Post-Crawford: Time to Liberalize the Substantive Admissibility of a Testifying Witness's Prior Consistent Statements

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POST-CRAWFORD: TIME TO LIBERALIZE THE SUBSTANTIVE ADMISSIBILITY OF A TESTIFYING WITNESS’S PRIOR CONSISTENT STATEMENTS

Lynn McLain*

I. INTRODUCTION

Imagine that you are a juror in a criminal trial for sexual child abuse. The alleged victim, a quivering five-year old, testifies for the prosecution; however, his speech is halting, his manner unsure, and much of his testimony is given in whispered one-syllable replies to the prosecutor’s leading questions.1 There are no other eyewitnesses to the alleged abuse.2

Despite compelling medical testimony and photographic evidence of the boy’s torn anus,3 you cannot find beyond a reasonable doubt that the defendant is

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2 See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (plurality opinion) (“Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”).

3 See, e.g., C. M. Mahady-Smith, Comment, The Young Victim as Witness for the Prosecution: Another Form of Abuse?, 89 DICK. L. REV. 721, 721-22 (1985) (reporting the dropping of a sexual abuse case due to inadmissibility of a child’s statements identifying his abuser, when the three-year old boy had gonorrhea of the mouth, penis, and rectum); Jackie Powder, Judge’s Ban of Social

At trial A.T., then 6 1/2 years old, was the Government’s first witness. For the most part, her direct testimony consisted of one- and two-word answers to a series of leading questions. Cross-examination took place over two trial days. The defense asked A.T. 348 questions. On the first day A.T. answered all the questions posed to her on general, background subjects. The next day there was no testimony, and the prosecutor met with A.T. When cross-examination of A.T. resumed, she was questioned about those conversations but was reluctant to discuss them. Defense counsel then began questioning her about the allegations of abuse, and it appears she was reluctant at many points to answer. As the trial judge noted, however, some of the defense questions were imprecise or unclear. The judge expressed his concerns with the examination of A.T., observing there were lapses of as much as 40-55 seconds between some questions and the answers and that on the second day of examination, the witness seemed to be losing concentration. The trial judge stated, “We have a very difficult situation here.”

Id. See infra notes 101 and 126. See also United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980) (“At trial Lucy [the nine-year-old victim] was unable to repeat the statements she had made to Officer Marshall and Dr. Hopkins although she was able to provide some facts to support her earlier statements.”). See generally JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES §§ 1.2-1.7, 1.29, 6.1-6.22 (3d ed. 1997) (describing and explaining difficulties faced by child witnesses).
the abuser when you have only the child’s trial testimony on that point. You
would like to hear when, to whom, and under what circumstances the child
reported the alleged abuse in order to help you evaluate the defense’s contention
that the child’s mother has coached him to fabricate the claim against the
defendant.

What you do not know is that although the prosecution is eager to present
evidence of the child’s prior statements, consistent with his trial testimony, the
United States Supreme Court’s 1995 decision in Tome v. United States has read
Federal Rule of Evidence 801(d)(1)(B) to prevent the prosecution’s offering
those statements as substantive evidence. As a result of that decision, the
statements will also be inadmissible even for the limited purpose of helping to
evaluate the credibility of a child, if there is a serious risk that the out-of-court
statements would be used on the issue of guilt or innocence.

Moreover, after the Court’s March 2004 decision in Crawford v. Washington, which redesigned the landscape of Confrontation Clause analysis, other avenues of substantive admissibility for the child’s prior statements—the excited utterance hearsay exception, the residual “catch-all” hearsay exception, provides:

Worker’s Testimony in Child Abuse Case Upsets Investigators, BALTSUN, Aug. 9, 1992, at 6B (the stepfather of a five-year old Maryland girl who contracted gonorrhea was acquitted when the State was not permitted to prove that the child had described her stepfather having sexual intercourse with her to a police officer).


5 Federal Rule of Evidence 801(d)(1)(B) provides:

(d) Statements which are not hearsay. A statement is not hearsay if—
(1) Prior statement by witness. The declarant testifies at the trial or hearing and is
subject to cross-examination concerning the statement, and the statement is . . . (B)
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 . . . .

6 See United States v. Kenyon, 397 F.3d 1071 (8th Cir. 2005) (holding it is reversible error to admit, for corroboration purposes, statements not admissible as substantive evidence); United States v. Acker, 52 F.3d 509, 516-18 (4th Cir. 1995). See also infra note 129 and text accompanying note 141.


9 Compare, e.g., People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (holding an excited utterance by 911 caller was “testimonial” and inadmissible absent compliance with Crawford) with People v. Moscat, 777 N.Y.S.2d 875 (N.Y. City Crim. Ct. 2004) (holding exited utterances by domestic violence victim in 911 call were nontestimonial and would be admissible even if declarant did not testify at trial). See generally Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. PA. L. REV. 1171 (2002); Hutton, supra note 8, at 66-71 (collecting post-Crawford child abuse cases).
or the states’ “tender years” hearsay exception—are all in jeopardy unless the child testifies at trial and is subject to cross-examination concerning the statement. The combination of Tome and Crawford has been a “one-two punch” for child abuse prosecutions.

Yet Crawford reasserts that when the witness testifies at trial and can be cross-examined by the accused regarding those statements, there is no Confrontation Clause obstacle to admitting the witness’s prior statements as substantive evidence. Therefore, given Crawford’s emphasis on requiring that the accused have the ability to cross-examine the declarant about his or her statement, now is the ideal time to amend the rules of evidence to overrule Tome so as to permit the substantive use of any of a witness’s prior statements, consistent with his or her trial testimony, that would be helpful to the fact-finder. Although the need for such an amendment may be starkest in child abuse prosecutions, the amendment will be of benefit in all types of cases.

Part II of this article provides background information regarding Crawford and the changes it has wrought regarding the constitutional parameters on the admission of hearsay. Part III discusses the pre-Federal Rules of Evidence common law regarding the substantive admissibility of a witness’s prior consistent statements, the curious adoption of an underinclusive Federal Rule of Evidence (“Rule”) 801(d)(1)(B), and the pre-Crawford case law construing the Rule, particularly the Court’s decision in Tome. The Tome majority read the Rule to require that a witness’s statement must have preceded the witness’s alleged motive to lie at trial in order to be admissible under the Rule.

Although the Advisory Committee on Evidence Rules determined prior to Crawford that the need for an amendment of Rule 801(d)(1)(B), which was suggested by Chief Judge Bullock of the United States District Court for the Middle District of North Carolina, did not justify the costs associated with any

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10 FED. R. EVID. 807. See Crawford, 541 U.S. at 63-65 (citing with disapproval cases that had affirmed the admission of testimonial statements under this exception or its predecessors, former Federal Rules of Evidence 803(24) and 804(b)(5)). The Tome majority suggested that the child victim’s statements, although inadmissible under Rule 801(d)(1)(B), might be admissible under the catch-all (then Rule 803(24)), if they were shown to be reliable. Tome v. United States, 513 U.S. 150, 166 (1995). That door has been closed by Crawford, at least as to testimonial statements when the declarant does not testify at trial and Crawford’s requirements have not otherwise been met. Crawford, 541 U.S. at 68.

11 See State v. Snowden, 867 A.2d 314 (Md. 2005) (holding it is reversible error to admit under Maryland’s statutory “tender years” hearsay exception a social worker’s testimony as to children’s out-of-court “testimonial” statements which were made in the presence of a police detective, when the children did not testify). See generally Lynn McLain, Children Are Losing Maryland’s “Tender Years” War, 27 U. BALTIMORE L. REV. 21 (1997) (discussing Maryland’s statute and citing “tender years” statutes of thirty-six other states).

12 See infra note 29 and accompanying text.

13 See infra note 66 and accompanying text.

14 See Stephen A. Saltzburg et al., 4 Federal Rules of Evidence Manual § 801.02[4][b] at 801-33 & n.31 (8th ed. 2002) (“Persuasive arguments have been made that Rule 801(d)(1)(B) should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate [a] witness.”); Frank W. Bullock, Jr. & Steven Gardner, Prior Consistent Statements and the Premotive Rule, 24 FLA. ST. U. L. REV. 509 (1997); Daniel S. Capra,
Crawford has raised the stakes considerably. Part IV argues that post-Crawford is the ideal time to revive and refine Judge Bullock’s proposal that Rule 801(d)(1)(B) should be amended. The amendment should permit the substantive use (subject to the court’s exercise of discretion under Rule 403) of all of a witness’s prior consistent statements that would be helpful to the fact-finder in assessing the credibility of the witness’s trial testimony given whatever method of impeachment of the witness had occurred. That test, like the test of helpfulness of lay or expert opinion evidence under Rules 701 and 702, ought to be a flexible one; there should be no hard and fast rule requiring that an admissible prior consistent statement precede an alleged impeaching fact. Because the current Rule has a particularly devastating effect on the prosecution of sexual child abuse and other sexual assaults, in the event this amendment to Rule 801(d)(1)(B) is not adopted, Part IV argues that the Federal Rules of Evidence should be amended to include, like the evidence laws of numerous states, a similar provision specifically admitting an alleged victim of sexual assault’s prior consistent statements reporting the assault.

II. THE POST-CRAWFORD LANDSCAPE

Before Crawford, the Supreme Court’s 1980 decision in Ohio v. Roberts and its progeny applied the Confrontation Clause so as to establish the outer limits on admissibility of hearsay evidence against a criminal accused, regardless of whether the out-of-court statements were “testimonial” or “nontestimonial.” Under Roberts, the Confrontation Clause and the rule against hearsay were conflated, so hearsay evidence that was sufficiently reliable and necessary

Memorandum to Advisory Committee on Evidence Rules (Nov. 1, 2003) (on file with the author) (discussing proposal by Chief Judge Bullock, who acted as liaison from the Standing Rules Committee to the Advisory Committee on Evidence Rules, to amend Rule 801(d)(1)(B) so as to provide, as drafted by the Reporter, Professor Capra, that “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 admissible, subject to Rule 403, to rehabilitate the declarant’s credibility as a witness.”).

15 E-mail from Daniel S. Capra, Professor of Law, Fordham University School of Law, to Lynn McLain, Professor of Law, Baltimore School of Law (the Committee “found that the benefits of an amendment did not outweigh the costs”) (Mar. 30, 2005, 10:22 EST) (on file with author).

16 The Federal Rules of Evidence apply in federal cases, but most states also have adopted codes based on the federal rules. See LYNN McLAIN, 5 MARYLAND EVIDENCE: STATE AND FEDERAL xvii n.2 (2d ed. 2001). See generally SALTZBURG, supra note 14 (should the federal rule be amended, those states likely would revisit their corollary rules as well).

17 E.g., United States v. Ellis, 121 F.3d 908, 926-27 (4th Cir. 1997) (finding lay witness was properly allowed to give the opinion that the defendant was pictured in surveillance photograph, when there was a basis for concluding that witness’s identification would be superior to jury’s).


19 See infra notes 160-64.

20 448 U.S. 56 (1980).

21 Id. at 66. Reliability could be shown either (1) because the hearsay fell within a “firmly rooted” hearsay exception or (2) by “a showing of particularized guarantees of trustworthiness.” Id.
was admissible, even though the defendant most often had no opportunity to cross-examine the declarant. Roberts applied the same analysis to testimonial and nontestimonial out-of-court statements. Crawford, on the other hand, construes the Confrontation Clause so as to require the opportunity for cross-examination, rather than some other gauge of reliability, but applies the Clause only to testimonial statements.

Under Crawford, the declarant is a "witness against" the accused within the meaning of the Sixth Amendment if the out-of-court statement was "testimonial." In that event, the Confrontation Clause bars the admission of the statement as substantive evidence for the prosecution, unless either (1) the defendant can cross-examine the declarant at trial, or (2) the declarant is unavailable to testify at trial, but the defendant earlier had an opportunity to cross-examine the declarant about the statement, or (3) the declarant's unavailability to testify at the trial was procured by the defendant, in which case the defendant has forfeited the ability to complain that he or she cannot cross-examine the declarant.

If the declarant is available to testify at the trial and the accused has the opportunity to cross-examine the witness-declarant, the Confrontation Clause guarantee has been met fully. Although the courts recognized this principle

22 Id. at 65 ("[T]he Sixth Amendment establishes a rule of necessity."). A declarant's unavailability to testify at trial satisfies the requirement of necessity. Id. In White v. Illinois, 502 U.S. 346 (1992) and United States v. Inadi, 475 U.S. 387, 395-96 (1986), the necessity prong was met by the fact that, even if the declarants had testified at trial, their testimony could not have duplicated the circumstances providing probative value to their out-of-court excited utterances, White, 502 U.S. 346, statements made for purposes of obtaining medical treatment, id. at 356, or their statements during and in furtherance of a conspiracy, Inadi, 475 U.S. at 395-96.


25 "The [Confrontation] Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," such as for impeachment of the declarant. Id. at 59 n.9.

26 Id.

27 Id. at 68.

28 Id. at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability."). See generally Richard D. Friedman, Confrontation and the Definition of Chutzpah, 31 ISRL. REV. 508 (1997); Richard D. Friedman, The Confrontation Blog, (Dec. 14, 2004), http://confrontationright.blogspot.com/2004_12_01_confrontationright_archieve.html.

29 E.g., Crawford v. Washington, 541 U.S. 36, 59 n.9; California v. Green, 399 U.S. 149, 162 (1970); United States v. Powell, 334 F.3d 42, 45-46 & n.2 (D.C. Cir. 2003) (applying this principle in the context of the admission of a testifying witness's prior consistent statements). But see Richard D. Friedman, Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket, 1995 SUP. CT. REV. 277 (arguing that the admission of extrinsic evidence of a witness's statements, generally consistent with, but more detailed than the witness's trial testimony, poses confrontation problems). Professor Friedman's objection, however, is answered at present by United States v. Owens in which Justice Scalia, writing for the majority of six, reiterated, "The Confrontation Clause guarantees only an opportunity for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense may wish." 484 U.S. 554, 559
before *Crawford*, it assumes more preeminence in a post-*Crawford* world in which Confrontation Clause analysis contemplates cross-examination only, rather than any other mechanism or test for ensuring reliability of the out-of-court statement.

Post-*Crawford*, then, the admissibility of hearsay under the Confrontation Clause turns on (1) whether the out-of-court statement was "testimonial" and, if so, then (2) whether the opportunity to cross-examine was either (a) provided to the accused or (b) forfeited by the accused's conduct that made the declarant unavailable to testify. *Crawford* strongly suggests, though it leaves a decision on the issue for another day, that the Court is inclined to hold that the Confrontation Clause does not apply to "nontestimonial" statements.

*Crawford* teaches that the admissibility of nontestimonial out-of-court statements is circumscribed only by the law of hearsay, as the states (or, in federal cases, the evidence rules adopted by the Court and Congress) choose to define it. Justice Scalia, writing for the Court, states, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."

The startling idea that admissibility of nontestimonial hearsay, even when the declarant does not testify at trial, would then be governed simply by the applicable evidence rules, left *Crawford*'s readers asking what, if anything, would establish the constitutional parameters on the admission of such hearsay. The answer is provided in Justice Thomas's concurring opinion in *White v. Illinois*, joined by Justice Scalia, presaging *Crawford*. Justice Thomas states:

> Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the [Confrontation] Clause makes no distinction based on the reliability of the evidence presented... Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection [regarding reliability of the evidence against them] that due process already provides them.

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30 E.g., *Green*, 399 U.S. at 162.
31 *Crawford*, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").
32 *Id.*
33 *Id.* at 60-61
34 *Id.* at 61.
35 *Id.* at 68.
37 *Id.* at 363-64.

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(1988). The Court found no error in the substantive admission under Federal Rule of Evidence 801(d)(1)(C) of an out-of-court identification by an assault victim, when the victim was sworn as a witness at trial and subject to cross-examination, but due to brain damage from the assault had no memory of the basis for the identification. *Id.* at 564.
Thus, the Court likely will hold in a future case that evidence rules regarding nontestimonial hearsay will be restrained not by the Confrontation Clause, but by the due process clause, which provides the constitutional guarantee that a judgment cannot be based on unreliable hearsay.38 Courts have traditionally applied this due process guarantee in their review of administrative proceedings.39 Therefore, the reliability analysis of Ohio v. Roberts and its progeny (minus the necessity analysis) will continue to apply to the question of what nontestimonial hearsay evidence can support a judgment, but will do so under the due process clause, which historically has been less restrictive40 than had the Confrontation Clause cases pre-Crawford.

If this prediction proves to be correct, the rules of evidence constitutionally could permit the admission of nontestimonial hearsay of nontestifying declarants as long as it meets the due process reliability standard. As to this category of out-of-court statements, even a general rule like that of the federal Administrative Procedure Act that only "irrelevant, immaterial or unduly repetitious evidence" must be excluded and judgments must be based on "reliable, probative, and substantial evidence,"41 would be a permissible choice.42 Such an approach harks

38 See, e.g., Richardson v. Perales, 402 U.S. 389 (1971) (finding procedural due process requirements were met when an agency based its decision on reliable hearsay experts' reports); Motor Vehicle Admin. v. McDorman, 772 A.2d 309 (Md. 2001) (holding an administrative agency's decision can be based on reliable hearsay); Bergstein v. State, 588 A.2d 779 (Md. 1991) (holding that an admission of reliable hearsay at a hearing to revoke a person's conditional release from a mental health facility did not violate due process, even though the admission would have been inadmissible at a trial).

39 E.g., Richardson, 402 U.S. 389 (holding that procedural due process requirements were met when agency based its decision on a reliable hearsay experts' reports); Gimbel v. Commodity Futures Trading Comm'n, 872 F.2d 196, 199 (7th Cir. 1989) ("It is well settled that hearsay may constitute substantial evidence in administrative hearings if factors assuring the underlying reliability and probative value of the evidence are present."); Bellsouth Adver. & Pub'l'g Corp. v. Unemployment Appeals Comm'n, 654 So.2d 292 (Fla. Dis. Ct. App. 1995) (hearsay evidence admissible to supplement or explain admissible evidence); Spreadbury v. Dep't of Pub. Safety, 745 So.2d 1204, 1208-09 (La. Ct. App. 1999) (hearsay evidence may be admissible in administrative proceedings, as long as it is "of the type that reasonable persons would rely upon"); Motor Vehicle Admin. v. McDorman, 772 A.2d 309 (Md. 2001) (administrative agency's decision can be based on reliable hearsay); De Carlo v. Comm'n of Soc. Servs., 131 A.D.2d 31, 34-35 (N.Y. App. Div. 1987) ("It is now well established that an agency can prove its case through hearsay evidence, so long as it is believable, relevant and probative.") (citations omitted).


41 See, e.g., Richardson, 402 U.S. at 398-401 (discussing admissibility of physician's records and reports in an administrative hearing regarding social security disability claims).

42 5 U.S.C. § 556(d) (1994). See, e.g., Md. CODE ANN., STATE GOV'T § 10-213(b)-(c) (2004 Repl. Vol.) (evidence not excludable simply because it is hearsay; rather, "probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs" is admissible).

43 See Richard D. Friedman, Reflections on the Brooklyn Conference, (Feb. 21, 2005), http://confrontationright.blogspot.com/2005_02_01_confrontationright_archive.html. ("My own feeling is that [after Crawford] hearsay law—as opposed to confrontation law—should generally become far less exclusionary and less rigid.").
back to the Federal Advisory Committee’s Preliminary Draft of March 1969, which provided for the admissibility of hearsay having “‘assurances of accuracy not likely to be enhanced by calling the declarant as a witness,’” and framed categories listed in Rule 803 merely as “‘examples of statements, conforming with the requirements of this rule.’”44

The constitutional caveat added by Crawford is that any testimonial statements offered against a criminal accused must exceed the due process standard. Crawford requires that either (1) the declarant testify and be subject to cross-examination at trial, (2) the declarant be unavailable to testify at trial but the accused had an earlier opportunity to cross-examine her about her statement, or (3) the declarant be unavailable to testify at trial and the court find that the accused procured her unavailability.45 Crawford necessitates the reevaluation of the definitions and boundaries of the previously firmly established hearsay exceptions, because even if a particular hearsay statement falls within one of those exceptions, if the statement is “testimonial” and it is offered against a criminal accused, it will be inadmissible unless the prosecution complies with Crawford.

Given the first category of the three avenues for compliance with Crawford, this article will begin reevaluation of the existing Federal Rules of Evidence with Rule 801(d)(1), regarding which prior statements of a testifying witness are admissible as substantive evidence. Because the witness is testifying at the trial, and Rule 801(d)(1) requires that she must be “subject to cross-examination concerning the statement,”46 the Confrontation Clause poses no barrier here,47 even if her prior statements were testimonial. This article addresses one subset of Rule 801(d)(1)(B), which delimits the substantive admissibility of a testifying witness’s out-of-court statements that are consistent with her testimony.

III. RULE 801(D)(1)(B)

Under the common law that was in effect just before the adoption of the Federal Rules of Evidence, a witness’s prior statements that were consistent with her testimony enjoyed no hearsay exception of their own. Rather, they were admissible only for the limited purpose of rehabilitating the credibility of a witness who had been impeached by the suggestion that the witness’s memory had slipped or that the witness was fabricating her testimony, and then only if relevant for that purpose.48 Rule 801(d)(1)(B) made certain statements rebutting the latter form of impeachment admissible as substantive evidence. Most post-Federal Rules of Evidence cases in the lower courts have permitted the use of statements not qualifying under the Rule, but nonetheless relevant to the

45 See supra notes 24-28 and accompanying text.
46 Fed. R. Evid. 801(d)(1).
47 See supra note 29 and accompanying text.
48 See infra Part III.B.
witness's credibility, for the limited purpose of rehabilitation only, and not as substantive evidence.

A. The Confrontation Clause Poses No Bar to Admissibility of a Testifying Witness's Prior Consistent Statements

By definition, in order for an out-of-court statement to be consistent with a witness's trial testimony, the witness must also testify at trial and thus be subject to cross-examination at trial. The Confrontation Clause, as most recently construed in Crawford, thus poses no obstacle to the admission of a testifying witness's prior consistent statements. The opponent may simultaneously contest the trustworthiness of the witness's prior consistent statements and the declarant's trial testimony through cross-examination of the declarant at trial.

Similarly, as long as the declarant testifies at trial and is subject to cross-examination concerning the prior statement, neither the Confrontation Clause nor Rule 801(d)(1)(B) precludes extrinsic proof, as by document or by testimony of persons other than the declarant, of the declarant's prior consistent statements. If other witnesses so testify, the opponent may cross-examine those witnesses as to their own bias, accuracy of perception, memory, and any other matters relevant to their credibility.

There are, however, reasons other than the Confrontation Clause to limit the admissibility of a witness's prior consistent statements. We would rather hear the witness testifying from a live memory—and be able to cross-examine her live

49 See supra note 29 and accompanying text.

50 This procedure was followed in, for example, United States v. Trujillo, 376 F.3d 593, 609-10 (6th Cir. 2004); United States v. Fulford, 980 F.2d 1110, 1114 (7th Cir. 1992). See, e.g., United States v. Hebeca, 25 F.3d 287, 291-92 (6th Cir. 1994) (The government proved the witness's statement through extrinsic evidence after the witness had testified. "Every other circuit [except the Seventh Circuit in West] which has addressed this issue permits third parties to testify about another witness's prior consistent statement . . . . Where, as here, the requirements of the rule are satisfied, the admission of a prior consistent statement through a third party on an important matter in dispute at trial should be permitted.") (citing United States v. Montague, 958 F.2d 1094, 1099 (D.C. Cir. 1992) (listing six other circuits in accord); United States v. Myers, 972 F.2d 1566, 1576 n.7 (11th Cir. 1992); United States v. Piva, 870 F.2d 753, 758 (1st Cir. 1989)); United States v. Dominguez, 604 F.2d 304, 311 (4th Cir. 1979) (finding extrinsic proof of such statements was proper after declarant had testified and been impeached at trial). See also United States v. Copes, 345 F.2d 723, 726 & n.7 (D.C. Cir. 1964) (holding in a pre-Federal Rules of Evidence case that admitting extrinsic proof of declarant's prior consistent statements when she had testified and been cross-examined about the statements was not error). But see United States v. West, 670 F.2d 675, 686-87 (7th Cir. 1982) (holding it was harmless error to permit extrinsic proof of statement after declarant had testified, but had not testified to statement; proof of statement must be elicited from declarant on redirect or in prosecution's case in rebuttal, so that he or she will be "subject to cross-examination concerning the out-of-court declaration"). Professor Friedman argues, however, that substantive admissibility of prior statements that are generally consistent but add detail should not be permitted if the declarant does not assert these facts at trial because cross-examination will be seriously hampered as to those facts. Friedman, supra note 29, at 287-301, 305-10, 321.
memory—than simply be confined to what she said before. If her recollection is complete, there is no need to resort to her earlier statements. To admit all of a witness’s prior consistent statements would consume a great deal of time and yield no particular benefit. 51 Additionally, to routinely admit a witness’s prior consistent statements might encourage the manufacture of well-crafted statements by unethical witnesses, parties, or counsel. 52

B. The Pre-Rule Common Law

Before the codification of the Federal Rules of Evidence, there was no hearsay exception per se for prior consistent statements of a testifying witness. For his or her statements to be admitted as substantive evidence, they had to meet the requirements for some hearsay exception, such as that for excited utterances. Under the applicable common law, prior consistent statements that did not fall under such a hearsay exception could be admitted only for the limited purpose of rehabilitating the credibility of a witness who had been impeached by an opposing party. 53 Of course, prior consistent statements were admissible for this limited purpose of rehabilitation only when they were helpful to the fact-finder because they logically rebutted the impeachment that had been undertaken. There were three situations where this criterion often was met.

The first scenario arose when the witness was impeached by questions or evidence suggesting that her testimony was inaccurate because her memory had faded since the event in question. The proponent of her testimony then could prove her prior consistent statements made significantly closer to the event. 54

51 See FED. R. EVID. 801(d)(1) advisory committee’s note (contrasting FED. R. EVID. 801(d)(1) with UNIF. R. EVID. 63(1) (1953), “which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination” (emphasis added)).

52 See FED. R. EVID. 801(d)(1), advisory committee’s note (stating an “unwillingness to countenance the general use of prior prepared statements as substantive evidence”), cited in Tome v. United States, 513 U.S. 150, 162 (1995).

53 See Bullock & Gardner, supra note 14, at 511-13 (chronicling evolution of common law rule from the admission of a witness’s prior consistent statements without limitation through early 1700’s, to the admission for corroboration only, regardless whether declarant had been impeached, and finally, to the admission only after an attack on witness’s credibility in the early 1800s); 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 BYU L. REV. 231, 234-42.

54 E.g., Bullock & Gardner, supra note 14, at 516 n.47 (citing 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) [1879]; 1 MCCORMICK ON EVIDENCE § 47, at 178 n.18 (John W. Strong, ed., 4th ed. 1992) (“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.”)); Michael H. Graham, Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and
Second, where the opponent suggested that the witness was lying at the trial due to her bias or improper motive, the courts routinely would admit the witness’s consistent statements made prior to the date that the alleged bias or motive came into existence. Post-motive statements that rebutted impeachment were also admitted by a number of courts.

Third, if the impeachment was by proof of the witness’s prior statement inconsistent with her trial testimony (which could imply either faded memory or subsequent fabrication), the prior consistent statement generally would need to precede the prior inconsistent statement in order to logically refute the impeachment so as to meet the relevancy requirement for admissibility. For instance, a witness who testified at trial that a civil defendant sped through a red traffic light and collided with the plaintiff’s car might be impeached with her deposition taken a year before trial in which she said that she was not sure of the color of the light. The plaintiff then could prove the witness’s statement to her husband on the evening following the accident that the defendant had run a red light.

Proposal, 30 HASTINGS L.J. 575, 591, 605-06 & nn.99-102 (1979) (noting that prior consistent statements properly rebut such an attack “if the statement was made shortly after the event in question”).

This “premotive” set of facts was found to exist in, for example, United States v. Dominguez. 604 F.2d 304, 311 (4th Cir. 1979) (holding it was not error to permit a government agent to testify to prior statements of prosecution witness, when witness’s cross-examination was rife with implications that he had improper motivation in testifying and that his testimony about two exhibits was fabricated recently, and the “prior consistent statements were made long before he belatedly produced the items in question”). It was found not to exist in, for example, United States v. Weil. 561 F.2d 1109, 1111 & n.2 (4th Cir. 1977) (per curiam) (holding that because government failed to establish that a witness’s prior consistent statement was given prior to government’s offer of leniency, statement was admitted erroneously to rebut inference of improper motive resulting from offer).

E.g., United States v. Hamilton, 689 F.2d 1262, 1274 (6th Cir. 1982) (holding it was not error to admit prior consistent statement where facts indicated that consistent statement was “independent of the alleged discrediting influence”); United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir. 1972) (per curiam); Hanger v. United States, 398 F.2d 91, 104-05 (8th Cir. 1968). See State v. George, 30 N.C. 324, 328 (1848) (per curiam) (In dictum, the court discussed settled North Carolina law that provided that whether the statements were made before or after an alleged improper influence “applies more properly to the weight than to the competency of the testimony.”). See also Bullock & Gardner, supra note 14, at 525-27 (discussing pre-Tome split among the circuits after the Federal Rules of Evidence were adopted regarding whether post-motive statements were admissible as substantive evidence or only for credibility purposes). See also infra note 109.

See also Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836) (holding it was proper to have excluded a prior consistent statement that was made after the impeaching prior inconsistent statement and was not relevant to rebut impeachment); Bullock & Gardner, supra note 14, at 518 & n.66 (citing 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, 792-93 (Colo. 1922); Chicago City Ry. v. Matthieson, 72 N.E. 443, 444-45 (I11. 1904); 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1126 (Chadbourn rev. 1972)). Yet numerous courts disallowed even this use. See Bullock & Gardner, supra note 14, at 518 & n.68. Professor Graham aptly describes the case law as “perplexing” and in “irreconcilable conflict.” Graham, supra note 54, at 576.
Considerable case law gave the courts discretion to admit whatever prior statements by the witness they found would be helpful to the jury in evaluating the credibility of the witness’s trial testimony, as, for example, when the prior statement helped to explain a prior inconsistent statement or to deny its having been made. Thus, a prior consistent statement close in time to, but nonetheless made after a prior inconsistent statement could be admitted. In the example just discussed, then, a statement given a week after the accident might be admitted, despite proof that immediately after the accident the witness said, “I don’t want to get involved. I didn’t see anything.”

The common law immediately preceding the adoption of the Federal Rules of Evidence would have required that the court give a limiting instruction, on request, that the prior consistent statement was to be considered only as to credibility of the witness and not as substantive proof. This limiting instruction was required even though the statement admitted was by definition consistent with, and thus cumulative of, the substantive testimony.

C. The Federal Rule

When the drafters of the federal rules considered the common law, they seemed to recognize that, because prior consistent statements are by definition consistent with the declarant’s trial testimony, the requirement that a limiting instruction be given was likely futile and apt to result, at best, in confusion of the jury. Imagine a plaintiff’s witness who has testified, “The traffic light was red when the blue van drove through it.” The defense impeaches the witness with the fact that it has been three years since the accident, implying that she cannot remember what happened. The plaintiff on redirect proves the witness’s

58 E.g., Gandy, 469 F.2d 1134 (per curiam); Hanger, 398 F.2d at 103-04; Copes v. United States, 345 F.2d 723 (D.C. Cir. 1964). See Bullock & Gardner, supra note 14, at 519 & n.72 (citing, inter alia, Nat’l Postal Transp. Ass’n v. Hudson, 216 F.2d 193, 200 (8th Cir. 1954); Cafasso v. Pennsylvania R.R., 169 F.2d 451, 453 (3d Cir. 1948); Affronti, 145 F.2d at 7 (8th Cir. 1944); State v. Ouimette, 298 A.2d 124, 133-34 (R.I. 1972)). See also Kaneshiro v. United States, 445 F.2d 1266, 1271 & n.4 (9th Cir. 1971) (prior consistent statements were properly admitted to correct the prejudicial effect of the unfair cross-examination technique used by defendant’s counsel, which falsely suggested that there were inconsistencies).

59 See Bullock & Gardner, supra note 14, at 519 & nn. 70-71 (citing Felice, 426 F.2d at 197-98 (2d Cir. 1970); 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, 169 F.2d at 453; 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); Sweazey v. Valley Transp., Inc., 107 P.2d 567, 572 (Wash. 1940)); Graham, supra note 54, at 594-602.

60 See Copes, 345 F.2d at 726-27 (finding that under the circumstances, the instruction was adequate); Graham, supra note 54, at 578 (holding prior consistent statements admissible only as to credibility). See also Fed. R. Evid. 105 (limiting instruction process generally, under the federal evidence code).
statement one week after the accident, that "the light was red for the blue van." The judge informs the jury that it may not consider the latter statement as proof the light was red for the blue van, but only on the issue as to whether the witness was truthful when she testified at trial that the light was red for the blue van.

The jurors hearing such an instruction might reasonably be heard to snicker, shake their heads, and murmur, like Mr. Bumble in Oliver Twist, "The law is a[n] ass."61 If the jury believes the witness's trial testimony, the prior consistent statement is merely cumulative.62 There is no need for a limiting instruction if the out-of-court statement duplicates already admitted substantive evidence. In recognition of this fact, the drafters of the Federal Rules undertook to make such prior consistent statements admissible as substantive evidence, thus obviating the need for a limiting instruction.63

Unfortunately, Rule 801(d)(1)(B) is underinclusive in several ways. First, it does not address all possible uses of prior consistent statements, but only those that follow impeachment by "an express or implied charge against the declarant of recent fabrication or improper influence or motive."64 The Rule requires not only that there have been the type of impeachment suggesting "fabrication," but
also that it must suggest “recent fabrication.” Further, the current paradigm for analyzing that category of statements, as established by the Supreme Court’s majority of five in Tome, imposes a strict requirement that the prior consistent statement have been made “before the impeaching fact” for admission under the Rule. Thus, current Rule 801(d)(1)(B) results in the exclusion as substantive evidence of prior consistent statements that are post-motive, but that a jury would find helpful in assessing the impeachment undertaken, suggesting fabrication. Likewise, the current Rule excludes as substantive evidence prior consistent statements when the witness has been impeached as having a dulled memory, and the prior statements simply are from a time when the witness’s memory was fresher than it is at trial.

The Advisory Committee’s Note to Rule 801(d)(1)(B) states only:

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.

Yet this rationale applies equally to relevant post-motive and fresher memory statements that rebut the impeachment undertaken, but which Tome interpreted the language of the Rule to exclude. No doubt for this reason, Professor Friedman ventures that the Rule’s underinclusiveness was unintentional:

[T]he most plausible explanation appears to be that this was just a careless bit of drafting. The intention of the drafters seems to have been that if a prior consistent statement is admissible for rehabilitation it should be admissible substantively—that is, to prove the truth of what it asserts—withstanding the rule against hearsay. The language used by the Rule describes the most common, but not the exclusive, situation in which a prior consistent statement might be admitted for “rehabilitation.”

In response to the underinclusiveness of Rule 801(d)(1)(B), Chief Judge Jack Weinstein of the United States District for the Eastern District of New York, a leading evidence scholar, and many federal and state courts have

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65 Id.
66 513 U.S. 150 (1995). The Tome majority adopted the position advocated by Professor Ohlbaum in his article. Ohlbaum, supra note 53. For an example of how the lower courts currently apply Tome, see United States v. Bordeaux. 400 F.3d 548, 557 (8th Cir. 2005).
67 FED. R. EVID. 801(d)(1)(B) advisory committee’s note.
68 Friedman, supra note 29, at 303-04.
69 E.g., United States v. Obayagbona, 627 F. Supp. 329, 335-38 (E.D.N.Y. 1985) (endorsing liberal admission of prior consistent statements when offered only for rehabilitation and not as substantive proof, and urging that there is no need for requirement concerning time of statement).
70 E.g., United States v. Stover, 329 F.3d 859, 866-69 (D.C. Cir. 2003), cert. denied, 541 U.S. 1018 (2004); United States v. Simonelli, 237 F.3d 19, 25-29 (1st Cir. 2001); United States v. Gluzman,
On making her feel frightened for her safety.

Note, 71 E.g., States v. Acker, 52 F.3d 509, 516-18 (4th Cir. 1995) (holding it is reversible error to admit post-substantive evidence or to rehabilitate, remains whether the statement has probative value apart from mere repetition; the charge of 'recent fabrication or improper influence or motive' could possibly have probative value for the assertedly more 'limited' purpose of rehabilitating a witness). The rule clearly includes no such limitation) (court distinguished between use of statements for purpose of rehabilitation and as affirmative evidence); United States v. Rubin, 609 F.2d 51, 70 (2d Cir. 1979) (Friendly, J., concurring) (construing Fed. R. Evid. 102), aff'd on other grounds, 449 U.S. 424 (1981); Gonzalez v. DeTella, 918 F. Supp. 1214, 1222 (N.D. Ill. 1996). See United States v. Lozada-Rivera, 177 F.3d 98, 103 (1st Cir. 1999) (discussing in authority regarding whether restraints of Rule 801(d)(1)(B) apply to all prior consistent statements); Bullock & Gardner, supra note 14, at 521-22 & nn.87-96 (citing cases); Friedman, supra note 29, at 319; Edward J. Imwinkelreid, Federal Rule of Evidence 402: The Second Revolution, 6 REV. LITIG. 129, 152-53 (1987); Yvette Olstein, Pierre and Brennan: The Rehabilitation of Prior Consistent Statements, 53 BROOK. L. REV. 515 (1987). Cf. United States v. Collicot, 92 F.3d 973, 979-82 (9th Cir. 1996) (declaring to reach question whether prior consistent statements that do not qualify under Rule 801(d)(1)(B) may be admitted as substantive evidence under the "opened door" doctrine); Middleton v. Cupp, 768 F.2d 1083, 1085-86 (9th Cir. 1985) (in habeas corpus proceedings, district court had held that, when defense impeached witness by showing that witness had made "deal," prosecution properly could show that part of deal was that witness had to pass a polygraph test (i.e., make a prior consistent statement); the appellate court affirmed on grounds that even if admission of evidence was error, it was not of constitutional dimension). Contra United States v. Miller, 874 F.2d 1255, 1271-75 (9th Cir. 1989) (questioning whether a prior consistent statement is offered as substantive evidence or to rehabilitate, remains whether the statement has probative value apart from mere repetition; "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") (citation omitted); United States v. Acker, 52 F.3d 509, 516-18 (4th Cir. 1995) (holding it is reversible error to admit post-motive consistent statements for purposes of corroboration). But see E. Desmond Hogan, Case Note, A Consistent Interpretation for 801(d)(1)(B) Prior Consistent Statements, 39 HOW. L.J. 819, 839 (1996) ("[T]he [Tome] predate requirement applies when a prior statement is offered for rehabilitation purposes.").

7) E.g., People v. Eppens, 979 P.2d 14, 20-21 (Colo. 1999); Holmes v. State, 712 A.2d 554 (Md. 1998) (holding statement admissible when state's witness testified that she did not "give any statement to police because Petitioner knew that she had witnessed the murder and she was frightened for her safety. She also testified that Petitioner visited her the day after the murder making her feel threatened." On cross-examination, defense counsel impeached her with her written statement to police following the shooting, stating that she did not see who shot the victim. On redirect, over objection, the court properly permitted the State to admit the witness's second
fallen back to the common law approach to fill the gaps left by the Rule; they admit helpful prior consistent statements for the limited purpose of use in assessing the declarant's credibility. The four dissenting justices in Tome endorsed the propriety of this approach, but the majority declined to address it. There being no Confrontation Clause bar to substantive use of a testifying witness's prior statements, as their reliability is subject to testing through cross-examination, Rule 801(d)(1)(B) should be amended to make this unnecessarily complicated, two-tier approach obsolete, and permit substantive use of all such statements that would both be helpful to the fact-finder and also pass Rule 403 scrutiny as not unduly prejudicial, distracting, or cumulative. Such an amendment also would further Rule 611's goals allowing the trial court to "make the interrogation [of witnesses] and presentation [of evidence] effective for the ascertainment of the truth . . . [and] avoid needless consumption of time."  

IV. PROPOSED AMENDMENT OF RULE 801(D)(1)(B)

Rule 801(d)(1)(B) is underinclusive. Its language and the result in Tome cut the jury off from substantive use of a testifying witness's prior consistent statements that would be helpful to it. The Tome rule usurps in part the jury's fact-finding role as to whether the witness has a motive to lie and, if so, when it arose and whether it affected the witness's trial testimony. An amended rule that broadens the substantive admissibility of a witness's prior statements consistent with her testimony, subject to exclusion in the court's discretion under Rule 403 as unduly prejudicial or cumulative, is desirable.

A. Shortcomings of the Present Rule: Underinclusiveness

Rule 801(d)(1)(B) is underinclusive in two significant ways. First, it fails altogether to address the use of prior consistent statements when the impeachment undertaken (whether by proof of the witness's prior inconsistent

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statement to the police, made two days after the shooting, identifying the defendant as the shooter) (pursuant to explicit provision of Md. Rule 5-616(c)(2) regarding rehabilitation of witnesses, see infra note 158); State v. Chew, 695 A.2d 1301 (N.J. 1997); State v. Brown, 969 P.2d 313, 325-26 (N.M. 1998); Beartusk v. State, 6 P.3d 138, 145 (Wyo. 2000).


73 Id. at 167 ("Our holding is confined to the requirements for admission under Rule 801(d)(1)(B)").

74 See supra note 29 and accompanying text.

75 FED. R. EVID. 403 (trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). See infra note 151.

76 FED. R. EVID. 611(a). "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Id.
statement or otherwise, as by mere passage of time) is to suggest that the witness’s memory has faded.\textsuperscript{77}

Further, its treatment of the type of impeachment it does address—by suggestion of fabrication by the witness—is also overly narrow for at least two reasons. Most importantly, the Rule’s strict requirement, as construed in \textit{Tome}, that in order to be substantively used the prior statement must precede an alleged motive to fabricate, provides the defense with a facile way to slam the door against statements that would be useful to the jury in determining what credence to give to the impeachment, simply by alleging any preexisting motive to fabricate. \textit{Tome}’s requirement works at all—and then only fairly well—when there is an objective fact that \textit{concededly causes such a motive} (regardless whether it has affected the witness’s testimony) and around which parameters of time may easily be placed. In those cases, \textit{Tome} applies, not unreasonably, to permit only those consistent statements made before that objective event.\textsuperscript{78}

Such facts would include, for example, an employment relationship between the witness and a party during which the witness might have a motive to tailor her testimony to fit her employer’s wishes. Another example would be the firing of the employee, after which she might have the opposite motive. Other objective facts concededly creating a motive to lie might include friendship, business partnership, or a romantic relationship. But drawing a bright line as to when the relationship began may be difficult.

\textsuperscript{77} See \textit{United States v. Bishop}, 264 F.3d 535, 548 (5th Cir. 2001) (holding it is harmless error to admit witness’s prior notes under Rule 801(d)(1)(B), when cross-examination merely challenged witness’s memory); \textit{United States v. Khan}, 821 F.2d 90, 93-94 (2d Cir. 1987) (holding that a prior consistent statement is admissible both as substantive evidence to rebut motive to fabricate and as rehabilitative evidence, with regard to impeachment by prior inconsistent statement); \textit{Baker v. Elcona Homes Corp.}, 588 F.2d 551, 559 (6th Cir. 1978) (arguably stretching to characterize cross-examination as to memory as an implication that witness made an earlier inconsistent statement, and therefore implying that his trial testimony was “a recent fabrication or result of an improper influence or motive,” opening the door under Rule 801(d)(1)(B)).

\textsuperscript{78} E.g., \textit{United States v. Wilson}, 355 F.3d 358, 361-62 (5th Cir. 2003) (in this drug distribution case when a government witness testified pursuant to a plea bargain to having worked for the defendant in the distribution of drugs and cross-examination implied that plea bargain benefits gave witness motive to fabricate his testimony, the trial judge properly permitted the government to introduce a letter, which referred to similar facts, written by the witness three years before the plea bargain; the Court of Appeals explained, “A prior consistent statement need not rebut all motives to fabricate, but only the specific motive alleged at trial.”); \textit{United States v. Stoeker}, 215 F.3d 788, 791 (7th Cir. 2000) (holding that statements made several years before plea agreement were properly admitted); \textit{United States v. Allison}, 49 M.J. 54 (C.M.A. 1998) (holding no abuse of discretion in admitting videotape of an early interview of child abuse victim by a social worker, which rebutted at least some of the alleged motives to fabricate, including coaching by various persons after the interview occurred); \textit{Dowthitt v. State}, 931 S.W.2d 244, 263-64 (Tex. Crim. App. 1996) (holding that statement made before a plea bargain rebutted impeachment of motive to lie because of the plea bargain); \textit{Moody v. State}, 827 S.W.2d 875, 894 n.11 (Tex. Crim. App. 1992) (holding that child’s statement prior to telling her mother of alleged sexual abuse rebutted impeachment that child had a motive to lie because of mother’s prodding).
In a criminal case, such a motive objectively occurs when one person is either arrested or “caught with the goods” and that person implicates another, “bigger fish” in the crime.\textsuperscript{79} For example, in celebrity Martha Stewart’s trial, her defense lawyers suggested on cross-examination of prosecution witness Douglas Faneuil that his testimony (which inculpated himself, his boss Peter Bacanovic, and Stewart) was given in an attempt to curry favor with the government. The trial judge ruled that the prosecution then could offer testimony as to Faneuil’s prior consistent conversations with his friends, before any effort to plea bargain with the government.\textsuperscript{80}

But reasonable minds may differ as to when an alleged motive to fabricate will have arisen.\textsuperscript{81} A number of courts have found, for example, that post-arrest statements made to authorities before any discussion of plea bargaining were not made after an alleged motive to win favor with the prosecution.\textsuperscript{82} Thus, the Tome model does not ensure predictability or uniformity of result, and ultimately fails to further justice.

When the existence of the improper motive, or of a fact that would create such a motive, is hotly disputed, Tome allows the mere self-serving allegation of fabrication to preclude answering that allegation by the substantive use of any of

\textsuperscript{79} E.g., United States v. Trujillo, 376 F.3d 593, 609-11 (6th Cir. 2004) (holding it was harmless error to admit coconspirators’ prior consistent statements, made during post-arrest interviews, which implicated the defendant as one of their employers in a drug business); United States v. Zapata, 356 F. Supp.2d 323 (S.D.N.Y. 2005). See also United States v. Esparza, 291 F.3d 1052 (8th Cir. 2002) (holding defendant’s exculpatory statement made to highway patrol upon discovery of drugs was properly excluded because motive to lie existed).

\textsuperscript{80} Stewart Judge to Allow Evidence Backing Prosecution Witness, BALT. SUN, Feb. 18, 2004, at 1D. For a similar fact scenario, see Andrea F. Siegel, Jury Hears Account of Fatal Brawl, BALT. SUN, May 11, 2005, at 1B. After a witness for the prosecution had been impeached with the suggestion that he fabricated his story from the police report and that his account “surfaced only as prosecutors were weighing which of the six defendants [including the witness] to try first,” the court permitted the witness’s uncle to testify that the witness had told him the same account “from the start.”

\textsuperscript{81} United States v. Fulford, 980 F.2d 1110, 1114 (7th Cir. 1992). See infra notes 135-36.

\textsuperscript{82} See United States v. Prieto, 232 F.3d 816, 819-22 (11th Cir. 2000) (holding that the trial court did not abuse its discretion in finding that declarant had no motive to fabricate on the evening of his arrest, when the subject of declarant’s cooperation had not been raised); United States v. Mincey, 106 Fed. App’x 750 (2d Cir. 2004) (mem.) (holding it was not error to have admitted a government witness’s prior consistent statement made “when she was initially questioned by government agents,” as defendant failed to establish that witness had a motive to falsely implicate him at that time); United States v. Montague, 958 F.2d 1094, 1100 (D.C. Cir. 1992) (Wald, J., concurring); United States v. Khan, 821 F.2d 90, 93-94 (2d Cir. 1987) (finding that witness’s arrest did not create a motive to falsely implicate defendant when witness did not mention defendant upon witness’s arrest, but four weeks later when entering a cooperation agreement, and defendant was not arrested until three months after that); United States v. Henderson, 717 F.2d 135 (4th Cir. 1983) (holding post-arrest pre-plea bargain statements admissible). See also Arizona v. Johnson, 351 F.3d 988, 998-1000 (9th Cir. 2003) cert. denied, 125 S. Ct. 254 (2004) (holding no abuse of discretion in finding that an illegal immigrant’s statement to a Border Patrol Agent about abuse by another agent was made before any motive to fabricate). See infra note 135.
the declarant's prior consistent statements. In this regard, the Tome model fails. As in Tome itself, an insuperable catch-22 is created.

In Tome the alleged motive to lie was the child's desire to live with her mother. This motive—the existence of which was not conceded—would have existed as soon as she was sent to live with her father. Yet, as it was alleged that when she went to live with her father was when the abuse began, there was no way that any of her prior consistent statements regarding abuse could have preceded the alleged motive to lie. Thus, under Tome, the mere allegation of the motive to lie foreclosed the admissibility under Rule 801(d)(1)(B) of evidence that the jury reasonably could have found crucial in evaluating the existence and impact of the alleged motive. This undesirable result occurs even when the motive is not conceded to exist. In an illogical, circular mode of reasoning, the mere allegation of the motive becomes a self-fulfilling end run against the witness, who is left defenseless against the accusation, except for her own protestations from the stand.

The United States Court of Appeals for the Fourth Circuit has found similarly circular the defense's argument that an informant's prior consistent statements, made after his arrest but before he had entered into a plea agreement, were inadmissible as being post-motive. Judge Erwin, writing for the panel, concluded that such an 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."

Rule 801(d)(1)(B) is also underinclusive, even as to the one mode of impeachment it addresses, in its superfluous, explicit requirement that in order to open the door to substantive use of prior consistent statements, the impeachment undertaken must be an implied or express charge not simply of "fabrication or

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84 While discovery of sexual abuse by a spouse may lead to marital separation, abuse by the father often begins after the parents have separated for other reasons. See Robin Fretwell Wilson, Children at Risk: The Sexual Exploitation of Female Children After Divorce, 86 CORNELL L. REV. 251, 253-56 (2001). See generally Thea Brown, Separated and Unmarried Fathers and the Courts: Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce, 41 FAM. CT. REV. 367 (2003) (commenting that while sexual abuse is most commonly committed by a male, fathers are not the most common offenders).
85 See Christopher A. Jones, Casenote, 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, 491 (1995). "[U]nder Tome[,] allegations of fabrication that trigger the temporal requirement never have to be substantiated. Due to the lack of a substantiation requirement, the possibility of abuse is high." Id. Moreover, with a very young declarant, the option of admitting a prior statement as recorded recollection under Rule 803(5) is unlikely. Either the child declarant will not have recorded anything or, even if the person to whom the child spoke recorded her statement, a very young child is unlikely to be able to testify to the required foundational elements. Id. See also infra note 123.
86 Henderson, 717 F.2d at 137.
87 Id. at 139.
improper influence or motive” but of “recent fabrication or improper influence or motive.” Why the adjective “recent” was employed and what effect its inclusion has are not easy questions to answer. A good part of the oral argument time in Tome was spent in attempts to resolve these matters. Perhaps the term was included simply as a result of the Rule’s parroting, without careful analysis, the language of precedents such as Ellicott v. Pearl, in which Justice Story stated that “proof of an antecedent declaration . . . may be admitted” when “a fabrication of a recent date” is alleged.

Whether “fabrication” needed to be modified in the Rule at all is questionable. Since fabrication is undesirable in a witness, no matter when it occurs or what for what motive, the added restriction to fabrication from an

88 FED. R. EVID. 801(d)(1)(B) (emphasis added). Maryland’s corollary rule, for example, deletes the word “recent.” MD. RULE 5-802.1(b).

89 See, e.g., People v. Singer, 89 N.E.2d 710, 711 (N.Y. 1949) (“[W]e think that ‘recent’ as so used [in the pre-Rules case law], has a relative, not an absolute meaning. It means, we think, that the defense is charging the witness not with mistake or confusion, but with making up a false story well after the event. ‘Recently fabricated’ means the same thing as fabricated to meet the exigencies of the case.”) (citations omitted); Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner, Tome v. United States, 513 U.S. 150 (1995) (No. 93-6892) (“By its express terms, [Rule 801(d)(1)(B)] is limited to prior consistent statements that rebut the suggestion that the witness’s trial testimony reflects a change in position.”).

Let us put aside the argument made by the Government in Tome that “recent” is meant only to modify ‘fabrication.’ Though the argument is not utterly implausible, neither is it persuasive, and Justice Breyer’s formulation—that the statement must show “that the witness did not recently fabricate his testimony as a result of an improper influence or motive”—seems useful. Even on this reading, however, “recent” is notoriously ambiguous. If taken literally, it seems to address the temporal relation of the fabrication, influence, or motive to the trial, not to the statement. Moreover, it seems clear that the word cannot be taken literally, in the dictionary sense of “occurring at a time immediately before the present.” Thus “recent” should be given a construction that fits the rehabilitation idea underlying the Rule. In my view, “arising recently enough that the prior statement retains substantial rebuttal value” satisfies this standard and does not distort the language. In most cases—but not in all—this construction would be equivalent to “arising after the statement was made.”

Friedman, supra note 29, at 314-15 (footnotes omitted); Graham, supra note 54, at 582-83, 614 (“recent” is “superfluous,” and means only “any time after the event”).


91 See Tome, 513 U.S. at 156 (“As Justice Story explained: ‘[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.’” (quoting Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439, 9 L.Ed. 475 (1836)). See also id. at 159-60 (citing Hanger v. United States, 398 F.2d 91, 104 (8th Cir. 1968)); Ohlbaum, supra note 53, at 245 (“Rule 801(d)(1)(B) employs the precise language—[rebutter charges] of recent fabrication or improper influence or motive’—consistently used in the panoply of pre-1975 decisions.”)).
“improper influence or an improper motive” is redundant—92—and, if somehow not redundant, it is unnecessarily narrowing. As to the recency requirement, perhaps it was mistakenly thought that were the alleged fabrication not recent, it would be difficult, if not impossible, to find a consistent statement that logically rebutted the fabrication. But, when closely evaluated, the cases do not support such a restriction. As Judge Bullock noted, “An attack on a witness’s memory often, but not always, includes a charge of recent fabrication.”

Indeed, the Rule’s recency requirement seems to have been read as superfluous. 94 If, for example, the Tome Court had found the recency requirement to be significant, it could have rested its decision of inadmissibility under 801(d)(1)(B) on the ground that the child’s alleged fabrication was not “recent.” The Court did not do so. It also could have chosen to read the disjunctive use of “or improper influence or motive” as providing an additional way of opening the door under Rule 801(d)(1)(B), other than “recent fabrication—an additional way that would not be modified by “recent.”

Instead, despite the fact that the Tome majority’s opinion, 95 the concurrence, 96 and the dissent, 97 repeatedly quote or refer to the modifier “recent,” all three opinions seem to read both “recent” and the first “or” out of the Rule, 98 so that the Rule in substance connotes merely “fabrication stemming from either an improper influence or an improper motive.”

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92 See Graham, supra note 54, at 585 (“‘influence’ is superfluous, and an ‘improper’ motive is any motive that tends to induce the witness to do anything but tell the truth”).
93 Bullock & Gardner, supra note 14, at 515 n.46.

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. 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.

See id. at 517 & nn.58-59 (footnotes omitted).
94 See supra note 89.
95 E.g., 513 U.S. at 156, 159 (“recent fabrication or improper influence or motive”).
96 Id. at 168 (Scalia, J., concurring) (“recent fabrication or improper motive, but not . . . that the witness’ memory is playing tricks”).
97 Id. at 169 (Breyer, J., joined by Rehnquist, C.J., and O’Connor and Thomas, JJ.) (“recent fabrication or improper influence or motive”).
98 E.g., id. at 158, 159 (“fabrication or improper influence or motive”); id. at 162-63 (the existence of “an improper influence or motive”). The majority in Tome first speaks of the two elements—fabrication and improper influence or motive—as synonymous, a “requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate, arose.” Id. at 158. The majority then retreats again to the disjunctive format. Id. (“Impeachment by charging
B. The Unsatisfactory Stopgap of Limited Admissibility

The lower courts have responded to Rule 801(d)(1)(B)'s shortcomings by falling back to the common law approach with regard to relevant, helpful statements that do not fall within Tome's parameters, and admitting them with a limiting instruction. This stopgap approach is unsatisfactory and inadequate for two reasons. First, limiting instructions are confusing and likely ineffective. Second, this approach requires the exclusion of such prior consistent statements if the court finds that the jury will be unduly tempted to use them as substantive evidence.

This result is particularly problematic in cases where a key witness is vulnerable in the courtroom and easily confused on cross-examination because, for example, of either extreme youth or advanced age. Under current law, if the declarant's accuracy is crucial to the case and the declarant's in-court manner is weak, the jury cannot use her prior consistent statements as substantive evidence that the testimony is a recent fabrication or results from an improper influence or motive is, as a general matter, capable of direct and forceful refutation through introduction of out-of-court consistent statements that predate the alleged fabrication, influence, or motive." (emphasis added). This juxtaposition suggests that the majority is using "or" to link terms it is using as synonyms. The majority also quotes Deans Wigmore and McCormick, both of whom refer only to charges of "bias" and such. Id. at 156 ("McCormick and Wigmore stated the rule in a more categorical manner. 'The applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated." (citing E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972); 4 J. WIGMORE, EVIDENCE § 1128 (J. Chadbourn rev. 1972) ("A consistent statement, at a time prior to the existence of a fact said to indicate bias . . . will effectively explain away the force of the impeaching evidence . . .") (emphasis omitted)). The dissent, too, refers to a witness who "recently fabricate[s] his testimony as a result of an improper influence or motive." Tome, 513 U.S. at 170 (Breyer, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Thomas, JJ.).

99 See supra notes 69-71.

100 E.g., United States v. Castillo, 14 F.3d 802 (2d Cir. 1994). See supra text accompanying notes 60-63; see infra note 108 and accompanying text.


"[A] young child can be easily intimidated into not testifying about [such] offenses . . . ." State v. Benwire, 98 S.W.3d 618, 624 (Mo. Ct. App. 2003). For that reason and others, "as a general phenomenon, child abuse victims frequently recant their initial reports of abuse." Yount v. State, 99 Md. App. 207, 210, 636 A.2d 50 (1994). Indeed, it has been observed that a child's out-of-court statements may "be more reliable than the child's testimony at trial, which may suffer distortion by the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial." Benwire, 98 S.W.3d at 624 (citation and emphasis omitted). That is why, we hold, that any conflicts between Nigha's out-of-court statements and her in-court testimony do not render her out-of-court statements inadmissible, but rather present a question of credibility to be resolved by the jury.

Id.
evidence. Under Tome, this holds true when the opponent’s allegation that the witness has a motive to lie is either not based on a fact that the witness concedes to be true or cannot be traced to a determinable time before which a relevant prior statement could possibly have been made. 102 Current Rule 801(d)(1)(B), as construed in Tome, excludes the substantive use of statements that the jury might find—and many lower courts have found—helpful to assess what effect, if any, to give the impeachment.

Where a jury might find that a witness's prior consistent statements add probative value beyond the witness's in-court testimony, the courts currently are constrained to exclude them, for fear that the jury might not follow an instruction limiting their use to evaluating the credibility of the witness's trial testimony. 103 This unnecessarily complicated approach should be jettisoned in favor of making such relevant statements admissible under Rule 801(d)(1)(B).

This is not to suggest that any impeachment would open the door to prior consistent statements. Such statements are not relevant to rebut impeachment by evidence of bad character; the fact that someone who would not hesitate to lie said the same thing before that he claims in court proves nothing with regard to the probative value that should be given to his in-court testimony. 104 A witness's prior consistent statements may be relevant not only when the method of impeachment is fabrication (as currently addressed by Rule 801(d)(1)(B)), but also when the method of impeachment is prior inconsistent statement 105 or

102 See supra notes 78-87 and accompanying text.
103 See supra note 6.
104 See Tome, 513 U.S. at 158.

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. By contrast, prior consistent statements carry little rebuttal force when most other types of impeachment are involved. McCormick § 49, p. 105 (“When the attack takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements. The defense does not meet the assault” (footnote omitted)); see also 4 Wigmore § 1131, p. 293 (“The broad rule obtains in a few courts that consistent statements may be admitted after impeachment of any sort— in particular after any impeachment by cross-examination. But there is no reason for such a loose rule.” (footnote omitted)).

Id.
105 Compare, e.g., United States v. Ruiz, 249 F.3d 643, 647-48 (7th Cir. 2001) (holding that an officer’s prior consistent statements to his partner, prior to his post-incident report which omitted certain details was admitted properly) with United States v. Toney, 161 F.3d 404 (6th Cir. 1998) (holding that the trial court properly excluded a coconspirator’s statements that were made six months after her arrest, when the coconspirator and ringleader had pled guilty and testified that she had duped the defendant who had no knowledge of alleged fraud; the government impeached coconspirator with her inconsistent statement made upon her arrest, and argued that coconspirator’s “motive to lie” to exculpate her friend, the defendant, arose after the scheme began to unravel and government charged defendant).
memory loss. As Justice Breyer, writing for the four dissenting justices in Tome, explained,

The majority is correct in saying that there are different kinds of categories of prior consistent statements that can rehabilitate a witness in different ways, including statements (a) placing a claimed inconsistent statement in context; (b) showing that an inconsistent statement was not made; (c) indicating that the witness' memory is not as faulty as a cross-examiner has claimed; and (d) showing that the witness did not recently fabricate his testimony as a result of an improper influence or motive . . . . But, I do not see where, in the existence of several categories, the majority can find the premise, which it seems to think is important, that the reason the drafters singled out one category (category (d)) was that category's special probative force in respect to rehabilitating a witness . . . . I doubt the premise because, as McCormick points out, other categories of prior consistent statements (used for rehabilitation) also, on occasion, seem likely to have strong probative force. What, for example, about such statements introduced to rebut a charge of faulty memory (category (c) above)? McCormick says about such statements: "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." Would not such statements (received in evidence to rehabilitate) often turn out to be highly probative as well?107

The dissent argued that the real reason for Rule 801(d)(1)(B) was a practical one: the ineffectiveness of limiting instructions:

Juries have trouble distinguishing between the rehabilitative and substantive use of the kind of prior consistent statements listed in Rule 801(d)(1)(B). Judges may give instructions limiting the use of such prior consistent statements to a rehabilitative purpose, but, in practice, juries nonetheless tend to consider them for their substantive value. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(1)(B)[01], p. 801-188 (1994) ("As a practical matter, the jury in all probability would misunderstand or ignore a limiting instruction [with respect to the class of prior consistent statements covered by the Rule] anyway, so there is no good reason for giving one"). It is possible that the Advisory Committee made them "nonhearsay" for that reason, i.e., as a concession "more of experience than of logic." Advisory Committee's Notes on Fed.Rule Evid. 801(d)(1)(B), 28 U.S.C. App., p. 773 . . . . On this

106 See, e.g., United States v. Denton, 246 F.3d 784, 789 (6th Cir. 2001); United States v. Simonelli, 237 F.3d 19, 25-29 (1st Cir. 2001) (holding prior consistent statements placing other prior inconsistent statements in context were admitted properly; admission of others that went beyond that purpose was harmless error); Engbretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 730 (6th Cir. 1994) (holding that prior consistent statements inadmissible under Rule 801(d)(1)(B) may be admissible for a limited purpose if they rehabilitate the witness "by clarifying or explaining his prior statements").

107 513 U.S. at 170 (Breyer, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Thomas, JJ.) (citation omitted).
rationale, however, there is no basis for distinguishing between premotive and postmotive statements, for the confusion with respect to each would very likely be the same.\textsuperscript{108}

The dissenters would have applied the crucible of logical relevance, rather than a rigid pre-or-post-motive standard with regard to admissibility under the Rule, as some post-motive statements will be relevant to rebut the attempted impeachment.\textsuperscript{109}

\textsuperscript{108} Id. at 171. \textit{See, e.g.,} United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001) ("[T]he line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors."); SALTZBURG, \textit{supra} note 14, § 801-02[4][c] at 801-38 ("A line between substantive and rehabilitative use of these statements may well be of little use. Yet this is the line drawn by the Rule. . . ."). \textit{See also infra} notes 113, 132-33.

\textsuperscript{109} Tome, 513 U.S. at 172-73 (Breyer, J., dissenting, joined by Rehnquist, C.J., and O’Connor and Thomas, JJ.)

A postmotive statement is relevant to rebut, for example, a charge of recent fabrication based on improper motive, say, when the speaker made the prior statement while affected by a far more powerful motive to tell the truth. 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 spontaneously, or when the speaker’s motive to lie was much weaker than it was at trial. In 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. Hence, postmotive statements can, in appropriate circumstances, directly refute the charge of fabrication based on improper motive, not because they bolster in a general way the witness’ trial testimony, . . . but because the circumstances indicate that the statements are not causally connected to the alleged motive to lie. For another thing, the common-law premotive rule was not as uniform as the majority suggests. A minority of courts recognized that postmotive statements could be relevant to rebut a charge of recent fabrication or improper influence or motive under the right circumstances.

\textit{Id.} (citations omitted). Judge Bullock elaborates, exploring situations where post-motive statements have “rebuttal force or related value,” including: (1) “when a separate motive to tell the truth or to make a different statement exists at the statement’s making;” (2) “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?;” (3) the spontaneity of particular statements may refute the impact of a charged motive; (4) “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
Indeed the Tome majority conceded, "[T]here may arise instances when out-of-court statements that postdate the alleged fabrication have some probative force in rebutting a charge of fabrication or improper influence or motive..."110 The majority saw no constitutional impediment to broadening the Rule in the way proposed in this article, as Justice Kennedy, writing for the majority reasoned:

If consistent statements are admissible without reference to the timeframe we find imbedded in the Rule, there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well... Congress could have adopted [the] rule [sought by the Government in Tome] with ease, providing, for instance, that 'a witness' prior consistent statements are admissible whenever relevant to assess the witness' truthfulness or accuracy.111

The majority concluded that it was hamstrung by the language of the current Rule. Tome in no way precludes amendment of the Rule so as to overrule the result reached in that case and follow instead the path urged by the dissent.

When the Advisory Committee made its choice for Rule 801(d)(1), it acknowledged (as pointed out by Justice Breyer in dissent in Tome) that it was a "judgment... more of experience than of logic."112 The experience referred to apparently was the inutility of the limiting instruction. Experience tells us that that inutility extends to all of a witness's prior consistent statements113 so there is 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," and (5) "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." Bullock & Gardner, supra note 14, at 535-37. See supra note 56. See also Lesley E. Daigle, Note, Tell Me No Timing Rule and I'll Tell You No Lies: Why a Child's Prior Consistent Statements Should Be Admissible Without a Pre-Motive Requirement—A Critique of Tome v. United States, 17 REV. LITIG. 91, 95, 104-10 (Winter 1988) (reviewing social science literature and concluding that "repeated consistent statements of young children have a particular reliability, independent of whether they were made pre- or post-motive"); Friedman, supra note 29, at 310-13 (explaining post-motive statements may rebut the charge of improper influence if the influence may well have had less impact at the time of the prior statement than it would have at trial; the earlier influence could be lesser, for example, (1) because "a grudge, or other improper influence, ... builds over time;" or (2) because of "the circumstances or manner in which the witness made the statement," such as in a conversation with an intimate). See also supra note 56.

110 513 U.S. at 158.
111 Id. at 159.
112 FED. R. EVID. 801(d)(1) advisory committee's note. See supra note 108 and accompanying text.
113 Bullock & Gardner, supra note 14, at 540-41.

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
no reason to preclude the substantive use of such statements when they would be sufficiently helpful to the trier of fact. Rule 801(d)(1)(B) should be amended to permit the substantive use of a witness's prior consistent statements that the trial court finds, as a preliminary matter under Rule 104(a), can logically be seen to rebut the impeachment undertaken. If that requirement is met, the court nonetheless in its discretion may exclude the evidence pursuant to Rule 403, and should apply that Rule to exclude evidence that is only marginally relevant or that is unduly repetitious.

This approach may be criticized on the ground that it provides for judicial discretion, under Rules 801(d)(1)(B), 403, and 611, which decreases predictability. Yet the current standard itself creates unpredictability, as

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.

Id. See supra notes 62-63, 100, 108 and accompanying text.

114 See Tome, 513 U.S. at 165.

The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee noted and sought to avoid: It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted.

Id.

115 See id. at 165-66 (conceding, "We are aware that in some cases it may be difficult to ascertain when a particular fabrication, influence, or motive arose."); Bullock & Gardner, supra note 14, at 537.

[T]his 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. Similarly, witnesses' uncertainty of dates and wavering testimony will often leave pre-trial predictions on the admissibility of a prior consistent statement difficult.
reasonable minds can differ as to the date when a motive to fabricate arose. The proposed standard merely adds the flexibility necessary for assessment of helpfulness,\(^{116}\) a test that the courts already routinely apply in the lay and expert opinion arenas.\(^{117}\) The trial judge should be able to admit, without a limiting

\[^{116}\text{See } \text{Bullock} \text{ & } \text{Gardner, supra note 14, at 511 ("A more flexible approach, one that takes account of the realities of a jury trial, is needed."); } \text{id. at 539.}\]

\[^{117}\text{See supra notes 17-18. As the dissenting opinion in } \text{Tome } \text{explains:}\]

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. 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.

\[^{\text{Id. See infra note 151.}}\]

This Court has acknowledged that the Federal Rules of Evidence worked a change in common-law relevancy rules in the direction of flexibility. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The Rules direct the trial judge generally to admit all evidence having "any tendency" to make the existence of a material fact "more probable or less probable than it would be without the evidence." Fed. Rules Evid. 401, 402. The judge may reject the evidence (assuming compliance with other rules) only if the probative value of the evidence is substantially outweighed by its tendency to prejudice a party or delay a trial. Rule 403. The codification, as a general matter, relies upon the trial judge's administration of Rules 401, 402, and 403 to keep the barely relevant, the time wasting, and the prejudicial from the jury. See, e.g., Abel, supra at 54, 105 S.Ct., at 470 ("A district court is accorded a wide discretion in ... assessing the probative value of [proffered evidence], and weighing any factors counseling against admissibility"); 1 Weinstein's Evidence, supra ¶ 401[01] (discussing broad discretion accorded trial judge); 22 C. Wright & K. Graham, Federal Practice and Procedure § 5162 (1978 and 1994 Supp.).

\(^{\text{Daubert}}\) 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. It is difficult to find any strong
instruction, a witness’s prior consistent statements that the jury would reasonably find to be helpful and that are not unduly cumulative. If post-motive statements are occasionally admitted under this test, the opponent may impeach them by arguing that the witness’s motive to lie already existed at the time of the statement.

C. The Current Rule Creates an Insurmountable Barrier for Alleged Child Abuse Victims

*Tome* has had a “devastating effect” on sexual child abuse prosecutions. Where the defendant had a parental or quasi-parental relationship with the child, such as in *Tome* itself, defendants also often allege that the child was angry because the defendant was a disciplinarian, or because the child wanted to live somewhere other than with the defendant for some other reason. Such a motive would naturally run throughout the entire time that the child knew or lived with the defendant. By requiring that, in order to be admissible under 801(b)(1)(B), the child’s prior consistent statements must precede the alleged improper motive, *Tome* creates an insurmountable catch-22. The child would have had no ability to report abuse by the defendant before she knew the defendant or lived with the defendant, as

practical or logical considerations for making the premotive rule an absolute condition of admissibility here. Perhaps there are other circumstances in which categorical common-law rules serve the purposes of Rules 401, 402, and 403, and should, accordingly, remain absolute in the law. But... this case, like *Daubert*, does not present such a circumstance.

513 U.S. at 173-75 (Breyer, J., dissenting, joined by Rehnquist, C.J., and O’Connor and Thomas, JJ.).


[T]he amici States would stress that the “pre-motive” restriction which Petitioner seeks to read into Rule 801(d)(1)(B) could have a devastating effect on efforts to prosecute charges of sexually abusing a child. As this Court recognized in *Craig*, the serious difficulties of obtaining testimony from victims of child abuse, and of sexual abuse in particular, in the traumatic setting of a courtroom trial should not be minimized. Especially in the case of young children, spontaneous or otherwise reliable statements made outside the courtroom often can provide useful and quite probative evidence as to the actual facts of the case.

*Id.*


121 See, e.g., *Tome*, 513 U.S. at 153, 165.

122 See supra notes 83-87 and accompanying text.
the case may be. Moreover, as in Tome the defendant may easily charge such a motive, but need not prove convincingly that it existed, in order to foreclose the admissibility of "pre-motive" statements. Until Tome is overruled by an amendment to Rule 801(d)(1)(B), the jury will be deprived of the ability to use those statements that it might reasonably find helpful as substantive evidence.

Imagine being seated on a jury in a case where the prosecution alleges that a small child was physically or sexually abused by his custodial parent. Assume that there is physical evidence of abuse. Assume further that in fact the child was abused and that he eventually confides in his non-custodial parent, and in a pediatrician to whom that parent takes him. The pediatrician reports the abuse to the prosecutor who charges the custodial parent. At trial, approximately a year and a half after the alleged abuse, the child is tongue-tied. The prosecutor is permitted to ask leading questions, to which the child accedes with apparent hesitation.

On cross-examination, the defense lawyer intimates that the allegations are false and that the child fabricated them—either on his own or at the non-custodial parent's urging—so as to be with the non-custodial parent, who does not discipline the child.

Would it be helpful to you as a juror to hear the non-custodial parent, the pediatrician, or both, testify to the child's earlier statements, which are consistent with the child's halting testimony at trial? Would the direct and cross-examination of these witnesses be helpful to you in evaluating what weight to give the respective allegations of abuse and of fabrication? If the testimony of either or both of these witnesses would be helpful to a reasonable jury, the judge should be able to admit that testimony.

In this situation, it is improper for the judge to decide, as presently mandated by Tome, that the motive existed, when it existed, and that it affected the child's reports of abuse. Those are jury questions, and the jury ought to

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123 Thirteen states filed an amicus brief in support of the United States in Tome, arguing:

In the context of such cases, the defense will always be able to devise some alleged motive for the child to lie. In cases of abuse, it may well be simply that the child would prefer not to have contact with the defendant, which would certainly be expected in such cases, or perhaps that the child is alleged to desire attention. See, e.g., State v. Robinson, 611 A.2d 852 (Vt. 1992). Such alleged motives to lie, which may be weak motives at best or may have little or no obvious or recent origin, could readily permit the defense to remove any possibility that prior consistent statements made by the child victim -- no matter how probative the circumstances in which they were made -- could be admitted at trial. Such a result would plainly disserve the substantial state interest, recognized in many decisions of this Court, in protecting the physical and psychological well-being of children.


124 See Bullock & Gardner, supra note 14.

125 See infra notes 136-37 and accompanying text.
have the prior consistent statements that would help it in evaluating whether the event happened as the child testified at trial, or whether the child fabricated it. These are difficult cases, and the judge should be able to give the jury whatever evidence it will find reasonably helpful and probative. The fact-finder’s need for this information is particularly acute when the witness is a young child victim, as such children are especially vulnerable when testifying in an intimidating and unsupportive atmosphere.  

**D. Specifics of Proposed Amendment of Rule 801(d)(1)(B)**

Current Rule 801(d)(1)(B)’s underinclusiveness results in a confusing two-track system of admissibility for a testifying witness’s prior consistent statements: some are admissible as substantive evidence; others may be admissible for the limited purpose of rehabilitating a witness’s credibility. But under the current scheme, the latter must be excluded pursuant to Rule 403 even for that limited purpose if the court concludes the jury is likely to use them as substantive evidence instead. Because the current Rule artificially excludes some helpful prior consistent statements, this approach can unnecessarily result in reversible error. Rule 801(d)(1)(B) should be amended to permit the trial court judge to admit a witness’s prior consistent statements that are helpful to rebut his or her impeachment. The proffered statements should first be evaluated by the judge under Rule 104(a) as to whether they meet the relevancy requirements of Rules 401 and 402; if so, the statements should be subject to exclusion, in the

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126 See Tome, 513 U.S. at 153-54; Lawson v. State, 865 A.2d 617, 631 (Md. App. 2005); Daigle, supra note 109, at 93 (children’s testimony is “often unclear or incomplete”); Friedman, supra note 29, at 277 (“Often the child who charges that an adult abused her is unable to testify at trial, or at least unable to testify effectively under standard procedures.”); Gail S. Goodman et al., Child Witnesses and the Confrontation Clause: The American Psychological Association Brief in Maryland v. Craig, 15 LAW & HUM. BEHAV. 13 (1991); Jones, supra note 85, at 491-92 & nn.199-201.
127 See supra notes 69-71 and accompanying text.
128 FED. R. EVID. 403, advisory committee’s note (advising courts to consider the effectiveness of a limiting instruction under Rule 105 when deciding whether to exclude evidence under Rule 403). See supra note 6.
129 See Bullock & Gardner, supra note 14, at 515 (citing, inter alia, 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)).
130 See Tome, 513 U.S. at 154 (“The trial court admitted all of the statements over defense counsel’s objection, accepting the Government’s argument that they rebutted the implicit charge that A.T.’s testimony was motivated by a desire to live with her mother.”); id. at 176 (Breyer, J., dissenting) (“In this case, the Court of Appeals decided . . . that A.T.’s prior consistent statements were probative on the question of whether her story as a witness reflected a motive to lie. There is no reason to reevaluate this factbound conclusion.”); United States v. Toney, 161 F.3d 404, 408 (6th Cir. 1998) (“The district court’s determination of when the motive to lie arose is a factual finding, which we review under the ‘clearly erroneous’ standard.”).
court’s discretion under Rules 403 or 611(a)(2), if they are unnecessarily cumulative.

This amendment would do away with the need for limiting instructions that are so baffling as to be ineffective. As the United States Court of Appeals for the Ninth Circuit has pointed out repeatedly, “The credibility/substance distinction is illusory in this context.”

The question of helpfulness is first a question of relevance under Rules 401 and 402 as to rehabilitation of the declarant in light of the impeachment that has been undertaken. Statements lacking probative value as to that purpose should be excluded. In making this determination, however, it is essential that the court refrain from finding whether a particular motive that is contested by the

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131 See supra notes 75-77, 114, 116 and accompanying text.
132 E.g., United States v. Copes, 345 F.2d 723, 727 (D.C. Cir. 1964) (quoting United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964)). Even the defense lawyers' association arguing in support of the petitioner in Tome conceded this point, stating in its brief:

The only change adopted by the Rule in 1975 is that the prior consistent statements, once admitted, could be given substantive effect. This was a relatively minor change that realistically had little effect, since most juries were probably ill-equipped to treat a prior consistent statement as “rehabilitative”, yet to understand that it was not to be considered as “substantive evidence”. The change simply did away with a distinction that meant nothing to juries anyway.

133 United States v. Beltran, 165 F.3d 1266, 1273 (9th Cir. 1999) (Kozinski, J., concurring). See United States v. Miller, 874 F.2d 1255, 1272-73 (9th Cir. 1989) (“The Rule [801(d)(1)(B)] thus does not change the type of statements that may be admitted; its only effect is to admit these statements [that are relevant under Rule 402 and pass muster under Rule 403] as substantive evidence rather than solely for the purpose of rehabilitation.”).
135 See, e.g., United States v. Drury, 396 F.3d 1303, 1316-17 (11th Cir. 2005) (defendant’s prior consistent statement, telling his son, after his arrest, that he had merely been “role-playing” with a federal agent was properly excluded).
declarant exists. To do so would "usurp the jury's function." Rather, the court should consider whether the prior consistent statement might be helpful to the jury in determining if the motive to lie existed. Reliability will be tested by cross-examination of the declarant at trial. If the court concludes that prior consistent statement evidence would be helpful, it should consider whether to limit, under Rule 611(a), the mode of proof to be used. The admissibility of more than one statement, even if otherwise admissible under the rule, should be within the court's discretion. The erroneous admission of prior consistent

137 See Bullock & Gardner, supra note 14, at 511 ("The [premotive] 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."). As Judge Bullock explains:

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." . . .

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 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.

Id. at 537-38 (quoting United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), rev'd on other grounds, 353 U.S. 391 (1957)) (emphasis added). See id. at 515 (citing cases). See also United States v. Baron, 602 F.2d 1248, 1252-53 (7th Cir. 1979) (whether motive to falsify existed at time of statement may well be for the jury to decide). But see, e.g., United States v. Prieto, 232 F.3d 816, 819-22 (11th Cir. 2000) (trial judge determines, as an "individualized and careful calibration of complex fact," when a motive to fabricate came into existence). See also supra notes 81-82 and accompanying text.

138 See supra note 76.
139 See United States v. Copes, 345 F.2d 723, 723-24 (D.C. Cir. 1964) (no error in admitting extrinsic evidence, through testimony of two other witnesses, of victim-witness's prior consistent statements, when defense had impugned her credibility).

Tome characterized as "rather weak" the charge that A.T. had fabricated her testimony so that she could live with her mother, and it complained that "the Government was
statements is most often found to be harmless because the evidence is by
definition cumulative of a testifying witness’s in-court, sworn testimony.140
Tome is the exception: the Court reasoned that the error was reversible because
the child victim’s court testimony was weak, and the prosecution had “present[ed] a parade of sympathetic and credible witnesses who did no more
than recount [the child’s] detailed out-of-court statements to them.”141

In Tome the trial judge permitted six witnesses to testify regarding the
child’s prior consistent statements: a babysitter, the child’s mother who
overheard the statements to the babysitter on one of two dates to which the
babysitter testified, a social worker, and three pediatricians.142 The defense made
no objection to one doctor’s testimony; the other two doctors’ testimony was
admitted under Rule 803(4) (recognizing a hearsay exception for statements
made by a person seeking medical diagnosis or treatment),143 but the United
States Court of Appeals upheld the admission of all the statements under Rule
801(d)(1)(B).144 Thus, as the case was presented to the Supreme Court, six
witnesses, but not the child, testified under Rule 801(d)(1)(B) to the child’s out-
of-court statements.

Though this author would quarrel with the Court’s arguable implication that
the jury did not understand that the underlying question was the child’s
credibility, the calling of so many witnesses under Rule 801(d)(1)(B) does strike
one as excessive. The best way to address this issue is through considered use of
Rules 403 and 611. The trial court should exercise its discretion to exclude
unduly cumulative testimony if it would cause unnecessary delay or likely result
in unfair prejudice that substantially outweighs the added probative value the
testimony would bring to the proceedings. In the Tome situation, in response to a
Rule 403 or 611(a)(2) objection, or on its own motion, the trial judge should
ordinarily restrict the extrinsic evidence of the witness’s prior consistent
statements to one or two other witnesses. If the witness’s prior consistent
statements have been admitted under another hearsay exception, such as Rule
803(4), the court should take that into account as well.

permitted to present a parade of sympathetic and credible witnesses who did no more
than recount A.T.’s detailed out-of-court statements to them.” Now suppose A.T. had
made all those statements at a time when, so far as she knew, a change of custody
arrangements was not in the offing. Satisfaction of the premotive requirement might
mean that the earlier statements more clearly rebut the fabrication charge—but that
charge would be just as weak as in the actual case, meaning that the parade of
witnesses would be, if anything, even less necessary and appropriate. Presumably the
Court would not object to the trial court’s exercise of discretion to admit only one
prior statement in rebuttal.

Friedman, supra note 29, at 317 (footnote omitted).
140 See supra note 62.
141 513 U.S. at 165. See United States v. Powell, 334 F.3d 42, 47 (D.C. Cir. 2003) (finding error in
case before it to be harmless, where testifying witness proved his own prior consistent statement).
142 513 U.S. at 154.
143 Id. at 154-55.
144 Id. at 155.
In child abuse cases, a perspicacious juror would most like to hear the child’s initial complaint and to learn under what circumstances it was made. For example, if the complaint was made to a parent, the juror may like to see that parent testify and be cross-examined as to any motive to coach the child. Hearing a witness, such as a police officer, social worker, or psychologist, who heard a subsequent consistent statement by the child would not be as persuasive to that juror if the juror had not had the opportunity to assess for himself the credibility of the first report.

Yet crafting a rule (like Louisiana’s rule permitting the substantive use of a consistent “initial complaint of sexually assaultive behavior”\textsuperscript{145}) to admit only the child’s “initial” prior consistent statement is unsatisfactory. How can we ever be sure that the earliest statement the lawyer knows about was the “initial” report? Rule 801(d)(1)(B) should be amended to provide:

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 would be helpful to the trier of fact in assessing what effect, if any, to give to impeachment, such as by a prior inconsistent statement, or an express or implied charge against the declarant of memory loss, recent fabrication, or improper influence or motive. . . .\textsuperscript{146}

Judge Bullock, an experienced trial judge, has called for a substantively similar amendment.\textsuperscript{147} Impeachment would remain a condition precedent to possible admission of a prior consistent statement under this Rule.\textsuperscript{148} The suggested added language to the Rule is intended to facilitate application by the trial judge and the fashioning of an appropriate jury instruction, if such evidence is admitted.\textsuperscript{149} The “such as” phrase is used in the event that the drafter did not

\textsuperscript{145} LA. CODE EVID. ANN. art. 801(D)(1)(d) (1995).

\textsuperscript{146} FED. R. EVID. 801(d)(1)(B). Deletions from current Rule 801(d)(1)(B) are shown by strike-throughs and additions are shown by underlining.

\textsuperscript{147} See Bullock & Gardner, supra note 14, at 534.

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.

\textit{Id.} at 537 ("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.").

\textsuperscript{148} E.g., United States v. Smith, 746 F.2d 1183 (6th Cir. 1984).

\textsuperscript{149} