

# PRIOR CONSISTENT STATEMENTS AND THE PREMOTIVE RULE

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## I. INTRODUCTION

The admissibility of prior consistent statements has long been a difficult and contentious issue.<sup>1</sup> The issue impacts a wide variety of significant cases, including sex-abuse cases,<sup>2</sup> criminal drug cases,<sup>3</sup> civil rights cases,<sup>4</sup> and many other actions, both criminal and civil.

Several factors contribute to the difficulty of determining when a prior consistent statement should be admitted. Included among

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1. See, e.g., *Hanger v. United States*, 398 F.2d 91, 103 (8th Cir. 1969) (noting that aspects of the issue have “plagued the courts for centuries”); Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 *HASTINGS L.J.* 575, 576 (1979) (“In modern litigation the use of prior consistent statements has become exceedingly confused and complex.”); Annotation, *Admissibility of Previous Statements by a Witness out of Court Consistent with His Testimony*, 41 *L.R.A. (N.S.)* 857, 858 (1913) (stating that the admissibility of prior consistent statements “is as perplexing as any in the law of evidence”) [hereinafter 41 *L.R.A. (N.S.)*].

2. See, e.g., *Tome v. United States*, 115 S. Ct. 696, 696-710 (1995), affg 3 F.3d 342 (10th Cir. 1993); *United States v. White*, 11 F.3d 1446, 1448-51 (8th Cir. 1993).

3. See, e.g., *United States v. Forrester*, 60 F.3d 52, 64-65 (2d Cir. 1995); *United States v. Montague*, 958 F.2d 1094, 1096-98 (D.C. Cir. 1992).

4. See, e.g., *United States v. Farmer*, 923 F.2d 1557, 1567-68 (11th Cir. 1991); *Washington v. Vogel*, 880 F. Supp. 1534, 1540 (M.D. Fla. 1995).

them is a tension between the theoretical analysis of the issue and the recognition that such an approach sometimes does not comport with the practicalities of a jury trial. This tension, combined with the desire for “bright-line” rules, resulted in the development of common-law evidence rules that sometimes needlessly prohibited the admission of evidence that would assist the jury in its deliberations.

The Federal Rules of Evidence, enacted in 1975,<sup>5</sup> sought to bring stability and provide guidance to evidence law in the federal courts. Rule 801(d)(1)(B) of the Federal Rules of Evidence exempts from the definition of hearsay certain prior statements made by a testifying witness who is subject to cross-examination concerning the statement.<sup>6</sup> Thus, prior consistent statements within Rule 801(d)(1)(B)’s scope are admissible as substantive evidence to show the truth of the matter asserted. The prior statement of a witness is exempted from the definition of hearsay if the statement is “consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.”<sup>7</sup> Unfortunately, Rule 801(d)(1)(B) has given rise to much confusion regarding several issues.

In *Tome v. United States*,<sup>8</sup> the United States Supreme Court addressed one of the principal points of confusion associated with Rule 801(d)(1)(B): whether prior consistent statements made by the declarant after the alleged fabrication or improper influence or motive arose are admissible under Rule 801(d)(1)(B). The vast majority of courts addressing this question under the common law held such statements inadmissible. These courts reasoned that such statements were of no value because they could be the product of the same improper influence charged at trial.<sup>9</sup> In a 5-4 decision, the Supreme Court reasoned that Rule 801(d)(1)(B) codified the common-law rule and held that a declarant’s prior consistent statement may be admitted into evidence under Rule 801(d)(1)(B) only if the statement was made before the alleged fabrication or improper influence or motive arose.<sup>10</sup> In other words, the Court held that pre-motive, but not postmotive, prior consistent statements are admis-

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5. See Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1296 (1975).

6. See FED. R. EVID. 801(d)(1)(B).

7. *Id.*

8. 115 S. Ct. 696 (1995).

9. See *infra* Part II.B.1.

10. See *Tome*, 115 S. Ct. at 700.

sible under Rule 801(d)(1)(B).<sup>11</sup> This time-line admissibility rule is known as the premotive rule.

Some commentators have criticized the Tome Court's analysis and conclusion.<sup>12</sup> These commentators address the Court's holding that the Federal Rules of Evidence codified the common-law premotive rule. None of these commentators, however, addressed the vital issue: the premotive rule itself.

This Article examines the admissibility of prior consistent statements, concentrating on the premotive rule. The Article concludes that the per se, time-line premotive rule codified in Rule 801(d)(1)(B) is overly restrictive in some instances. The rule can hamper the jury's fact-finding mission by placing an often crucial factual determination where it does not belong—in the hands of the trial judge. Although a per se premotive rule compels the correct result in the vast majority of situations, it does not sufficiently take into account the ebb and flow of an individual's motives and emotions, the infinite array of factual situations in which the issue might arise, or the strength of the jury's ability to weigh evidence. A more flexible approach, one that takes account of the realities of a jury trial, is needed. This need can be met by amending the Federal Rules of Evidence.

Part II of this Article provides background and an historical discussion of the admissibility of prior consistent statements at common law. Part III examines the admissibility of prior consistent statements under the Federal Rules of Evidence, focusing on the premotive rule. Part IV describes the Tome case, including a discussion of the Supreme Court's majority and dissenting opinions. Part V suggests that Rule 801(d)(1)(B) should be amended, and sets forth some issues that the amendment should address.

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11. The terms "premotive" and "postmotive" are employed throughout this Article as short-hand for, respectively, before and after "recent fabrication or improper influence or motive" (the language of Rule 801(d)(1)(B) and many common-law courts).

12. See, e.g., Robert P. Burns, Foreword: Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision, 85 J. CRIM. L. & CRIMINOLOGY 843 (1995); Eileen A. Scallen, Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes, 28 LOY. L.A. L. REV. 1283 (1995); Eileen A. Scallen, Classical Rhetoric, Practical Reasoning, and the Law of Evidence, 44 AM. U. L. REV. 1717 (1995); Andrew E. Taslitz, Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics, 32 HARV. J. ON LEGIS. 329 (1995); Christopher A. Jones, Note, Clinging to History: The Supreme Court (Mis)Interprets Federal Rule of Evidence 801(d)(1)(B) as Containing a Temporal Requirement, 29 U. RICH. L. REV. 459 (1995).

## II. THE COMMON LAW AND PRIOR CONSISTENT STATEMENTS

### A. Development of the Common-Law Rule

Through the early 1700s, courts admitted witnesses' prior consistent statements as substantive evidence without limitation.<sup>13</sup> These courts reasoned that such statements effectively corroborated witnesses' in-court testimony.<sup>14</sup>

Around 1675, common-law courts began to question the admissibility of hearsay.<sup>15</sup> However, common-law rules prohibiting the admission of hearsay were not prevalent until the mid-1700s.<sup>16</sup>

The hearsay rule's development impacted the admissibility of prior consistent statements. In the early 1700s, litigants began making hearsay objections to the admission of prior consistent statements.<sup>17</sup> In response, some courts began prohibiting the admission of prior consistent statements for their truth and content.<sup>18</sup> These courts, however, continued to allow the admission of such statements during direct testimony for independent, corroborative, nonsubstantive use, even though the witness had not yet been impeached.<sup>19</sup> Eighteenth-century evidence commentator Sir Geoffrey Gilbert explained the prevailing thought on the matter: although "hearsay [evidence may not be] allowed as direct evidence, . . . it may be in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself."<sup>20</sup>

In the early 1800s, litigants began objecting to prior consistent statements on additional, other-than-hearsay grounds, including relevancy.<sup>21</sup> These objections brought about the common-law rule that a witness's testimony could not be bolstered until the witness's credibility was attacked.<sup>22</sup> Courts recognized that bolstering evidence offered before impeachment provided no value.<sup>23</sup> Courts thus reasoned that prior consistent statements offered before impeach-

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13. See 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1123, at 254 (Chadbourn Rev. 1972); John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 446-47 (1904).

14. See 4 WIGMORE, *supra* note 13, § 1123, at 254.

15. See 5 *id.* § 1364, at 18.

16. See 5 *id.*

17. See 4 *id.* § 1123, at 254.

18. See 4 *id.* § 1123, at 254-55.

19. See 4 *id.* § 1123, at 254; 5 *id.* § 1364, at 20.

20. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 108 (photo. reprint, Garland Publishing, Inc. 1979) (1754). For an interesting look at Gilbert's evidentiary work, see Judy M. Cornett, *The Treachery of Perception: Evidence and Experience in Clarissa*, 63 U. CIN. L. REV. 165 (1994).

21. See 4 WIGMORE, *supra* note 13, § 1123, at 254.

22. See Graham, *supra* note 1, at 577-78; see also *United States v. Holmes*, 26 F. Cas. 349, 352 (C.C.D. Me. 1858) ("No principle in the law of evidence is better settled than" the rule that direct testimony supporting a witness's credibility "is not to be heard except in reply" to an opposing party's impeachment attempt).

23. See 4 WIGMORE, *supra* note 13, § 1124, at 255.

ment were no more probative than in-court statements and were unnecessarily cumulative.<sup>24</sup> Indeed, most courts agreed that “a falsehood may be repeated as often as the truth.”<sup>25</sup> Based on this analysis, courts held prior consistent statements inadmissible when offered during direct testimony, and admitted such statements only after impeachment<sup>26</sup> of the declarant witness’s credibility, and then for only rehabilitative, and not substantive, purposes.<sup>27</sup> This became the accepted and prevailing common-law rule.<sup>28</sup>

Beginning in the mid-1900s, several commentators advocated the alteration of the hearsay rules to allow admission of a witness’s prior statements as nonhearsay. Scholars taking such a position included John H. Wigmore,<sup>29</sup> Edmund M. Morgan,<sup>30</sup> Charles T. McCormick,<sup>31</sup> and Jack B. Weinstein.<sup>32</sup>

The Uniform Rules of Evidence, promulgated in 1953, and the Model Code of Evidence, promulgated in 1942, incorporated these scholars’ position.<sup>33</sup> Rule 63(1) of the Uniform Rules of Evidence provided that prior statements were not hearsay if the declarant was present at the trial and was available for cross-examination.<sup>34</sup>

24. See 4 *id.*

25. E.g., *State v. Parish*, 79 N.C. 610, 613 (1878).

26. “Impeachment” includes “attempted impeachment” as applicable throughout this discussion. What constitutes sufficient “impeachment” to satisfy the requirements of Rule 801(d)(1)(B) and the common law is beyond the scope of this Article.

27. See, e.g., *Conrad v. Griffey*, 52 U.S. (11 How.) 480, 491-92 (1850); *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836); *Stewart v. People*, 23 Mich. 63 (1871).

28. See 4 WIGMORE, *supra* note 13, § 1124.

29. See 3A *id.* § 1018, at 996 (discussing self-contradiction and observing that “the whole purpose of the hearsay rule has been already satisfied”); see also *California v. Green*, 399 U.S. 149, 154-55 (1970).

30. See Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948). Professor Morgan reasoned that “[w]hen the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. This is especially true where Declarant as a witness is giving as part of his testimony his own prior statement.” *Id.*; see also Edmund M. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 4 (1937).

31. See CHARLES T. MCCORMICK, *LAW OF EVIDENCE* § 224, at 458 (1954); 2 CHARLES T. MCCORMICK, *MCCORMICK ON EVIDENCE* § 251, at 117 (John W. Strong ed., 4th ed. 1992) [hereinafter *MCCORMICK ON EVIDENCE*]; Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573, 575-88 (1947).

32. See Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 333 (1961) (describing the “practical absurdity in many instances [of] treating the out of court statement of the witness himself as hearsay”).

33. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence. See generally Symposium on the Uniform Rules of Evidence, 10 RUTGERS L. REV. 479, 479-646 (1956).

The American Law Institute promulgated the Model Code of Evidence. See MODEL CODE OF EVIDENCE (1942). Professor Morgan served as reporter for the Model Code, while Dean Wigmore served as chief consultant. See *id.* at iii-iv.

34. The Uniform Rules of Evidence defined as nonhearsay “[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the state-

The Model Code of Evidence contained the same provision.<sup>35</sup> However, this position was not well-received. Only a few jurisdictions adopted the original Uniform Rules of Evidence.<sup>36</sup> No jurisdictions adopted the Model Code of Evidence.<sup>37</sup> The common-law rule described earlier remained the accepted rule regarding prior consistent statements.

## B. Circumstances Required for the Admission of Prior Consistent Statements Under the Common-Law Rule

Although the accepted common-law rule continued to govern, courts disagreed on what circumstances must precede the admission of a prior consistent statement. Courts' decisions in this regard generally depended on (1) what the impeachment charged or attacked, (2) the method by which the impeachment was accomplished, and (3) the purpose for which the prior consistent statement was offered.

### 1. Charge or Attack

Courts overwhelmingly agreed that prior consistent statements were admissible to rebut impeachment that charged recent fabrication or improper influence or motive.<sup>38</sup> Such a charge can be accomplished by several means of impeachment, including opposing counsel's questions and the introduction of prior inconsistent statements.

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ment would be admissible if made by declarant while testifying as a witness." UNIF. R. EVID. 63(1) (1953). In 1974, the Uniform Rules of Evidence abandoned this position and generally conformed to the Federal Rules of Evidence. See UNIF. R. EVID. 801(d)(1) (1974).

35. See MODEL CODE OF EVIDENCE Rule 503 (1942). "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable to testify, or (b) is present and subject to cross-examination." *Id.*

36. See 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5005, at 91-92 (1977).

37. See 21 *id.* § 5005, at 88-89. As a result of the Nebraska Supreme Court's adoption of the Model Code of Evidence, the Nebraska Legislature repealed the court's rulemaking power and rejected the Model Code. See 21 *id.* § 5005, at 89 & n.80 (citing Edmund M. Morgan, *The Future of the Law of Evidence*, 29 TEX. L. REV. 587, 599 (1951)).

38. See, e.g., *Conrad v. Griffey*, 52 U.S. (11 How.) 480, 491-92 (1850); *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836); *Dowdy v. United States*, 46 F.2d 417, 424 (4th Cir. 1931); *Dwyer v. State*, 145 A.2d 100, 109-10 (Me. 1958); *Commonwealth v. Retkovitz*, 110 N.E. 293, 297-99 (Mass. 1915); *State v. Flint*, 14 A. 178, 184-86 (Vt. 1888); see also Annotation, *Admissibility, for Purposes of Supporting Impeached Witnesses, of Prior Statements by Him Consistent with His Testimony*, 75 A.L.R.2D 909, 935-50 (1961) (citing cases) [hereinafter 75 A.L.R.2D]; Annotation, *Admissibility, for Purpose of Supporting Impeached Witness, of Prior Statements by Him Consistent with His Testimony*, 140 A.L.R. 21, 78-129 (1942) (citing cases) [hereinafter 140 A.L.R.].

Judge Weinstein and Professor Berger note that "[p]rior to the federal rules, the courts were virtually unanimous in allowing" prior consistent statements to be used following impeachment by this method. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 801(d)(1)(B)[01], at 801-149 to -150 (1996).

Moreover, the vast majority of courts followed a time-line admissibility rule for prior consistent statements. Courts held that prior consistent statements made before, but not after, the alleged fabrication or improper influence or motive arose were admissible.<sup>39</sup> This time-line rule is known as the premotive rule.

Courts following the premotive rule reasoned that prior consistent statements made before the existence of the alleged motive directly rebut such impeachment by demonstrating that the declarant's in-court statement is consistent with out-of-court statements made when the declarant is not alleged to have had an improper motive to falsify his or her statement.<sup>40</sup> Conversely, these courts noted, prior consistent statements made afterwards could be the result of the same improper influence that generated the in-court statements, and therefore are of little value.<sup>41</sup>

In nearly all of these jurisdictions, a prior consistent statement's admissibility was decided in the same manner as other evidentiary questions that require predicate showings for admissibility. The trial judge determined whether a prior consistent statement was premotive or postmotive based on evidence presented to the jury up to the time the statement's admission was sought, evidence presented to the judge out of the jury's presence, or a combination of these two means. The judge's determination of this question would normally dictate the admissibility of the statement.<sup>42</sup>

The United States Court of Appeals for the Second Circuit, recognizing the strength and propriety of the jury's fact-finding ability, adopted a different, deferential standard of admissibility. The Second Circuit held that if it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them."<sup>43</sup>

A small minority of courts held that prior consistent statements made after the alleged fabrication or improper influence or motive arose also could be admissible.<sup>44</sup> These courts reasoned that post-

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39. See, e.g., *Ellicott*, 35 U.S. (10 Pet.) at 439; *Ryan v. UPS*, 205 F.2d 362, 364 (2d Cir. 1953); *People v. Walsh*, 301 P.2d 247, 250-51 (Cal. 1956); *People v. Singer*, 89 N.E.2d 710, 711-12 (N.Y. 1949); see also 75 A.L.R.2D, *supra* note 38, at 944-46 (citing cases); 140 A.L.R., *supra* note 38, at 117-21 (citing cases).

40. See sources cited *supra* note 39.

41. See sources cited *supra* note 39.

42. See sources cited *supra* note 39.

43. *United States v. Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd* on other grounds, 353 U.S. 391 (1957); see also *United States v. Sampol*, 636 F.2d 621, 673 (D.C. Cir. 1980); *United States v. DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970); *Greenway v. State*, 626 P.2d 1060, 1062 (Alaska 1980) (Matthews, J., concurring).

44. See, e.g., *United States v. Gandy*, 469 F.2d 1134, 1134-35 (5th Cir. 1972); *Hanger v. United States*, 398 F.2d 91, 104-05 (8th Cir. 1968); *Copes v. United States*, 345 F.2d 723, 725-26 (D.C. Cir. 1964); *State v. George*, 30 N.C. 324, 328 (1848).

motive prior consistent statements and the circumstances surrounding such statements are relevant to the jury's evaluation of the declarant's motive and testimony.<sup>45</sup>

A witness's memory is sometimes attacked as faulty. Such an attack can be accomplished by opposing counsel's questions, prior inconsistent statements, negative evidence, and other impeachment means.<sup>46</sup> Several courts held prior consistent statements admissible following an attack on a witness's memory.<sup>47</sup> These courts reasoned that such statements indicate the witness's "true belief"<sup>48</sup> or demonstrate the witness's "accuracy of memory."<sup>49</sup> Moreover, these courts reasoned that such statements are "necessary to give the jury a complete basis upon which to judge the credibility" of the witness's testimony.<sup>50</sup> Given this rationale, many of these courts required that the prior consistent statement be made soon after the event in question.<sup>51</sup>

A few courts held prior consistent statements inadmissible in like circumstances.<sup>52</sup> These courts did not explicitly set forth their rationale in this regard. It appears, however, that their reasoning was

45. See, e.g., *Gandy*, 469 F.2d at 1134-35; *Copes*, 345 F.2d at 725.

46. It is important to note that an attack on a witness's memory often, but not always, includes a charge of recent fabrication.

47. See, e.g., *Applebaum v. American Export Isbrandtsen Lines*, 472 F.2d 56, 61 (2d Cir. 1972); *Felice v. Long Island R.R.*, 426 F.2d 192, 198 n.6 (2d Cir. 1970); *United States v. Keller*, 145 F. Supp. 692, 695-97 (D.N.J. 1956); *People v. Basnett*, 8 Cal. Rptr. 804, 810-11 (Ct. App. 1960); *Thomas v. Ganezer*, 78 A.2d 539, 542 (Conn. 1951); *Openshaw v. Adams*, 445 P.2d 663, 668-69 (Idaho 1968); *Cross v. State*, 86 A. 223, 227 (Md. 1912); *People v. Mann*, 212 N.W.2d 282, 287 (Mich. Ct. App. 1973); *State v. Slocinski*, 197 A. 560, 562 (N.H. 1938); *Jones v. Jones*, 80 N.C. 246, 250 (1878); see also *Graham*, supra note 1, at 605-06 (noting that prior consistent statements properly support such an attack "if the statement was made shortly after the event in question"); 1 MCCORMICK ON EVIDENCE, supra note 31, § 47, at 178 n.18 ("If the witness's accuracy of memory is challenged, it seems clear common sense that a consistent statement made shortly after the event and before he had time to forget, should be received in support."); 75 A.L.R.2D, supra note 38, at 929-30 (citing cases); 140 A.L.R., supra note 38, at 48-49 (citing cases). Courts hold similarly today. See *Debra T. Landis*, Annotation, Admissibility of Impeached Witness' Prior Consistent Statement—Modern State Civil Cases, 59 A.L.R.4TH 1000, 1023 (1988 & Supp. 1994) (citing cases) [hereinafter 59 A.L.R.4TH]; *Debra T. Landis*, Annotation, Admissibility of Impeached Witness' Prior Consistent Statement—Modern State Criminal Cases, 58 A.L.R.4TH 1014, 1051-53 (1987 & Supp. 1994) (citing cases) [hereinafter 58 A.L.R.4TH].

48. *Openshaw*, 445 P.2d at 669.

49. *Thomas*, 78 A.2d at 542 (quoting *Jones*, 80 N.C. at 250) (internal quotation marks omitted).

50. *Applebaum*, 472 F.2d at 62.

51. See, e.g., *id.* at 61-62; *Jones*, 80 N.C. at 250; see also 1 MCCORMICK ON EVIDENCE, supra note 31, § 47, at 178 n.18.

52. See, e.g., *People v. Doyell*, 48 Cal. 85, 90-91 (1874); *People v. Kinney*, 95 N.E. 756, 757 (N.Y. 1911); *Cincinnati Traction Co. v. Stephens*, 79 N.E. 235, 236-37 (Ohio 1906); *Green v. State*, 110 S.W. 929, 929-30 (Tex. Crim. App. 1908); see also *Graham*, supra note 1, at 605-06; 140 A.L.R., supra note 38, at 47-48. The common-law trend throughout the twentieth century, however, was to admit prior consistent statements following an attack on a witness's memory.

based on a very strict adherence to the general common-law rule prohibiting the use of hearsay.<sup>53</sup>

Many courts construed an attack on a witness's memory to be a charge of recent fabrication. Thus, these courts admitted prior consistent statements to rebut such attacks under the well-recognized rule admitting such statements to rebut a charge of recent fabrication.<sup>54</sup> These courts took an expansive view of the term "fabricated." Courts recognized "fabricated" to mean "fabricat[ion] to meet the exigencies of the case."<sup>55</sup> However, "fabricated" normally indicates a conscious and purposeful falsification.<sup>56</sup> "Fabricate" is defined as "to make up for the purposes of deception."<sup>57</sup>

Although an attack on a witness's memory may include a charge of purposeful deception, such an attack does not always do so. For example, an attack charging inaccurate memory by showing the witness's simple forgetfulness or confusion may be made without charging purposeful deception. Common-law courts, however, often seemed to treat "recent fabrication" as a term of art, including non-purposeful deception within its definition.<sup>58</sup>

Other courts, in admitting prior consistent statements to rebut attacks on a witness's memory, recognized some distinction between such attacks and a charge of recent fabrication. These courts reasoned that such attacks created situations that were "sufficiently analogous" to the cases admitting prior consistent statements to rebut a charge of recent fabrication.<sup>59</sup>

## 2. Other Types of Impeachment

Common-law courts largely agreed that impeachment methods that did not charge a recent fabrication or improper influence or motive, or attack the witness's memory, did not open the door to the introduction of prior consistent statements.<sup>60</sup> Some methods received near-uniform treatment, while others resulted in disagreement.

Nearly all courts held prior consistent statements inadmissible to rebut impeachment by mere contradiction evidence.<sup>61</sup> If mere con-

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53. See, e.g., Kinney, 95 N.E. at 757 ("It is sufficient to state somewhat dogmatically that this evidence [a prior consistent statement regarding identification] was utterly incompetent, for this is so baldly the law that there is no chance for debate or discussion.").

54. See sources cited supra note 47.

55. E.g., *People v. Singer*, 89 N.E.2d 710, 711 (N.Y. 1949).

56. See Graham, supra note 1, at 582-83.

57. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 443 (1989).

58. See, e.g., sources cited supra notes 38-39.

59. E.g., *Thomas v. Ganezer*, 78 A.2d 539, 542 (Conn. 1951).

60. Professor Michael Graham refers to this type of impeachment as "naked impeachment." Graham, supra note 1, at 594.

61. Mere contradiction evidence usually takes the form of a witness whose testimony portrays a different version of the matter about which a previous witness testified. Many

tradition justified the admission of prior consistent statements, "then the witness who had repeated his story to the greatest number of people would be the most credible."<sup>62</sup>

Most courts, noting that a person of bad moral character could easily repeat a story, held prior consistent statements inadmissible to rebut impeachment by evidence of the declarant's bad moral character.<sup>63</sup> Following the same general reasoning, nearly all courts held prior consistent statements inadmissible to rebut impeachment by evidence of the declarant's bad reputation for veracity.<sup>64</sup>

Courts split as to whether prior consistent statements were admissible following impeachment of the witness by prior inconsistent statements alone.<sup>65</sup> A majority of courts held prior consistent statements inadmissible following such impeachment.<sup>66</sup> These courts generally reasoned that "since the self-contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the inconsistent statement."<sup>67</sup> A number of courts, however, held

courts decline to admit prior consistent statements to rebut such impeachment. See, e.g., *Inman Bros. v. Dudley & Daniels Lumber Co.*, 146 F. 449, 456 (6th Cir. 1906); *Evans v. State*, 22 S.E. 298, 298-99 (Ga. 1894); *People v. Katz*, 103 N.E. 305, 312-13 (N.Y. 1913); see also 4 WIGMORE, supra note 13, § 1127, at 267; 140 A.L.R., supra note 38, at 38-42 (citing cases).

A very small minority of courts, however, ruled such statements admissible following contradiction evidence. See, e.g., *Mallonee v. Duff*, 19 A. 708, 708-09 (Md. 1890); *State v. Rhyne*, 13 S.E. 943, 943-44 (N.C. 1891); see also 140 A.L.R., supra note 38, at 42-47 (citing cases). Dean Wigmore described these courts as "misled." 4 WIGMORE, supra note 13, § 1127, at 267.

62. 4 WIGMORE, supra note 13, § 1127, at 267.

63. See, e.g., *Edwards v. Commonwealth*, 140 S.W. 1046, 1047 (Ky. 1911); *Lyles v. State*, 239 S.W. 446, 449-50 (Tenn. 1922); *Thurmond v. State*, 11 S.W. 451, 452 (Tex. Ct. App. 1889); see also 4 WIGMORE, supra note 13, § 1125, at 258; 140 A.L.R., supra note 38, at 34-35 (citing cases). A few courts, however, admitted prior consistent statements to rebut the impeachment of the declarant's moral character. See, e.g., *State v. Rowe*, 4 S.E. 506, 509-10 (N.C. 1887); *Zell v. Commonwealth*, 94 Pa. 258, 267 (1880); see also 140 A.L.R., supra note 38, at 35-36 (citing cases).

64. See, e.g., *Yoder v. United States*, 71 F.2d 85, 89 (10th Cir. 1934); *McKelton v. State*, 6 So. 301, 301 (Ala. 1889); *Mason v. Vestal*, 26 P. 213, 213-14 (Cal. 1891); see also 4 WIGMORE, supra note 13, § 1125, at 258; 75 A.L.R.2D, supra note 38, at 927-28 (citing cases); 140 A.L.R., supra note 38, at 36-37 (citing cases). A few courts, however, admitted prior consistent statements to rebut such impeachment. See, e.g., *State v. Parrish*, 468 P.2d 143, 149 (Kan. 1970); *State v. Dove*, 32 N.C. 469, 474-75 (1849); 4 WIGMORE, supra note 13, § 1125, at 258; 140 A.L.R., supra note 38, at 37 (citing cases).

65. "The admission of prior consistent statements to support a witness impeached by prior inconsistent statements has plagued the courts for centuries . . ." *Hanger v. United States*, 398 F.2d 91, 103 (8th Cir. 1968). Impeachment by prior inconsistent statement is also called self-contradiction. See id.

66. See, e.g., *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836); *Affronti v. United States*, 145 F.2d 3, 7 (8th Cir. 1944); *Gelbin v. New York, N.H. & H.R. Co.*, 62 F.2d 500, 502 (2d Cir. 1933); *American Agric. Chem. Co. v. Hogan*, 213 F. 416, 420-21 (1st Cir. 1914); *Baker v. People*, 209 P. 791, 793 (Colo. 1922); *Chicago City Ry. v. Matthieson*, 72 N.E. 443, 444-45 (Ill. 1904); see also 4 WIGMORE, supra note 13, § 1126; 140 A.L.R., supra note 38, at 49-59 (citing cases). Much of the case law recognized this as the "general rule."

67. 4 WIGMORE, supra note 13, § 1126, at 259.

that prior consistent statements were admissible following impeachment by prior inconsistent statements alone.<sup>68</sup> These courts generally reasoned that "if a contradictory statement counts against the witness, a consistent one should count for him."<sup>69</sup>

Moreover, some courts reasoned that prior consistent statements are admissible following impeachment by a prior inconsistent statement alone if the prior consistent statement is related to an explanation or denial of the alleged prior inconsistent statement.<sup>70</sup> In other words, courts held that prior consistent statements could be admitted to help explain that the previously admitted prior inconsistent statement is incorrect or misleading, or to help explain that the prior inconsistent statement was simply never made.<sup>71</sup> Appellate courts sometimes answered this difficult question by leaving the decision to the trial judge's sound discretion.<sup>72</sup>

This remained the state of the common law regarding prior consistent statements until the enactment of the Federal Rules of Evidence. Both state and federal common-law evidentiary rules were important to federal courts of the time. Before the enactment of the Federal Rules of Evidence, the admission of evidence in federal civil

68. See, e.g., *Schoppel v. United States*, 270 F.2d 413, 417 (4th Cir. 1959); *United States v. Corry*, 183 F.2d 155, 157 (2d Cir. 1950); *Childs v. State*, 55 Ala. 25, 28 (1876); *Thompson v. State*, 58 N.E.2d 112, 112-13 (Ind. 1944), overruled by *Dean v. State*, 433 N.E.2d 1172 (Ind. 1982); *American Stores Co. v. Herman*, 171 A. 54, 55-56 (Md. 1934); *Cross v. State*, 86 A. 223, 226-27 (Md. 1912); *People v. Purman*, 185 N.W. 725, 727 (Mich. 1921); *Stewart v. People*, 23 Mich. 63, 74-76 (1871); *Stafford v. Lyon*, 413 S.W.2d 495, 498 (Mo. 1967); *Piehler v. Kansas City Pub. Serv. Co.*, 226 S.W.2d 681, 683-84 (Mo. 1950); *Reeves v. Hill*, 158 S.E.2d 529, 537 (N.C. 1968); *Hale v. Smith*, 460 P.2d 351, 353 (Or. 1969); *State v. Turner*, 15 S.E. 602, 602-03 (S.C. 1892); *Kepley v. State*, 320 S.W.2d 143, 145 (Tex. Crim. App. 1959); *State v. Sibert*, 310 P.2d 388, 391 (Utah 1957); *Russell v. Cavelero*, 246 P. 25, 26 (Wash. 1926); see also *Kaneshiro v. United States*, 445 F.2d 1266, 1271 (9th Cir. 1971); *Sweazey v. Valley Transp., Inc.*, 107 P.2d 567, 572 (Wash. 1940) (describing admitting prior consistent statements to rebut prior inconsistent statements as the minority rule); 140 A.L.R., supra note 38, at 59-65 (citing cases); see generally 4 WIGMORE, supra note 13, § 1126, at 258-67.

69. 4 WIGMORE, supra note 13, § 1126, at 259.

70. See, e.g., *United States v. Fayette*, 388 F.2d 728, 733-35 (2d Cir. 1968); *Newman v. United States*, 331 F.2d 968, 970-71 (8th Cir. 1964); *United States v. Agueci*, 310 F.2d 817, 834 (2d Cir. 1962); *United States v. Lev*, 276 F.2d 605, 608 (2d Cir. 1960); *Cafasso v. Pennsylvania R.R.*, 169 F.2d 451, 453 (3d Cir. 1948); *Affronti*, 145 F.2d at 7 ("[I]f some portions of a statement made by a witness are used on cross-examination to impeach him, other portions of the statement which are relevant to the subject matter about which he was cross-examined may be introduced in evidence to meet the force of the impeachment."); *United States v. Weinbren*, 121 F.2d 826, 828-29 (2d Cir. 1941); *United States v. Katz*, 78 F. Supp. 435, 440 (M.D. Pa. 1948), aff'd, 173 F.2d 116 (3d Cir. 1949); see generally MICHAEL H. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 6712, at 461 (interim ed. 1992).

71. See, e.g., *Felice v. Long Island R.R.*, 426 F.2d 192, 198 (2d Cir. 1970); *Twardosky v. New England Tel. & Tel. Co.*, 62 A.2d 723, 727 (N.H. 1948); *Sweazey*, 107 P.2d at 572; see also 4 WIGMORE, supra note 13, § 1126, at 260-65; GRAHAM, supra note 70, § 6712, at 461; Graham, supra note 1, at 594-602.

72. See, e.g., *Hanger v. United States*, 398 F.2d 91, 103-04 (8th Cir. 1968); *National Postal Transp. Assoc. v. Hudson*, 216 F.2d 193, 200 (8th Cir. 1954); *Cafasso*, 169 F.2d at 453; *Affronti*, 145 F.2d at 7; *State v. Ouimette*, 298 A.2d 124, 133-34 (R.I. 1972).

cases was primarily governed by Rule 43(a) of the Federal Rules of Civil Procedure.<sup>73</sup> Rule 43(a), enacted in 1938, provided for the admission of evidence in federal court in civil trials if the evidence was admissible under federal statute, federal common law or decisions, or under statutes or rules of the state where the district court sat.<sup>74</sup> Rule 26 of the Federal Rules of Criminal Procedure provided that the admissibility of evidence in federal criminal cases was generally governed by common law.<sup>75</sup>

### III. THE FEDERAL RULES OF EVIDENCE AND PRIOR CONSISTENT STATEMENTS

#### A. Prior Consistent Statements and Rule 801(d)(1)(B) of the Federal Rules of Evidence

The Federal Rules of Evidence gave rise to a new era of evidence law. Congress enacted the Federal Rules of Evidence in 1975 "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."<sup>76</sup> Moreover, the Rules sought to reduce inconsistency and arbitrariness in the admission of evidence in federal courts.<sup>77</sup>

Although much of the Federal Rules of Evidence is based on the Uniform Rules of Evidence,<sup>78</sup> the Federal Rules of Evidence did not incorporate the Uniform Rules of Evidence's position on prior statements as nonhearsay.<sup>79</sup> Instead, the Federal Rules of Evidence generally adhered to the prevailing common-law hearsay rules.<sup>80</sup>

73. FED. R. CIV. P. 43(a) (1938) (amended 1972).

74. See *id.* Rule 43(a) provided, in pertinent part:

All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs . . .

*Id.*; see also generally Thomas F. Green, Jr., Federal Civil Procedure Rule 43(a), 5 VAND. L. REV. 560 (1952).

75. See FED. R. CRIM. P. 26 (1946). Rule 26 provided, in pertinent part: "The admissibility of evidence . . . shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.*

76. FED. R. EVID. 102.

77. See William L. Hungate, An Introduction to the Proposed Rules of Evidence, 32 FED. B.J. 225, 228-29 (1973).

78. See 21 WRIGHT & GRAHAM, *supra* note 36, § 5005, at 90.

79. See FED. R. EVID. 801(d) advisory committee's note (comparing Rule 63(1) of the Uniform Rules of Evidence with Rule 801(d)).

