹ In *In re Johnny G.*, 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979), the witness-victim assertedly made an unsworn statement immediately after the crime which identified his attacker. The police found the witness "lying near the street with his face covered with blood." *Id.* at 546, 601 P.2d at 197, 159 Cal. Rptr. at 180. According to police, the witness was "conscious and coherent, though 'a little shook up.'" *Id.* The police pointed to the defendant, and asked the witness if the defendant was the man who attacked him. The witness replied "yes." *Id.* At trial, the witness completely repudiated his prior statement to the police. *Id.* at 546, 548, 601 P.2d at 196, 198, 159 Cal. Rptr. at 180, 182. The court found the evidence insufficient to sustain the conviction. *Id.* at 548, 601 P.2d at 196, 159 Cal. Rptr. at 182.

⁸⁰ *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981).

⁸¹ *Id.* at 212, 635 P.2d at 1177, 178 Cal. Rptr. at 197.

⁸² *Id.* at 212 n.1, 635 P.2d at 1177 n.1, 178 Cal. Rptr. at 197 n.1.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 214-15, 635 P.2d at 1178-79, 178 Cal. Rptr. at 198-99.

⁸⁶ *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981).

diating his preliminary hearing testimony.⁸⁷ The court noted that either explanation could have "aroused the jury's suspicions" regarding the truthfulness of the witness' trial testimony, because the preliminary hearing transcript refuted both explanations.⁸⁸ For example, the witness claimed during trial that at the preliminary hearing, the judge had insisted on a definitive answer as to whether the defendant was the robber.⁸⁹ The transcripts, however, indicated that the witness clearly, without prodding, identified the defendant as the one who had committed the crime.⁹⁰ The court concluded that even if the witness'

⁸⁷ *Id.* at 214, 635 P.2d at 1178, 178 Cal. Rptr. at 198.

⁸⁸ *Id.*

⁸⁹ The witness claimed that he "positively identified defendant at the preliminary hearing only "[b]ecause the judge told me I had to make a definite decision. She said I couldn't say 'looked like,' I had to say yes or no. In my mind I wasn't completely decided whether that was the man or not." *Id.*

⁹⁰ The witness identified the defendant at the preliminary hearing thus:

"Q. [by the prosecutor] I would like you to look around the courtroom and tell us if you see the man who was holding that gun in the courtroom right now.

"[Objection by defense counsel.]

"THE COURT: The man who was holding the gun on you at the time of the robbery.

"THE WITNESS [Lane]: That's him right there.

"THE COURT: Did you see his face?

"THE WITNESS: Yes, I do [sic].

"THE COURT: Do you have a clear recollection of what his face looked like?

"THE WITNESS: Yes, I do.

"THE COURT: Do you see him in the courtroom?

"THE WITNESS: Yes, I do.

"[Objection overruled.]

"THE COURT: . . . Will you identify the person you say you saw from your recollection at the time of the robbery?

"THE WITNESS: That is the gentleman over there [pointing to defendant]."

Id. at 214 n.3, 635 P.2d at 1178 n.3, 178 Cal. Rptr. at 198 n.3.

Similarly, when the witness' testimony at the prior hearing remains unshaken in cross-examination, it is regarded as a reliable indicator of the truthfulness of the prior statement. *See People v. Chavez*, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980). In *Chavez*, the court stated that the witness, "though reluctant to testify at the preliminary hearing, ultimately confirmed his identification of defendant when pressed by the questioning of the municipal court judge; defendant presented no evidence that [the witness'] identification of him at that time had been shaken or discredited by cross-examination." *Id.* at 364, 605 P.2d at 420, 161 Cal. Rptr. at 781. *See also People v. Ford*, 30

explanation of his preliminary hearing testimony was plausible, the jury ultimately had to resolve the validity of the various testimony.⁹¹

Intimidation of a witness is another factor courts assess in determining motivation for repudiating a prior statement.⁹² Intimidation is often the reason for a witness' trial repudiation.⁹³

The identity of a declarant may also bear on the trustworthiness of a prior statement. A prior statement may be unreliable if the person who made it was an accomplice of the defendant, or if he made the statement under threat of prosecution by the police.⁹⁴ Conversely, a statement may be reliable if the witness is also the victim of the crime, and voluntarily contacts the police and testifies against the defendant.⁹⁵

Cal. 3d 209, 214, 635 P.2d 1176, 1178, 178 Cal. Rptr. 196, 198 (1981); *In re Eugene M.*, 55 Cal. App. 3d 650, 659, 127 Cal. Rptr. 851, 856 (2d Dist. 1976).

⁹¹ *People v. Ford*, 30 Cal. 3d 209, 215, 635 P.2d 1176, 1179, 178 Cal. Rptr. 196, 199 (1981).

⁹² See, e.g., *id.* at 218 n.2, 635 P.2d at 1181 n.2, 178 Cal. Rptr. at 201 n.2. In *Ford*, Chief Justice Bird discounted the Attorney General's suggestion that the conversation between the defendant, his wife, and the witness may have indicated that the witness had been intimidated, and thus decided against testifying. *Id.* See also *In re Johnny G.*, 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979), where the court concluded that no evidence of intimidation could reasonably be inferred from the circumstances surrounding the witness's repudiation. *Id.* at 548, 601 P.2d at 198, 159 Cal. Rptr. at 182.

⁹³ The House Committee on the Judiciary recognized support for the substantive use of unsworn prior inconsistent statements "based largely on the need to counteract the effect of witness intimidation in criminal cases." HOUSE REPORT, *supra* note 6 at 13, 1974 U.S. CODE CONG. & AD. NEWS at 7086. See note 92 *supra* for the California Supreme Court's consideration of this possibility.

⁹⁴ This was an important factor in *In re Eugene M.*, 55 Cal. App. 3d 650, 127 Cal. Rptr. 851 (2d Dist. 1976), where the court said: "In sum, proof here consists of a prior unsworn out-of-court statement given by an apparent accomplice under threat of prosecution and thereafter repudiated under oath. We think this proof 'so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt.'" *Id.* at 659, 127 Cal. Rptr. at 855-56 (citations omitted).

⁹⁵ In *People v. Maxwell*, 94 Cal. App. 3d 562, 156 Cal. Rptr. 630 (2d Dist. 1979), the defendant was convicted of false imprisonment as a lesser included offense on a charge of kidnapping. The witness-victim's testimony formed the basis of the prosecution's case. *Id.* at 565, 156 Cal. Rptr. at 632. At trial, the witness refused to testify against the defendant, invoking her fifth amendment privilege. Therefore, her prior sworn testimony was admitted under the former testimony exception to the hearsay rule, not as a prior inconsistent statement. *Id.* at 566, 156 Cal. Rptr. at 632. Nevertheless, the court's analysis of the suffi-

With the apparent exception of the sworn versus unsworn distinction, California courts do not require any single factor for a criminal conviction.⁹⁶ Clearly, no one factor alone is ever sufficient for a criminal conviction. Instead, a combination of trustworthy circumstances must exist before a prior statement is credited over a witness' repudiating trial testimony.⁹⁷ Again, the courts have not specified the required combination of factors.⁹⁸ Indeed, the differing circumstances of each case make such specificity as impossible as defining "proof beyond a reasonable doubt."⁹⁹

The requisite factors, and the degree of reliability necessary to support a conviction based on prior inconsistent statements, can only be ascertained by careful study of past decisions. In *Ford*, for example, the combination of factors found to be sufficient included positive identification made under oath at an adversary judicial proceeding, ample opportunity for the witness to observe the defendant during the crime, multiple inconsistencies in

ciency of the evidence is much the same as if a prior inconsistent statement had been used to convict. *Id.* at 574, 579, 156 Cal. Rptr. at 637, 639-40. The court compared the untrustworthiness of the statements used in *In re Eugene M.*, discussed in note 94 *supra*, to those in *Maxwell*, finding that:

By contrast, the evidence against defendant here consisted of the sworn preliminary hearing testimony by the victim who contacted the police, voluntarily testified against defendant under oath at the preliminary hearing, and then at the trial admitted she was presently in love with defendant and refused to testify on grounds it would incriminate her.

94 Cal. App. 3d at 578, 156 Cal. Rptr. at 640.

⁹⁶ See notes 61-74 and accompanying text *supra* for discussion of the sworn versus unsworn distinction.

⁹⁷ The court will not permit a prior inconsistent statement to be sufficient simply because it is sworn. Both *Ford* and *Chavez* require that the circumstances surrounding a prior statement make it more reliable than a trial repudiation. In *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981), the court noted that as in *Chavez*, there was other evidence the jury could have used to discredit the witness' trial testimony in favor of the preliminary hearing testimony. *Id.* at 213, 214, 635 P.2d at 1178, 178 Cal. Rptr. at 198. In *People v. Chavez*, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980), the court listed several factors that were "unlike the prior cases in which the record contained no concrete basis to credit the witness' prior identification over his trial testimony." *Id.* at 364, 605 P.2d at 620, 161 Cal. Rptr. at 781. Thus, the jury had a reasonable basis for crediting the witness' prior testimony over his trial repudiation. *Id.*

⁹⁸ See notes 64-95 and accompanying text *supra*.

⁹⁹ See notes 27-29 and accompanying text *supra*.

the witness' explanation of his prior inconsistent statement—coupled with a preliminary hearing transcript which “apparently refuted” the witness' explanation, and a possible motivation for the witness' trial repudiation.¹⁰⁰ In another case, trustworthy circumstances were established where the witness was a member of a rival gang, who reluctantly testified at the defendant's preliminary hearing, but whose testimony was neither shaken nor discredited on cross-examination, whose motivation for repudiation was suggested by his preference to “settle the issue in the streets,” and whose prior statement taken under oath was available on transcripts to the jury.¹⁰¹ In both cases, the combination of factors made the prior inconsistent statement more reliable than the witness' trial repudiation.¹⁰²

III. PROPOSAL

Commentators are in sharp disagreement over the substantive use of prior inconsistent statements. For example, Judge Weinstein claims such evidence could persuade a reasonable trier of fact to convict only in a most unusual case.¹⁰³ Judge Weinstein is skeptical of the questionable circumstances under which most prior statements are given to police.¹⁰⁴

¹⁰⁰ *People v. Ford*, 30 Cal. 3d 209, 212-15, 635 P.2d 1176, 1177-79, 178 Cal. Rptr. 196, 197-99 (1981).

¹⁰¹ *People v. Chavez*, 26 Cal. 3d 334, 339, 343, 364, 605 P.2d 401, 405-06, 420, 161 Cal. Rptr. 762, 765, 767, 781 (1980).

¹⁰² See note 97 *supra*.

¹⁰³ J. WEINSTEIN, *supra* note 9, at § 801(d)(1)(a)[01], at 801-86, citing *California v. Green*, 399 U.S. 149, 163-64 n.15 (1970).

¹⁰⁴ Weinstein states:

One practical aspect of the problem should not be lost sight of. While proponents of the rule as adopted by the Supreme Court [which would have permitted the substantive use of both sworn and unsworn statements] point out that statements made earlier in time may be more reliable, most prior inconsistent statements used at trials are given under circumstances where there are subtle and sometimes severe pressures operating to skew the story one way or the other. The inconsistent statement may be given to an insurance investigator or an FBI agent at the time of arrest, or before a Grand Jury where the witness can be led, inadvertently or otherwise, to give a somewhat colored version of the events. In a swearing contest between the witness and FBI agents the witness will usually come off second best. Very few such statements used at trial are given in a completely neutral and unpressured setting.

J. WEINSTEIN, *supra* note 9, at § 801(d)(1)(a)[01], at 801-86.

Other commentators regard prior inconsistent statements as generally more trustworthy than trial repudiations.¹⁰⁵ Dean McCormick argues that where a witness changes his story between the event and the trial, the "circumstances most frequently suggest that the 'something' which caused the change was an improper influence."¹⁰⁶ Professor Wigmore suggests permitting the trier of fact to give prior inconsistent statements as much testimonial credit as they may seem to deserve.¹⁰⁷

The commentators, and the courts, would move toward consistency if no strict line were drawn between sworn and unsworn prior inconsistent statements. Instead, emphasis should be placed where California courts have often placed it—on the reliability of the circumstances surrounding the statements.¹⁰⁸ Prior

Others share Weinstein's concern. In the Senate Hearings on Rule 801(d)(1)(a), Professor Cleary testified that the House did not envision prior inconsistent statements as sufficient in themselves for conviction. Professor Cleary said "one of the premises which underlies the House rule, although they do not say it, is that they think that this kind of evidence standing alone ought not to be enough to support a conviction." *Proposed Federal Rules of Evidence: Hearings on 801 Before the Committee on the Judiciary, United States Senate, 93rd Cong., 2d Sess. 51 (1974) (statement of Professor Cleary).*

A Senate Committee Report on 801(d)(1)(a) stated:

It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the sufficiency of the evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.

SENATE REPORT, *supra* note 24, at 16 n.21, 1974 U.S. CODE CONG. & AD. NEWS at 7063 n.21.

¹⁰⁵ The earlier statements are more trustworthy because "memory hinges on recency, the prior statement is always nearer and usually very much nearer to the event than is the testimony. The fresher the memory, the fuller and more accurate it is." MCCORMICK, *supra* note 1, at § 251, at 602.

¹⁰⁶ *Id.*

¹⁰⁷ 3A WIGMORE, *supra* note 1, at § 1048, at 996.

¹⁰⁸ See notes 64-95 and accompanying text *supra*.

Even in *People v. Gould*, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960), where the California Supreme Court first held that those extrajudicial identifications that cannot be confirmed at trial may never result in a conviction, it stated:

[T]he probative value of an identification depends on the circumstances under which it was made. [The witness] merely selected one of a small group of photographs. The small size of the group increased the danger of suggestion. Identification from a still pho-

inconsistent statements that are "inherently untrustworthy," whether sworn or unsworn, should never be sufficient to convict.¹⁰⁹ Prior inconsistent statements should be sufficient only where there is a "sound basis for discounting the witness' trial testimony," and thus for giving greater credence to the prior statements.¹¹⁰

In general, sworn statements are inherently more trustworthy than unsworn statements. Hearing transcripts usually preserve the content and accuracy of a declarant's statement.¹¹¹ Consequently, there is little doubt that the declarant made the prior statement.¹¹² Further, that he chose to make the prior statement under oath, in the solemn circumstances attending a formal proceeding, increases the witness' credibility.¹¹³ Consequently, sworn statements are more likely to be sufficient for criminal convictions than unsworn statements.

Nevertheless, whether the prior statement is sworn or unsworn should be only one element in the overall determination of the reliability of the statement. An unsworn statement may

tograph is substantially less reliable than identification of an individual seen in person. It becomes particularly suspect when, as in the present case, the witness subsequently fails to identify the subject of the photograph when seen in person and there is no other evidence tending to identify him.

Id. at 631, 354 P.2d at 870, 7 Cal. Rptr. at 278 (citations omitted).

¹⁰⁹ For examples of untrustworthy circumstances that dominated the prior statements, see *In re Johnny G.*, 25 Cal. 3d 543, 545-46, 548, 601 P.2d 196, 197-98, 159 Cal. Rptr. 180, 181-82 (1979); *People v. Gould*, 54 Cal. 2d 621, 631, 354 P.2d 865, 870, 7 Cal. Rptr. 273, 278 (1960); *In re Eugene M.*, 55 Cal. App. 3d 650, 657-59, 127 Cal. Rptr. 851, 854-56 (2d Dist. 1976). See also notes 64-102 and accompanying text *supra*.

¹¹⁰ *People v. Chavez*, 26 Cal. 3d 334, 364, 605 P.2d 401, 420, 161 Cal. Rptr. 762, 781 (1980). Trustworthy circumstances also existed for crediting the witness' prior inconsistent statements over the trial repudiation in *People v. Ford*, 30 Cal. 3d 209, 212-15, 635 P.2d 1176, 1177-79, 178 Cal. Rptr. 196, 197-99 (1981); *People v. Green*, 3 Cal. 3d 981, 991, 479 P.2d 998, 1004, 92 Cal. Rptr. 494, 500 (1971); and *People v. Maxwell*, 94 Cal. App. 3d 562, 578, 156 Cal. Rptr. 630, 640 (2d Dist. 1979). See also notes 30, 63-102 and accompanying text *supra*. However, prior statements given to the police should receive particular scrutiny. See note 104 *supra*.

¹¹¹ See HOUSE REPORT, *supra* note 6, at 13, 1974 U.S. CODE CONG. & AD. NEWS at 7087, set forth in note 23 *supra*.

¹¹² See HOUSE REPORT, *supra* note 6, at 13, 1974 U.S. CODE CONG. & AD. NEWS at 7087, set forth in note 23 *supra*.

¹¹³ See HOUSE REPORT, *supra* note 6, at 13, 1974 U.S. CODE CONG. & AD. NEWS at 7087, set forth in note 23 *supra*.

certainly be as trustworthy under the criteria of the California courts¹¹⁴ as sworn statements. Suppose, for example, that a person who witnessed a crime contacts the police and provides them with detailed information about the perpetrator's role in the crime. He then repeats these statements on several occasions to others, all of whom have excellent reputations for truthfulness. At trial, the witness repudiates his earlier statements. There is, however, abundant evidence of an attempt to intimidate the witness and prevent him from testifying. Further, the witness gives multiple explanations for his repudiation which, though individually plausible, are inconsistent with each other. Certainly, these circumstances provide as much reason to value the prior statements over the witness' trial testimony as those found to be sufficient by the California Supreme Court in cases involving sworn statements.¹¹⁵

Clearly, there are situations where unsworn prior inconsistent statements possess qualities of reliability which some believe exist only in sworn statements.¹¹⁶ In the hypothetical above, for example, there is no doubt that the witness made the prior statement. The statement is substantiated by the witness' repeated, detailed, and voluntary statements to several reliable people. Admittedly, there is no transcript that would provide the trier of fact with the declarant's exact words. However, the corroborated accounts of the people who will testify to the con-

¹¹⁴ See notes 64-95 and accompanying text *supra*.

¹¹⁵ *People v. Ford*, 30 Cal. 3d 209, 212-15, 635 P.2d 1176, 1177-99, 178 Cal. Rptr. 196, 197-99 (1981); *People v. Chavez*, 26 Cal. 3d 334, 364, 605 P.2d 401, 420, 161 Cal. Rptr. 762, 781 (1980); *People v. Green*, 3 Cal. 3d 981, 986-87, 991, 479 P.2d 998, 1000-01, 1004, 92 Cal. Rptr. 494, 496-97 (1971). See also notes 30, 64-102 and accompanying text *supra*.

¹¹⁶ See HOUSE REPORT, *supra* note 6, at 13, 1974 U.S. CODE CONG. & AD. NEWS at 7087, set forth in note 23 *supra*. See also *People v. Ford*, 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981), where the California Supreme Court permitted a prior statement given "in a formal judicial proceeding, under oath and subject to cross-examination" to be sufficient for conviction because such statements satisfy "traditional indicia of reliability." *Id.* at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199. However, many authorities agree that subsequent cross-examination of the witness provides an adequate guarantee for determining the truthfulness of the prior statement. See *California v. Green*, 399 U.S. 149 (1970); note 13 and accompanying text *supra*; CAL. EVID. CODE § 1235, Law Revision Commission Comment, set forth in note 10 *supra*; S. CT. ADVIS. COMM. NOTES, *supra* note 24; SENATE REPORT, *supra* note 24, at 15, 16, 1974 U.S. CODE CONG. & AD. NEWS at 7062. See also Justice Learned Hand's opinion in *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925).

tent of the declarant's prior statements compensates for this shortcoming. When the circumstances surrounding a prior inconsistent statement are as reliable as those hypothesized, there is as little reason to question their truthfulness or accuracy as there would be had they been made under oath.

Emphasis on the trustworthiness of the circumstances surrounding prior inconsistent statements facilitates the application of the broad due process tests. This approach is consistent with these tests because just as the standard of proof "beyond a reasonable doubt" is impossible to refine, no specific test is available to determine the sufficiency of prior inconsistent statements to convict.¹¹⁷ Instead, prior inconsistent statements should be examined in their totality to determine if they meet the test of proof "beyond a reasonable doubt." Such statements can only be sufficient to convict where all the circumstances surrounding the prior inconsistent statement meet this broad due process standard.

CONCLUSION

Both federal and California courts place undue emphasis on sworn, as opposed to unsworn, prior inconsistent statements. Examination of all the circumstances surrounding prior inconsistent statements provides a more accurate and sensible approach to determine whether this type of evidence is sufficient to convict a defendant. Rather than arbitrarily denying an unsworn statement's efficacy, a careful examination of the surrounding circumstances would provide the necessary guarantees of trustworthiness for a criminal conviction. This approach requires sufficient indicia of reliability to surround the prior inconsistent statement—whether sworn or unsworn, to meet the constitutional due process standard of proof "beyond a reasonable doubt."

Brooks S. Talley

¹¹⁷ See notes 27-29, 99 and accompanying text *supra* for discussion of the difficulty of refining such definitions.