

At a woman's trial for bank robbery, the prosecutor has called a private security guard for the bank who has testified, without objection, that while he was on a coffee break, the woman's brother rushed up to him and said, "Come quickly! My sister is robbing the bank!" The woman now seeks to call a witness to testify that the brother later told the witness, "I got my sister into trouble by telling a security guard that she was robbing the bank, but now I realize I was mistaken." The brother is unavailable to testify.

Is the witness's testimony admissible?

- A. No, because the brother will be afforded no opportunity to explain or deny the later statement.
- B. No, because the prosecutor will be afforded no opportunity to confront the brother.
- C. Yes, because it is substantive proof that the woman did not rob the bank.
- D. Yes, but only as an inconsistent statement to impeach the brother's credibility.

Explanation:

When a **hearsay statement** is admitted under (1) *any* **hearsay exception** or (2) the **hearsay exclusion** for statements made by an opposing party's agent, employee, or coconspirator, the **declarant may be impeached** (and then rehabilitated) as though the declarant had testified **as a witness**. The *same* **methods for impeaching** a witness can therefore be used against the declarant. This includes a declarant's **inconsistent statement** that—unlike a witness's inconsistent statement—can be used for impeachment **regardless of**:

whether the inconsistent statement **occurred prior to or after** the hearsay statement *or* whether the declarant has an **opportunity to explain or deny** the inconsistent statement **(Choice A)**.

Here, the brother's hearsay statement—"My sister is robbing the bank!"—was admitted into evidence presumably under the hearsay exception for **excited utterances**. As a result, his inconsistent statement to the witness—"I was mistaken"—is admissible to *impeach* his credibility. But since the brother's inconsistent statement constitutes hearsay, it cannot be used as *substantive* proof that the woman did not rob the bank unless it is also excepted or excluded from the hearsay rule **(Choice C)**.

(Choice B) The **Sixth Amendment** confrontation clause gives criminal defendants—not prosecutors (as seen here)—the right to cross-examine opposing witnesses.

Educational objective:

When certain hearsay is admitted into evidence, the declarant can be impeached as though he/she had testified as a witness. But the declarant's inconsistent statement—unlike a witness's one—can be used for impeachment even if (1) it occurred after the hearsay statement or (2) the declarant had no opportunity to explain or deny it.

References

Fed. R. Evid. 806 (attacking and supporting the declarant's credibility).

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**Impeaching hearsay declarant
(FRE 806)**



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