80. See *id.*

Federal Rule of Evidence 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>81</sup> Hearsay is generally excluded from evidence under Rule 802.<sup>82</sup>

Rule 801(d)(1)(B) addresses the admission of prior consistent statements by removing certain prior consistent statements from the definition of hearsay. Rule 801(d)(1)(B) provides:

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.<sup>83</sup>

The most important aspect in which Rule 801(d)(1)(B) differs from the common-law rule governing the admission of prior consistent statements is that Rule 801(d)(1)(B) allows the admission of statements within its scope for substantive purposes.<sup>84</sup> The Advisory Committee noted that this aspect of Rule 801(d)(1)(B) rejects the "bulk of the case law" and is a "judgment . . . more of experience than of logic."<sup>85</sup>

Many federal circuits hold that prior consistent statements offered for the limited purpose of rehabilitation, and not for substantive use, are not governed by Rule 801(d)(1)(B).<sup>86</sup> Evidence commen-

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81. FED. R. EVID. 801(c). Rule 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a). Rule 801(b) defines a "declarant" as "a person who makes a statement." FED. R. EVID. 801(b).

82. See FED. R. EVID. 802. Rule 802 provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." *Id.*

83. FED. R. EVID. 801(d)(1)(B). Of course, prior consistent statements admissible under Rule 801(d)(1)(B) must still qualify for admission under the relevancy rules. See FED. R. EVID. 401-03.

84. This is true for all prior statements admitted under Rule 801(d). See FED. R. EVID. 801(d) advisory committee's note.

85. *Id.*

86. See, e.g., *Engbretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729-30 (6th Cir. 1994); *United States v. Castillo*, 14 F.3d 802, 805-06 (2d Cir. 1994); *United States v. White*, 11 F.3d 1446, 1449 (8th Cir. 1993); *United States v. Casoni*, 950 F.2d 893, 905-06 (3d Cir. 1991); *United States v. Bolick*, 917 F.2d 135, 138 (4th Cir. 1990); *United States v. Roy*, 843 F.2d 305, 307 (8th Cir. 1988); *United States v. Colon*, 835 F.2d 27, 31 (2d Cir. 1987); *United States v. Khan*, 821 F.2d 90, 94 (2d Cir. 1987); *United States v. Bowman*, 798 F.2d 333, 338 (8th Cir. 1986); *United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986), *aff'd*, 867 F.2d 111 (2d Cir. 1989); *United States v. Andrade*, 788 F.2d 521, 532-33 (8th Cir. 1986); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986); *United States v. Harris*, 761 F.2d 394, 399-400 (7th Cir. 1985); *United States v. Juarez*, 549 F.2d 1113, 1114 (7th Cir. 1977); see also *United States v. Jones*, 766 F.2d 994, 1004 (6th Cir. 1985) (holding, without discussion, that trial court's admission of prior consistent statements to rehabilitate witnesses was not an abuse of discretion); see also *United States v. Rubin*, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring) (arguing that the limitations on the

tators agree with this conclusion.<sup>87</sup> Courts reason that Rule 801(d)(1)(B) applies only to statements offered for the truth of the matter asserted.<sup>88</sup> Because prior consistent statements offered for the limited purpose of rehabilitation are not offered for the truth, these courts reason, Rule 801(d)(1)(B) does not govern their admission.<sup>89</sup> Some courts state their belief that the Federal Rules of Evidence did not alter prior common-law rules in this regard.<sup>90</sup> In addition, some courts reason that admission of such statements furthers the principle of completeness promoted by Federal Rule of Evidence 106.<sup>91</sup> Essentially, these courts hold that the Federal Rules of Evidence impart to the trial courts great discretion to determine, under the rules of relevancy, the admissibility of prior consistent statements offered for the limited purpose of rehabilitation.<sup>92</sup>

Conversely, the Ninth Circuit holds that "a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all."<sup>93</sup> The Ninth Circuit reasoned that prior to the Federal Rules of Evidence, "prior consistent statements were traditionally only admissible for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive."<sup>94</sup> Examining the legislative history, the court determined that Rule 801(d)(1)(B)'s "only effect is to admit these statements as substantive evidence."<sup>95</sup> Therefore, the court concluded, "it no longer makes sense to speak of a prior consistent statement as being of-

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use of prior consistent statements apply only to affirmative evidence), *aff'd*, 449 U.S. 424 (1981); *United States v. James*, 609 F.2d 36, 50 n.20 (2d Cir. 1979) (noting but not deciding the issue).

87. See 2 MCCORMICK ON EVIDENCE, *supra* note 31, § 251, at 117; WRIGHT & GRAHAM, *supra* note 36, § 6712, at 461-63; Graham, *supra* note 1, at 594-604.

88. See, e.g., *Engbretsen*, 21 F.3d at 730; *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 399; *Rubin*, 609 F.2d at 66-70 (*Friendly, J., concurring*); *United States v. Quinto*, 582 F.2d 224, 233-34 (2d Cir. 1978); see also *White*, 11 F.3d at 1449; *Bolick*, 917 F.2d at 138; *Bowman*, 798 F.2d at 338.

89. See cases cited *supra* note 88.

90. See, e.g., *Quinto*, 582 F.2d at 233.

91. See, e.g., *Andrade*, 788 F.2d at 533; *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; see also John D. Bennett, Note, *Prior Consistent Statements and Motives to Lie*, 62 N.Y.U. L. REV. 787 (1987). Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." FED. R. EVID. 106. Courts have recognized that this is "not a precise use of Rule 106." E.g., *Pierre*, 781 F.2d at 333.

92. See, e.g., *Engbretsen*, 21 F.3d at 729; *Pierre*, 781 F.2d at 333.

93. *United States v. Miller*, 874 F.2d 1255, 1273 (9th Cir. 1989); see also *United States v. Payne*, 944 F.2d 1458, 1470-71 (9th Cir. 1991); *Judith A. Archer*, Note, *Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule of Evidence 801(d)(1)(B)*, 55 *FORDHAM L. REV.* 759 (1987).

94. *Miller*, 874 F.2d at 1273 (emphasis added).

95. *Id.* (emphasis omitted).

ferred solely for the more limited purpose of rehabilitating a witness.”<sup>96</sup>

### B. The Premotive Rule Under the Federal Rules of Evidence

The plain language of Rule 801(d)(1)(B) makes no express reference to a time-line premotive requirement. Some commentators maintain that the term “recent” embodies the premotive rule<sup>97</sup> while others consider the term “recent” superfluous.<sup>98</sup> Moreover, none of the cases examining the premotive rule focus on the term “recent.”

The Advisory Committee’s note to Rule 801(d)(1)(B) is very short and makes no express reference to a premotive requirement. The note states:

Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.<sup>99</sup>

Fueled in large part by this lack of explicit direction regarding the premotive rule from either Rule 801(d)(1)(B) itself or the Advisory Committee notes, federal circuit courts disagreed on whether Rule 801(d)(1)(B) embodies the premotive rule.

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96. *Id.* In reaching this conclusion, the Ninth Circuit quoted a treatise on the Federal Rules of Evidence:

[T]he drafters believed (i) that the principles governing rehabilitation would remain unchanged by the Rules, (ii) that the rather specific description of circumstances of admissibility contained in Rule 801(d)(1)(B) reaches all cases in which prior consistent statements may be received to repair credibility, and consequently (iii) that this Rule permits the substantive use of every prior statement which may be received to rehabilitate a witness.

*Id.* at 1273 n.11 (quoting 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 420, at 195 (1980)).

97. See, e.g., Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 246. Professor Ohlbaum reasons that:

[T]he term “recent” . . . purposefully introduces the crucial element of the time frame during which the alleged motive to lie emerged. If improper influence or motive is the basis for the intentionally fabricated testimony, “recent” fabrication requires that the motive occur after the consistent statement was made. Thus, the phrase “recent fabrication” introduces two elements: first, with regard to “fabrication,” an intentional or purposeful falsification; second, with respect to “recent,” a falsification which results from a motive that developed after the statement was made.

*Id.* at 246-47.

98. See, e.g., Graham, *supra* note 1, at 583.

99. FED. R. EVID. 801(d) advisory committee’s note.

At the time of the Tome decision, the federal circuits were closely split as to this issue. The Second, Third, Fourth, Seventh, and Eighth Circuits held that postmotive prior consistent statements were inadmissible for substantive purposes but were admissible for the limited purpose of rehabilitation.<sup>100</sup> In adhering to the time-line

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100. First Circuit: First Circuit case law discussing this issue is sparse. Only one First Circuit case, *United States v. Vest*, 842 F.2d 1319 (1st Cir. 1988), examines the issue. The Vest court determined that the prior consistent statements at issue "were made before [the declarant] acquired a motive to fabricate," and thus were admissible. *Id.* at 1330. Other prior consistent statements were made after the declarant acquired a motive to fabricate. See *id.* The court reasoned that these statements were "not hearsay at all" because they "were not 'offered . . . to prove the truth of the matter asserted.'" *Id.* (quoting FED. R. EVID. 801(c)). Thus, these postmotive statements were "not 'prior consistent statements' under Fed. R. Evid. 801(d)(1)(B)." *Id.* The First Circuit noted the split in the circuits on this issue without further elaboration in *United States v. Piva*, 870 F.2d 753, 759 n.4 (1st Cir. 1989).

Second Circuit: See *United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986) (holding prior consistent statement admissible for rehabilitation purposes even if inadmissible under Rule 801(d)(1)(B)); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986) (same); *United States v. Rubin*, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring) (arguing that standards of admissibility announced in *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978), should not apply when prior consistent statements are introduced for purely rehabilitative purposes), *aff'd*, 449 U.S. 424 (1981); *Quinto*, 582 F.2d at 234 (litigant seeking to introduce prior consistent statement "must demonstrate that the . . . statement was made prior to the time that the supposed motive to falsify arose"); see also *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir. 1994) (examining the 'Pierre exception' for rehabilitative purposes); *United States v. Shulman*, 624 F.2d 384, 393 (2d Cir. 1980) ("[T]he Quinto requirements were satisfied in this case."); see also generally Yvette Olstein, Comment, *Pierre and Brennan: The Rehabilitation of Prior Consistent Statements*, 53 BROOK. L. REV. 515 (1987) (discussing *Pierre*, *Brennan*, *Quinto*, *Rubin*, and the law of prior consistent statements in the Second Circuit).

Third Circuit: See *United States v. Casoni*, 950 F.2d 893, 904-06 (3d Cir. 1991) (whether to admit postmotive prior consistent statement is a relevancy matter; when statement is made postmotive, the statement is not relevant to rebut an implication of recent fabrication, and is therefore inadmissible for substantive purposes; however, postmotive statements offered only for rehabilitative purposes may be admissible); see also *United States v. De Peri*, 778 F.2d 963, 977 (3d Cir. 1985) (noting, but not reaching, the issue).

Fourth Circuit: See *United States v. Henderson*, 717 F.2d 135, 138-39 (4th Cir. 1983) ("[A] prior consistent statement is admissible under the rule only if the statement was made prior to the time the supposed motive to falsify arose."); see also *United States v. Bolick*, 917 F.2d 135, 138 (4th Cir. 1990). The Bolick court "assume[d], without deciding, that the prior consistent statements were admitted as rehabilitation and that they are not subject to the requirements of Rule 801(d)(1)(B)." *Id.* The court further noted that the Fourth Circuit "may have endorsed" the proposition that postmotive prior consistent statements are admissible for nonsubstantive purposes in *United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983). *Bolick*, 917 F.2d at 138 (citing *Parodi*, 703 F.2d at 785-86 (citing in turn *Rubin*, 609 F.2d at 66-70 (Friendly, J., concurring))); see also *United States v. Mehra*, 824 F.2d 297, 300 (4th Cir. 1987) (holding without elaboration in face of defendant's postmotive rule argument that "[a]dmission of the statement, even if erroneous, presents no grounds for reversal") (citing FED. R. CRIM. P. 52(a)); *United States v. Dominguez*, 604 F.2d 304, 310-11 (4th Cir. 1979) (allowing prior consistent statement for rehabilitation of impeached witness); *United States v. Weil*, 561 F.2d 1109, 1111 & n.2 (4th Cir. 1977) (assuming that the prior consistent statement was not made before the motive to fabricate existed).

Seventh Circuit: See *United States v. Patterson*, 23 F.3d 1239, 1247 (7th Cir. 1994) (explaining that in order to admit prior consistent statements under Rule 801(d)(1)(B), "the witness must . . . have made the statements before he had a motive to fabricate")

premotive rule and denying the admission of postmotive prior consistent statements for substantive use, these courts reasoned that such statements are not relevant to rebut an allegation of recent fabrication.<sup>101</sup> These courts observed that such statements demonstrate only that the declarant said the same thing before trial as the declarant said at trial.<sup>102</sup> They noted that the alleged motive to fabricate existed at the time of all of these statements, and that “mere repetition does not imply veracity.”<sup>103</sup> Some of these courts reasoned that the premotive requirement is not a literal requirement of Rule 801(d)(1)(B), but is a relevancy requirement examined under the relevancy rules.<sup>104</sup>

In admitting postmotive prior consistent statements for the limited purpose of rehabilitation, some of these courts reasoned that such statements are not hearsay under Rule 801 because they are

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(citing *United States v. Fulford*, 980 F.2d 1110, 1114 (7th Cir. 1992)); *United States v. Davis*, 890 F.2d 1373, 1379 (7th Cir. 1989) (to admit prior consistent statements as non-hearsay under Rule 801(d)(1)(B), “the statement must have been made before the declarant had a motive to fabricate”) (quoting *United States v. Monzon*, 869 F.2d 338, 342-43 (7th Cir. 1989)); *United States v. Harris*, 761 F.2d 394, 398-400 (7th Cir. 1985) (“[The postmotive] condition need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements.”); see also *Thomas v. United States*, 41 F.3d 1109, 1119 n.2 (7th Cir. 1994) (“[The defendant did] not argue that he offered his prior consistent statement merely to rehabilitate his testimony on the stand, that is, not as substantive evidence. Therefore, [the court did] not address whether Fed. R. Evid. 801(d)(1)(B) would encompass the admissibility of his prior statement offered for that purpose.”); *United States v. Lewis*, 954 F.2d 1386, 1391 (7th Cir. 1992) (setting forth four criteria, including the premotive rule, that must be met in order to admit a prior consistent statement under Rule 801(d)(1)(B)).

Eighth Circuit: See *United States v. White*, 11 F.3d 1446, 1450-51 (8th Cir. 1993) (“[T]o be admitted as substantive evidence under Rule 801(d)(1)(B), a prior consistent statement must have been made before the motive to fabricate came into existence.”) (citing *United States v. Bowman*, 798 F.2d 333, 338 (8th Cir. 1986)). The *Bowman* court had stated that “the better rule imposes a requirement that the consistent statements must come before the motive to fabricate existed”; however, the court noted, no prejudicial error was shown. *Bowman*, 798 F.2d at 338; see also *United States v. Roy*, 843 F.2d 305, 307 (8th Cir. 1988) (“*Bowman* specifically held that prior consistent statements made after the existence of a motive to fabricate are admissible for rehabilitation . . . .”) (citing *Bowman*, 798 F.2d at 338); *United States v. Andrade*, 788 F.2d 521, 532-33 (8th Cir. 1986) (allowing F.B.I. agent’s statements to “rehabilitate and support” agent following implied charge of fabrication). The *Andrade* court also noted that the *Quinto* holding was being questioned by the Second Circuit and cited Judge Friendly’s concurrence in *Rubin*. See *id.*; see also *United States v. Scholle*, 553 F.2d 1109, 1121-22 (8th Cir. 1977) (finding that the facts did not support defendant’s argument that prior consistent statements were inadmissible because they were postmotive).

101. See, e.g., *Patterson*, 23 F.3d at 1247; *Casoni*, 950 F.2d at 904; *Harris*, 761 F.2d at 399; *Quinto*, 582 F.2d at 233-34.

102. See, e.g., *Harris*, 761 F.2d at 399; *Quinto*, 582 F.2d at 234-35.

103. *United States v. McPartlin*, 595 F.2d 1321, 1351 (7th Cir. 1979) (quoting 4 WEINSTEIN & BERGER, *supra* note 38, ¶ 801(d)(1)(B)[01], at 801-100 (1977)); see also *White*, 11 F.3d at 1450 (quoting same).

104. See, e.g., *Casoni*, 950 F.2d at 904-05; *Harris*, 761 F.2d at 399 (citing FED. R. EVID. 402).

not offered for the truth of the matter asserted.<sup>105</sup> Some courts noted that Rule 801(d)(1)(B) does not explicitly require the premotive element.<sup>106</sup> Courts also observed that such statements may be relevant to the declarant's credibility.<sup>107</sup> They explained that the statements may demonstrate the context of the impeachment evidence, and may help the jury weigh the impeachment evidence and thus determine the extent of the declarant's credibility.<sup>108</sup> Some of these courts also cite a "doctrine of completeness" promoted by Federal Rule of Evidence 106 in reasoning that the statements are admissible.<sup>109</sup>

The Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits held that postmotive prior consistent statements were admissible for both substantive and rehabilitative purposes.<sup>110</sup> These

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105. See, e.g., *Harris*, 761 F.2d at 400; *United States v. Juarez*, 549 F.2d 1113, 1114 (7th Cir. 1977).

106. See, e.g., *United States v. Parodi*, 703 F.2d 768, 785 (4th Cir. 1983).

107. See, e.g., *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986); *Harris*, 761 F.2d at 400.

108. See, e.g., *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; see also GRAHAM, *supra* note 70, § 6712, at 461-63.

109. See, e.g., *Pierre*, 781 F.2d at 333; *Harris*, 761 F.2d at 400; *United States v. Rubin*, 609 F.2d 51, 70 (2d Cir. 1979); *United States v. Baron*, 602 F.2d 1215, 1252 (7th Cir. 1979); see also *United States v. Andrade*, 788 F.2d 521, 533 (8th Cir. 1986) ("[T]his rehabilitative use of prior consistent statements is in accord with the principle of completeness prompted by Rule 106."); *supra* note 86 and accompanying text. But see Ohlbaum, *supra* note 97, at 282 & n.140 ("[T]hese courts have relied on a tortured reading of the 'rule of completeness' . . ."). Courts, too, have noted that this is "not a precise use of Rule 106." E.g., *Pierre*, 781 F.2d at 333.

110. Fifth Circuit: See *United States v. Parry*, 649 F.2d 292, 295-96 (5th Cir. Unit B June 1981) (postmotive prior consistent statement admissible for substantive purposes); *United States v. Williams*, 573 F.2d 284, 289 & n.3 (5th Cir. 1978) (postmotive prior consistent statement admissible for substantive purposes) (citing *United States v. Gandy*, 469 F.2d 1134 (5th Cir. 1972)); see also *United States v. Cifarelli*, 589 F.2d 180, 185 (5th Cir. 1979) (noting, but not examining, the issue).

Sixth Circuit: See *United States v. Lawson*, 872 F.2d 179, 182-83 (6th Cir. 1989) ("[W]here there are other indicia of reliability surrounding a prior consistent statement that make it relevant to rebut a charge of recent fabrication or improper motive, then the fact that the statement was made after the alleged motive to falsify should not preclude its admissibility."); *United States v. Hamilton*, 689 F.2d 1262, 1273-74 (6th Cir. 1982) (noting the Sixth Circuit's "desire for a more relaxed standard of admissibility under Rule 801(d)(1)(B) and [the court's] uneasiness with the Quinto decision") (citing *United States v. LeBlanc*, 612 F.2d 1012 (6th Cir. 1980)).

Ninth Circuit: The Ninth Circuit has a somewhat convoluted history on this issue. Recent case law indicates, however, that the Ninth Circuit fits into this category. Cf. 4 WEINSTEIN & BERGER, *supra* note 38, ¶ 801(d)(1)(B)[01], at 801-196 to -198 (putting Ninth Circuit in premotive requirement category). In *United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989), the Ninth Circuit stated that the premotive "requirement should not be applied as a rigid per se rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value." *Id.* at 1274. The *Miller* court reasoned that "a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all." *Id.* at 1273. The *Miller* court also found this conclusion "consistent with the case law of this circuit." *Id.* at 1273 n.13; see also *United States v. Payne*, 944 F.2d 1458, 1470-72 (9th Cir. 1991) (following *Miller*); cf. *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986) ("A prior consistent statement is admissible only if it was made before the witness had a motive

courts recognized that whether a prior consistent statement is pre-motive or postmotive may affect the statement's materiality.<sup>111</sup> These courts, however, rejected a per se, time-line premotive requirement. These courts reasoned that a postmotive prior consistent statement may be relevant in some circumstances.<sup>112</sup> Some noted that Rule 801(d)(1)(B) does not explicitly state a premotive requirement.<sup>113</sup> These courts observed that other, nontemporal factors may indicate that a postmotive statement is reliable, and thus should be admissible under the Federal Rules.<sup>114</sup> These courts also stated that because the issue is one of relevancy under the Federal Rules, trial courts should have discretion in this matter.<sup>115</sup>

Moreover, in *United States v. Miller*,<sup>116</sup> the Ninth Circuit reasoned that the Federal Rules of Evidence make no distinction between substantive and rehabilitative use of prior consistent statements.<sup>117</sup> The court stated that "we fail to see how a statement that has no probative value in rebutting a charge of 'recent fabrication or improper influence or motive' could possibly have probative value for the assertedly more 'limited' purpose of rehabilitating a witness."<sup>118</sup> The court concluded that a prior consistent statement is "admissible as substantive evidence under Rule 801(d)(1)(B) . . . .

to fabricate.") (citing *United States v. De Coito*, 764 F.2d 690, 694 (9th Cir. 1985)); *United States v. Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983) ("A prior consistent statement is admissible to rehabilitate a witness only if made before the witness has a motive to fabricate.").

Tenth Circuit: *United States v. Tome*, 3 F.3d 342, 350 (10th Cir. 1993) ("[T]he premotive rule is clearly too broad."), rev'd, 115 S. Ct. 696 (1995). For a discussion of the *Tome* case, see *infra* Part IV.

Eleventh Circuit: See *United States v. Farmer*, 923 F.2d 1557, 1567-68 (11th Cir. 1991) ("[The] argument that . . . prior consistent statements [are] inadmissible because they were not made before the motive to fabricate arose has repeatedly been rejected by this circuit."); *United States v. Pendas-Martinez*, 845 F.2d 938, 942 n.6 (11th Cir. 1988) (same); *United States v. Anderson*, 782 F.2d 908, 915-16 (11th Cir. 1986) (same); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. Unit B June 1981) (following *Williams*, 573 F.2d at 289 n.3, and *Gandy*, 469 F.2d at 1135).

D.C. Circuit: See *United States v. Montague*, 958 F.2d 1094, 1096-98 (D.C. Cir. 1992) ("[The] prior consistent statement need not have preceded the appearance of the motive in order to render the statement non-hearsay under Rule 801(d)(1)(B).").

111. See, e.g., *Montague*, 958 F.2d at 1098; *Miller*, 874 F.2d at 1274; *Hamilton*, 689 F.2d at 1273.

112. See, e.g., *Miller*, 874 F.2d at 1274; *Lawson*, 872 F.2d at 182; *Williams*, 574 F.2d at 289 n.3 (following *Gandy*, 469 F.2d at 1135).

113. See, e.g., *Montague*, 958 F.2d at 1098.

114. See, e.g., *Tome*, 3 F.3d at 350; *Montague*, 958 F.2d at 1098; *Miller*, 874 F.2d at 1274; *Lawson*, 872 F.2d at 182-83.

115. See, e.g., *Miller*, 874 F.2d at 1274; *Lawson*, 872 F.2d at 182-83.

116. 874 F.2d 1255 (9th Cir. 1989).

117. See *id.* at 1272-74.

118. *Id.* at 1272 (citation omitted). The court based this conclusion on its reasoning that "[because] the requirement of no prior motive to fabricate is rooted in Rules 402 and 403, and not in the terms of Rule 801(d)(1)(B), there is no basis for limiting the requirement to cases involving prior statements under Rule 801(d)(1)(B)." *Id.*

or it is not admissible at all.”<sup>119</sup> The court went on to reject a per se pre motive rule.<sup>120</sup>

Recognizing the split between the circuits on the admissibility of postmotive prior consistent statements under Rule 801(d)(1)(B), the Supreme Court granted certiorari to address the problem.

#### IV. THE TOME DECISION

In *Tome v. United States*,<sup>121</sup> the Supreme Court addressed the question of “whether out-of-court consistent statements made after the alleged fabrication, or after the alleged improper influence or motive arose, are admissible under” Federal Rule of Evidence 801(d)(1)(B).<sup>122</sup> In a 5-4 decision,<sup>123</sup> the Court explained that such statements—postmotive prior consistent statements—are not admissible as substantive evidence under Rule 801(d)(1)(B).<sup>124</sup>

##### A. The Majority Opinion

The pertinent common-law evidentiary rule that prevailed in the United States for over a century before the enactment of the Federal Rules of Evidence was important to the Court’s analysis. The majority defined the common-law pre motive rule as holding that “a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards.”<sup>125</sup>

In seeking to determine the effect of the Federal Rules of Evidence on the common-law rule, the Court looked to the language of Rule 801(d)(1)(B). The Court found two aspects of Rule 801(d)(1)(B)’s language especially informing: (1) the language’s focus on one kind

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119. *Id.* at 1273 (footnote omitted). For a further discussion of *Miller*, see *supra* notes 93-96 and accompanying text.

120. See *Miller*, 874 F.2d at 1274.

121. 115 S. Ct. 696 (1995).

122. *Id.* at 699.

123. Justice Kennedy wrote the majority opinion and was joined by Justices Stevens, Scalia, Souter, and Ginsburg in all but Part II.B, which Justice Scalia did not join. See *id.* at 699. Justice Breyer wrote the dissenting opinion and was joined by Chief Justice Rehnquist and Justices O’Connor and Thomas. See *id.* at 706 (Breyer, J., dissenting). Justice Scalia filed an opinion concurring in part and concurring in the judgment. See *id.* at 706 (Scalia, J., concurring in part and concurring in the judgment).

124. See *id.* at 705.

125. *Id.* at 700 (emphasis added) (citing *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836) (“[W]here the testimony is assailed as a fabrication of a recent date . . . in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.”)); see also *People v. Singer*, 89 N.E.2d 710, 712 (N.Y. 1949). The majority also cited the treatises of Professor McCormick and Dean Wigmore. See *Tome*, 115 S. Ct. at 700 (citing MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, *supra* note 13, § 1128, at 268).

of impeachment (i.e., rebutting charges of recent fabrication or improper influence or motive), and not on other forms of impeachment; and (2) Rule 801(b)(1)(B)'s use of wording from common-law cases describing the premotive rule.<sup>126</sup>

The Court considered it important that the Advisory Committee did not give all prior consistent statements nonhearsay status.<sup>127</sup> It emphasized that the Advisory Committee limited the types of prior consistent statements that receive nonhearsay status to those offered to rebut only one form of impeachment: a charge of "recent fabrication or improper influence or motive."<sup>128</sup> This limitation, the Court found, "reinforce[s] the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate arose."<sup>129</sup>

The Court reasoned that the rebuttal force of premotive prior consistent statements is very strong when introduced to rebut a charge of recent fabrication or improper influence or motive.<sup>130</sup> The Court, however, explained that little rebuttal force is present when any prior consistent statement is introduced to rebut other forms of impeachment, such as character impeachment by misconduct, convictions, or bad reputation.<sup>131</sup> Likewise, the Court explained, little rebuttal force is present when postmotive prior consistent statements are introduced to rebut a charge of recent fabrication or improper influence or motive,<sup>132</sup> even though such statements may "suggest in some degree that the testimony did not result from some improper influence."<sup>133</sup>

The Court further reasoned that if Rule 801(d)(1)(B)'s drafters intended to permit admission of postmotive prior consistent statements—which have low rebuttal force—then there is "no sound reason" for the drafters to have expressly limited the use of prior consistent statements to rebut impeachment only when such statements

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126. See *Tome*, 115 S. Ct. at 701-02.

127. See *id.* at 701.

128. *Id.* The majority noted that the Advisory Committee used "the same phrase . . . in its description of the 'traditiona[l]' common law of evidence." *Id.* (citing FED. R. EVID. 801(d) advisory committee's note).

129. *Id.* The majority rephrased this reasoning: "the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense." *Id.*

130. See *id.* ("A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive.")

131. See *id.* ("[P]rior consistent statements carry little rebuttal force when most other types of impeachment are involved.") (citing MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, *supra* note 13, § 1131, at 293).

132. See *id.* ("[O]ut-of-court statements that postdate the alleged fabrication . . . refute the charged fabrication in a less direct and forceful way.")

133. *Id.* at 702.

have very high rebuttal force,<sup>134</sup> while prohibiting the use of such statements to rebut other forms of impeachment when such statements have low rebuttal force similar to the low rebuttal force of postmotive prior consistent statements.<sup>135</sup> The Court thus found it “clear . . . that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement.”<sup>136</sup>

The Court found support for its analysis by observing that Congress easily could have adopted an evidentiary rule that expressly allows admission of postmotive prior consistent statements.<sup>137</sup> In the Court’s view, its “analysis is strengthened by the observation that the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common-law cases that describe the premotive requirement.”<sup>138</sup> It reasoned that this similarity supports the conclusion that Rule 801(d)(1)(B) “was intended to carry over the common-law pre-motive rule.”<sup>139</sup>

The Court rejected the government’s argument that “the common-law premotive rule . . . is inconsistent with the Federal Rules’ liberal approach to relevancy.”<sup>140</sup> It noted that because “[r]elevance is not the sole criterion of admissibility,” relevant out-of-court statements may still be inadmissible.<sup>141</sup>

The Court also based its reasoning on the negative aspects of not having such a rule. It feared that the premotive rule’s absence could shift a trial’s emphasis from the in-court statements to the out-of-court statements.<sup>142</sup> In addition, the Court stated its belief that the absence of the premotive rule would increase the burden of the trial court, and would provide no guidance to attorneys preparing for trial or to reviewing appellate courts.<sup>143</sup>

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134. Recall that prior consistent statements have very high rebuttal force when used to rebut impeachment by charges of recent fabrication or improper influence or motive. See *supra* note 130 and accompanying text.

135. See *Tome*, 115 S. Ct. at 702 (explaining that if there is no temporal requirement “imbedded in” Rule 801(d)(1)(B), then there is “no sound reason not to admit consistent statements to rebut other forms of impeachment as well”).

136. *Id.*

137. See *id.* The majority suggested that a rule that provides that “a witness’ prior consistent statements are admissible whenever relevant to assess the witness’s truthfulness or accuracy” would embody the Government’s theory. *Id.*

138. *Id.* at 702 (citing *Ohlbaum*, *supra* note 97, at 245 (“Rule 801(d)(1)(B) employs the precise language—‘rebut[ting] . . . charge[s] . . . of recent fabrication or improper influence or motive’—consistently used in the panoply of pre-1975 decisions.”)); see also *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836); *Hanger v. United States*, 398 F.2d 91, 104 (8th Cir. 1968); *People v. Singer*, 89 N.E.2d 710, 711 (N.Y. 1949).

139. *Tome*, 115 S. Ct. at 702.

140. *Id.* at 704 (“This argument misconceives the design of the Rules’ hearsay provisions.”).

141. *Id.*

142. See *id.* at 705.

143. *Id.* The majority noted that postmotive prior consistent statements could gain admission under Federal Rule of Evidence 803(24) if the statements met Rule 803(24)’s e-

Four members of the five-justice majority found their analysis “confirmed by an examination of the Advisory Committee Notes to the Federal Rules of Evidence.”<sup>144</sup> The plurality explained: “Where, as with Rule 801(d)(1)(B), ‘Congress did not amend the Advisory Committee’s draft in any way, . . . the Committee’s commentary is particularly relevant in determining the meaning of the document Congress enacted.’”<sup>145</sup> The plurality found that the Advisory Committee’s notes stated a “purpose to adhere to the common law” except where expressly provided.<sup>146</sup> They reasoned that when the Rules departed from the common law, “in general the Committee said so.”<sup>147</sup> The plurality found no indication from the notes “that Rule 801(d)(1)(B) abandoned the premotive requirement.”<sup>148</sup> Moreover, the plurality asserted, the Rules demonstrate the Committee’s compromise, one that the Committee stated was “more of experience than of logic,”<sup>149</sup> “between the views expressed by the ‘bulk of the case law . . . against allowing prior statements of witnesses to be used generally as substantive evidence’ and the views of the majority of ‘writers . . . [who] ha[d] taken the opposite position.’”<sup>150</sup>

Based on this analysis, the Court overruled six of the federal circuits<sup>151</sup> and held that Rule 801(d)(1)(B) codified the common-law premotive rule.<sup>152</sup> Thus, following *Tome*, postmotive prior consistent statements are not admissible as substantive evidence under Rule 801(d)(1)(B).

## B. The Dissenting Opinion

Four justices, in a dissent authored by Justice Breyer, expressed their disagreement with the majority opinion. The majority and dissenting opinions began from the same point—acknowledgment of the traditional common-law rule—but quickly parted company.

Although the dissent agreed with the majority’s statement of the common-law rule,<sup>153</sup> the dissent emphasized that the reason for the

quirements. See id. Rule 803(24) is known as the “catch-all exception.” See generally GRAHAM, *supra* note 70, § 6775; see also *infra* note 205.

144. *Tome*, 115 S. Ct. at 702. Justice Scalia did not join in Part II.B of the Court’s opinion because the majority’s discussion “gives effect to those Notes” as displaying “the ‘purpose’ or ‘inten[t]’ of the draftsmen.” *Id.* at 706 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

145. *Id.* at 702 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165-66 n.9 (1988)).

146. *Id.*

147. *Id.* at 702-03.

148. *Id.* at 703.

149. *Id.* at 704.

150. *Id.* at 703-04 (quoting FED. R. EVID. 801(d) advisory committee’s note).

151. See *supra* note 110 and accompanying text.

152. See *Tome*, 115 S. Ct. at 700.

153. See *id.* at 706 (Breyer, J., dissenting).

pre motive requirement was that post motive prior consistent statements had “no relevance to rebut the charge.”<sup>154</sup> This point of departure served as the basis for the Court’s fracture in this case.

The dissent characterized the majority’s holding as finding that a hearsay-related rule—Rule 801(d)(1)(B)—codified a common-law relevancy rule, and asserted that Rule 801(d)(1)(B) “has nothing to do with relevance. Rather, that Rule carves out a subset of prior consistent statements that were formerly admissible only to rehabilitate a witness.”<sup>155</sup>

The dissent rejected the majority’s premise that the Advisory Committee “singled out one category” of rehabilitative prior consistent statements for nonhearsay treatment because of the category’s high probative force.<sup>156</sup> It pointed out that other categories also have high probative force in certain situations, including prior consistent statements used to rebut a charge of faulty memory.<sup>157</sup> The dissent further argued that, doubts regarding the majority’s premise aside, the majority’s holding did not follow from such a premise.<sup>158</sup> It asserted that hearsay law basically turns on the reliability of the out-of-court statement, and not its probative force.<sup>159</sup> It agreed that post motive statements may weaken probative force, but asserted that the reliability of such statements is not reduced.<sup>160</sup> Thus, the dissent concluded that “from a hearsay perspective, the timing of a prior consistent statement is basically beside the point.”<sup>161</sup>

The dissent also rejected the majority’s “no sound reason” analysis.<sup>162</sup> The dissent noted that “[j]uries have trouble distinguishing between the rehabilitative and substantive use of” prior consistent statements admitted to rebut a charge of recent fabrication or improper influence or motive (i.e., the type of statements covered in Rule 801(d)(1)(B)).<sup>163</sup> The dissent observed that the Advisory Com-

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154. *Id.* The dissent noted that the treatises discuss the issue “under the general heading of ‘impeachment and support’ (McCormick) or ‘relevancy’ (Wigmore), and not ‘hearsay.’” *Id.* at 706-07.

155. *Id.* at 707.

156. *Id.*

157. See *id.* “‘[I]f the witness’s accuracy of memory is challenged, it seems clear common sense that a consistent statement made shortly after the event and before he had time to forget, should be received in support.’” *Id.* (quoting MCCORMICK ON EVIDENCE, *supra* note 31, § 49, at 105 n.88 (2d ed. 1972)) (alteration in original).

158. See *id.*

159. See *id.*

160. See *id.*

161. *Id.*

162. See *id.* The majority’s “no sound reason” analysis is described *supra* notes 134-36 and accompanying text.

163. Tome, 115 S. Ct. at 707 (Breyer, J., dissenting) (citing 4 WEINSTEIN & BERGER, *supra* note 38, ¶ 801(d)(1)(B)[01], at 801-188 (“[A]s a practical matter, the jury in all probability would misunderstand or ignore a limiting instruction [with respect to the class of

mittee may have recognized this difficulty and made such statements nonhearsay as an acknowledgment of the realities of a jury trial.<sup>164</sup> It contended that the drafters may have excluded other categories of prior consistent statements from nonhearsay status—and thus from dual rehabilitative and substantive use status—because other categories cause less jury confusion.<sup>165</sup> Thus, the dissent inferred that Rule 801(d)(1)(B) “singled out one category” because the Advisory Committee felt that juries could more easily separate the rehabilitative and substantive use of other categories of prior consistent statements—generally with an instruction from the trial court—than juries could separate the rehabilitative and substantive use of prior consistent statements admitted to rebut a charge of recent fabrication or improper influence or motive.<sup>166</sup> Thus, the dissent found, this is a concession “more of experience than of logic,” and is a sound hearsay-related reason for singling out one category.<sup>167</sup> Based on this analysis, the dissent concluded that “there is no basis for distinguishing between pre and postmotive statements, for the confusion with respect to each would very likely be the same.”<sup>168</sup>

The dissent, like the majority, found support in Rule 801(d)(1)(B)’s lack of explicit direction on the issue. The dissent reasoned that “if the drafters had wanted to insulate the common-law rule from the Rules’ liberalizing effect, this would have been a remarkably indirect (and therefore odd) way of doing so.”<sup>169</sup>

Finding that Rule 801(d)(1)(B) did not codify the premotive rule, the dissent went on to determine that the common-law premotive rule did not stand as an absolute bar to the admission of a postmotive prior consistent statement used to rebut a charge of recent fabrication or improper influence or motive.<sup>170</sup> The dissent based this conclusion on (1) its observation that postmotive prior consistent statements are sometimes relevant; and (2) the Federal Rules’ liberalization of relevancy.

The dissent found circumstances where the premotive rule’s “no relevancy” premise is false. The dissent provided an example: “A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that only the truth will save his child’s life.”<sup>171</sup> The speaker may then be “affected by a

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prior consistent statements covered by the Rule] anyway, so there is no good reason for giving one.”).

164. See *id.* at 707-08.

165. See *id.*

166. See *id.* at 707-08.

167. *Id.* at 708 (quoting FED. R. EVID. 801(d) advisory committee’s note).

168. *Id.* at 708.

169. *Id.* at 709.

170. See *id.* at 709-10.

171. *Id.* at 708.

far more powerful motive to tell the truth.”<sup>172</sup> The dissent also noted that the common-law promotive rule was not followed uniformly.<sup>173</sup> It found no explanation for why courts enforced an absolute promotive common-law rule.<sup>174</sup>

The dissent noted that the Federal Rules made relevancy more flexible than the common-law rules.<sup>175</sup> It analogized the promotive rule to the Frye test. The Frye test “excluded scientific evidence that had not gained general acceptance in the relevant field.”<sup>176</sup> It noted the similarities between the Frye rule and the promotive rule: “‘rigid,’ [and] setting forth an ‘absolute prerequisite to admissibility.’”<sup>177</sup> The dissent reasoned that “Daubert suggests that the liberalized relevancy provisions of the Federal Rules can supersede a pre-existing rule of relevance, at least where no compelling practical or logical support can be found for the pre-existing rule.”<sup>178</sup>

Based on this analysis, the dissent would have held “that the Federal Rules authorize a district court to allow (where probative in respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication, improper influence or motive (subject of course to, for example, Rule 403).”<sup>179</sup> When allowed, the dissent explained, such admission would be as substantive evidence.<sup>180</sup>

## V. OBSERVATIONS REGARDING RULE 801(D)(1)(B) AND THE CURRENT PROMOTIVE RULE

Rule 801(d)(1)(B) of the Federal Rules of Evidence has generated considerable confusion since its enactment. Some commentators have called for the Rule’s amendment and have suggested changes.<sup>181</sup> These commentators, however, do not provide for the admission of postmotive prior consistent statements under Rule 801(d)(1)(B).

As the Tome Court explained, Rule 801(d)(1)(B) codified a *per se* time-line promotive rule.<sup>182</sup> Rule 801(d)(1)(B) should be amended.

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172. *Id.*

173. See *id.* (citing *United States v. Gandy*, 469 F.2d 1134, 1135 (5th Cir. 1972); *Copes v. United States*, 345 F.2d 723, 726 (D.C. Cir. 1964); *State v. George*, 30 N.C. 324, 328 (1848)).

174. See *id.*

175. See *id.* at 709.

176. *Id.* (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

177. *Id.* (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993) (finding the Frye test “at odds with the ‘liberal thrust’ of the Federal Rules”)).

178. *Id.*

179. *Id.* at 709-10.

180. See *id.* at 710.

181. See, e.g., *Graham*, *supra* note 1; *Ohlbaum*, *supra* note 97.

182. See 115 S. Ct. at 702.

Any such amendment should serve at least two purposes. First, the amendment should reject the per se time-line premotive rule and allow the admission of prior consistent statements where the statements are relevant and have value but are inadmissible under the Tome Court's interpretation of Rule 801(d)(1)(B). Second, the amendment should expressly provide for the admission of prior consistent statements as substantive evidence in all cases where such statements are admissible for rehabilitation.

#### A. The Pitfalls of the Per Se Approach

The overwhelming majority of common-law courts applied a per se time-line premotive rule.<sup>183</sup> It is important to understand, however, why a per se time-line rule developed. Courts reasoned that a consistent statement made during the time in which the witness allegedly had the same motivation that resulted in the impeached in-court statement has no rebuttal force and is thus irrelevant.<sup>184</sup> In the vast majority of cases, a strict time-line rule furthers this rationale. Consequently, the rule developed into a per se time-line rule because such a rule is properly determinative in the great majority of cases in which the issue of temporalness and prior consistent statements arise, and theoretically provides predictability and facilitates the decision-making process.

Common-law courts applying the rule shortly before the development and codification of the Federal Rules of Evidence sensed that something was wrong with the per se time-line premotive rule.<sup>185</sup> This sense had not fully developed when the Federal Rules of Evidence were enacted. As a result, Rule 801(d)(1)(B) codified, as the Tome Court explained, the common-law rule accepted by the vast majority of courts, including the time-line premotive requirement.<sup>186</sup>

Courts' wariness of the time-line premotive rule continued and expanded under the Federal Rules. Several courts applying Rule 801(d)(1)(B) before Tome allowed the admission of postmotive prior consistent statements as substantive evidence under the Rule in some instances.<sup>187</sup> Moreover, all but one of the circuits admitted

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183. See *supra* note 39 and accompanying text.

184. See *supra* note 41 and accompanying text.

185. See, e.g., *United States v. Gandy*, 469 F.2d 1134, 1134-35 (5th Cir. 1972); *Hanger v. United States*, 398 F.2d 91, 104-05 (8th Cir. 1968); *Copes v. United States*, 345 F.2d 723, 725-26 (D.C. Cir. 1964); see also *United States v. Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957).

186. See 115 S. Ct. at 702.

187. See *supra* notes 110-20 and accompanying text.

postmotive prior consistent statements for the limited purpose of rehabilitation in some instances.<sup>188</sup>

Courts and commentators have become overly focused on a pure time-line analysis when examining prior consistent statements. While it is true that the time-line premotive rule comports to unadorned logic, in practical application the rule's per se approach can be overly restrictive.

There are situations where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible. One such time is when a separate motive to tell the truth or to make a different statement exists at the statement's making. Consider a situation where the declarant has been impeached by a charge of improper influence or motive arising at a particular time. Normally (and logically), a statement that is made after the time the improper influence or motive arose and is consistent with the declarant's in-court testimony offers no rebuttal value and is irrelevant. However, if the postmotive prior consistent statement is made when a separate motive to tell the truth or to make a different statement exists, the postmotive prior consistent statement may offer some rebuttal force. The Tome dissent provided examples of this situation:

A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that only the truth will save his child's life. Or, suppose the postmotive statement was made . . . when the speaker's motive to lie was much weaker than it was at trial.<sup>189</sup>

The dissent explained that "[i]n these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation; it may have been made not because of, but despite, the improper motivation."<sup>190</sup>

If a motivation to tell the truth or to make a different statement at the time the prior consistent statement was made appears greater than or equal to the strength of the improper influence or motivation charged at the statement's making, the prior consistent statement may have some rebuttal force or related value, may be relevant, and should be admissible. Any amendment to Rule 801(d)(1)(B) should

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188. See supra notes 100-09 and accompanying text. The Ninth Circuit reasoned that prior consistent statements are admissible as substantive evidence or not at all. See supra notes 93-95, 110, 116-20 and accompanying text. However, the Ninth Circuit allowed postmotive prior consistent statements for substantive use in certain situations. See *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989).

189. 115 S. Ct. at 708 (Breyer, J., dissenting).

190. *Id.*

provide for this situation. A jury is fully capable of making this assessment and should be permitted to do so.

Another situation where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible, is when the charged motive is contextually weak. For example, consider a situation where a criminal defendant alleges that a large number of police officers are conspiring to frame the defendant. The defendant impliedly charges that the officers are lying on the stand about their investigation, and charges that the improper motivation arose as soon as each officer arrived on the crime scene. Should such a charge prevent the officers from being rehabilitated by showing that they made prior consistent statements from the beginning of their investigation? Would not their consistency tend to show the absence of such a conspiracy even though the prior consistent statements were made after the alleged conspiracy began?

Still another example where the charged motive may be contextually weak and the postmotive prior consistent statement would have some rebuttal force or related value was cited by the *Tome* dissent: postmotive statements made spontaneously.<sup>191</sup> Circumstances may reveal that any alleged effect of the charged motive on the declarant was greatly weakened by the reliability evidenced by the statement's spontaneity. The statement could serve to rebut a charge of improper motive and its admissibility should be determined in context.

There are other situations where postmotive prior consistent statements may have some value and should be admissible. A declarant's ability to tell a complicated or unique story more than once may, in some instances, indicate reliability and be relevant. Child sex-abuse cases are one example of this situation. A young child's postmotive description of the details of sexual abuse can offer some value and indicate that the child is not fabricating the story. A jury is able to weigh these possibilities in context and should be allowed to do so.

In addition, in a situation when a witness testifies as to his or her own prior consistent statement, the jury's ability to view the witness testifying offers more than the statement itself. It gives the jurors another opportunity to observe the witness and judge the witness's credibility.

It is important to note that in most cases, postmotive prior consistent statements will be inadmissible under the relevancy rules for the reasons originally noted by courts developing common-law evi-

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191. See *id.*

dentiary rules.<sup>192</sup> The suggestions made in this Article will not change the result in the vast majority of situations, but will refocus the inquiry regarding the admission of prior consistent statements where it belongs—on relevancy.

An argument can be made that anything but a time-line rule leaves some uncertainty in the parties' pre-trial preparation. However, this potential uncertainty does not outweigh the need to allow the jury to consider relevant matters. Moreover, rejecting the time-line rule would leave no more uncertainty than is present with the current rule. The parties cannot know exactly how the court will rule in regard to relevancy or the premotive or postmotive status of a prior consistent statement. This is particularly evident in the many co-defendant-turned-state's-evidence cases. Whether the trial court will find that the co-defendant's motive arose when he or she was first approached by the government, after a deal was put on paper, or at some other time, seems nearly impossible to predict ahead of the ruling.<sup>193</sup> Similarly, witnesses' uncertainty of dates and wavering testimony will often leave pre-trial predictions on the admissibility of a prior consistent statement difficult.

The per se premotive rule also results in administrative problems that hamper the fact-finding process. Sometimes, a trial judge may find that the motive arose and the prior consistent statement was made on particular dates when a different fact-finder could reasonably choose different dates. This results in a trial judge sometimes finding a prior consistent statement to be made postmotive when a jury could reasonably find it to be made premotive, or vice-versa. Prior consistent statements that may rehabilitate should not be excluded in such circumstances. This situation could be rectified by using the Second Circuit's Grunewald standard: If it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them."<sup>194</sup> This standard acknowledges that the determination of a prior consistent statement's admissibility is often too crucial to deprive the jury of weighing the statement and determining its value when reasonable minds could differ on the timing of events. Although the use of this rule would be a step in the right direction, it is not enough to solve the numerous other problems with the per se premotive rule.

Additionally, it is often difficult for the trial court to pin down the date when a charged improper influence or motive arose or the date

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192. See *supra* Part II.

193. See *infra* notes 195-99 and accompanying text.

194. *United States v. Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd* on other grounds, 353 U.S. 391 (1957); see *supra* note 43 and accompanying text.

when a statement was made. Frequently, and particularly in criminal drug trials, witnesses cannot remember even the month in which a particular event occurred. Evidence concerning when an improper influence or motive arose and when a particular prior consistent statement was made may be scant. The trial judge should be free to allow the jury to weigh the evidence under all the circumstances without being bound by a restrictive time-line rule.

These problems with the *per se* time-line rule have, on occasion, resulted in some legal gymnastics on the issue of when a motive arose. For example, in *United States v. Henderson*,<sup>195</sup> the defendant impeached the government's informant by charging that the informant fabricated his allegations against the defendant in return for leniency.<sup>196</sup> On redirect, the trial court admitted the informant's prior consistent statements made after arrest but before the informant and the government reached a plea agreement.<sup>197</sup> On appeal, the defendant argued that such admission was error. The Fourth Circuit rejected the defendant's argument. The court reasoned that the defendant's argument "effectively swallows the rule with respect to prior consistent statements made to government officers: by definition such statements would never be prior to the event of apprehension or investigation by the government which gave rise to a motive to falsify."<sup>198</sup> The court explained that "[s]uch a result also would render superfluous our [previous] distinction . . . between statements made to police after arrest but before a bargain and statements made after an agreement is reached. We decline to so eviscerate Rule 801(d)(1)(B)."<sup>199</sup> Thus, the arrestee-declarant's prior consistent statements made after arrest but before the government and the arrestee-declarant reach a plea agreement are admissible under the *Henderson* rule, while such statements made post-agreement are not.

In many cases, it is doubtful that a motive to fabricate suddenly changes upon the signing of an agreement. It seems much more likely that the motive to fabricate was the same before and after the agreement. In such instances, a pre-agreement (or premotive *per Henderson*) prior consistent statement offers little that a post-agreement (or postmotive) prior consistent statement does not. The parties, and the jury, would be better served if the court could consider the admissibility of a proffered prior consistent statement in relation to all of the circumstances of the particular case.

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195. 717 F.2d 135 (4th Cir. 1983).

196. See *id.* at 138.

197. See *id.*

198. *Id.* at 139.

199. *Id.* (citations omitted).

When considering the admissibility of prior consistent statements, courts' attention should be directed toward the charged motive, its context, and all of its characteristics, not merely the motive's alleged birthday. When the characteristics and context of a prior consistent statement, including a postmotive prior consistent statement, indicate that the statement is relevant to the juries' consideration of a witness's credibility, or to other relevant issues, the statement should be admissible.

B. Admissibility of Prior Consistent Statements Outside of Rule 801(d)(1)(B)

Any amendment to Rule 801(d)(1)(B) also should clarify the question of the admissibility of prior consistent statements outside of Rule 801(d)(1)(B). This is particularly important because, before *Tome*, all circuits but the Ninth Circuit held postmotive prior consistent statements admissible for the limited purpose of rehabilitation. Many of these courts explained that Rule 801(d)(1)(B) did not govern such statements.

Some commentators and the Ninth Circuit reason that the drafters of the Federal Rules meant to provide that prior consistent statements are admissible under Rule 801(d)(1)(B) or not at all.<sup>200</sup> Of course, statements that are not offered for the truth of the matter asserted are not hearsay by definition. Thus, logically, there would be no reason to seek the admission of a statement offered merely for rehabilitation purposes—and not for the truth of the matter asserted—under Rule 801(d)(1)(B). Absent a desire to use the statement substantively, there would be no reason to seek to classify as nonhearsay under Rule 801(d)(1)(B) a statement that is already outside the definition of hearsay. Therefore, the admission of such a statement would be governed by the relevancy rules. It would seem that Rule 801(d)(1)(B), part of Article VIII—the hearsay rules—would play no part in the calculus. The circuits allowing the admission of prior consistent statements offered for the limited purpose of rehabilitation without reference to Rule 801(d)(1)(B) follow the logical path provided by the Federal Rules.

Any indication that *Tome* provides in relation to the question of whether postmotive prior consistent statements offered for the limited purpose of rehabilitation are admissible is dictum in the classic sense. It was not necessary for the Supreme Court to decide this question to reach its decision in *Tome*. The prior consistent statements at issue in *Tome* were admitted by the trial court as nonhearsay under Rule 801(d)(1)(B). The statements were not offered for the

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200. See *supra* notes 93-96 and accompanying text.

limited purpose of rehabilitation. The government's brief explained that "[t]his case does not require the Court to decide whether a pre-motive rule also applies to prior consistent statements that are not admitted as substantive evidence, but are used merely to rehabilitate a witness."<sup>201</sup> Moreover, the Tome opinion clearly states that "[o]ur holding is confined to the requirements for admission under Rule 801(d)(1)(B)."<sup>202</sup>

After Tome, there are two possible scenarios regarding the admission of prior consistent statements. The first is that pre-motive prior consistent statements are admissible as substantive evidence, while post-motive prior consistent statements are not admissible for any purpose. As explained above, this situation is unsatisfactory. The second scenario is that pre-motive prior consistent statements are admissible as substantive evidence, while post-motive prior consistent statements are admissible for the "limited purpose of rehabilitation." This, too, is an unsatisfactory situation.

Distinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning. Juries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use. This is likely a large part of the reason that the drafters of Rule 801(d)(1)(B) provided that evidence that meets the Rule's requirements is admissible substantively.

It makes little sense to differentiate prior consistent statements with a cumbersome time-line rule in regard to the statements' admission as substantive evidence while also allowing the admission of statements rejected by such a rule when juries normally do not make such differentiations. Experience shows that jurors are adept at determining the weight to be given to a witness's testimony and can easily recognize the interest a witness has in the matter about which he or she testified, including any motive that could affect the witness's credibility. In recognition of this, the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence. The weight given these statements would then be for the jury to determine. Amending Rule 801(d)(1)(B) to account for the issues raised herein would alleviate the concern over substantive versus limited rehabilitative use of prior consistent statements, eliminate the often misunderstood limiting instruction, and make the Rule compatible with the realities of a jury trial.

Courts have cited other evidence rules in allowing the admission of post-motive prior consistent statements. Several courts cite Rule

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201. Respondent's Brief at 45 n.24, Tome (No. 93-6892).

202. 115 S. Ct. at 705.

106 to account for a “completeness” admission of prior consistent statements.<sup>203</sup> Courts have recognized that this is not a precise use of Rule 106.<sup>204</sup> Indeed, it appears that this is not a contemplated use of Rule 106 at all. However, the admission of a prior consistent statement to clarify a self-contradiction is often a practical necessity of trial. Such statements should not be forced through the back door of Rule 106, but should be explicitly recognized as admissible when relevant.

As the Tome Court noted, postmotive prior consistent statements, even though not admissible under Rule 801(d)(1)(B), may be admitted substantively under Rule 803(24)<sup>205</sup> if the statements meet Rule 803(24)’s requirements.<sup>206</sup> Although this avenue is available, Rule 803(24) does not address the issues raised above. Moreover, it is often difficult to meet all of Rule 803(24)’s requirements,<sup>207</sup> and such requirements are usually unnecessary when addressing the admissibility of postmotive prior consistent statements. For example, Rule 803(24)’s notice requirement is normally superfluous in such a situation because an opposing litigant knows that if a charge of recent fabrication or improper influence or motive is made, prior consistent statements may be admissible. In addition, the notice requirement of Rule 803(24) would require the proponent of a postmotive prior consistent statement to anticipate the opponent’s impeachment of the declarant with a charge of recent fabrication or improper influence or motive. Because some courts may continue a trial in recognition of Rule 803(24)’s notice requirement when a party seeks to use the rule and has not notified the opposing party

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203. See *supra* note 109 and accompanying text.

204. See *supra* note 109 and accompanying text.

205. Rule 803(24) provides that:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

206. See 115 S. Ct. at 705; see also *United States v. Obayagbona*, 627 F. Supp. 329, 340-41 (E.D.N.Y. 1985); *United States v. Iaconetti*, 406 F. Supp. 554 (E.D.N.Y.), *aff’d*, 540 F.2d 574 (2d Cir. 1976); *Arizona v. Huerta*, 826 P.2d 1210, 1212-14 (Ariz. Ct. App. 1991); *Arizona v. Thompson*, 805 P.2d 1051, 1053-55 (Ariz. Ct. App. 1990); see generally Arthur H. Travers, Jr., *Prior Consistent Statements*, 57 NEB. L. REV. 974, 998-1002 (1978).

207. See generally GRAHAM, *supra* note 70, § 6775.

before trial, the use of Rule 803(24) in this situation could result in needless delay.<sup>208</sup>

A charge of recent fabrication or improper influence or motive is a serious charge reflecting unfavorably on its recipient. The charging party is aware that such a charge can open the door to relevant prior consistent statements that meet the requirements of Rule 801(d)(1)(B). Once that party has opened the door in this manner, there is no convincing reason not to admit, as substantive evidence, prior consistent statements that have some value to the jury from a practical standpoint and that meet the relevancy rules' requirements.

## VI. CONCLUSION

Federal Rule of Evidence 801(d)(1)(B) is overly restrictive in regard to the admission of prior consistent statements in many instances. The primary example of this problem is the focus of this Article: postmotive prior consistent statements. Such statements, on occasion, are relevant and offer sufficient value to warrant their admission. Nevertheless, Rule 801(d)(1)(B), as interpreted by the Supreme Court in *Tome v. United States*, provides a *per se* prohibition on such statement's admission as substantive evidence. Rule 801(d)(1)(B) should be amended to allow the admission of a prior consistent statement as substantive evidence in instances where the statement is relevant and valuable, but is inadmissible under the current Federal Rules of Evidence after *Tome*.

The issue of the admissibility of prior consistent statements has long been recognized as "perplexing."<sup>209</sup> Much of the confusion arises from conflict between the theoretical and the practical approaches to the issue. This tension must be recognized and reconciled or the issue will remain a puzzle. An amendment to the Federal Rules of Evidence addressing the several observations discussed in this Article would serve to clarify the admissibility of prior consistent statements and to further the goals of the Federal Rules of Evidence.

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208. See *id.* § 6775, at 744-47. Rule 803(24)'s other requirements are similarly unnecessary and overburdensome in this situation.

209. 41 L.R.A. (N.S.), *supra* note 1, at 858.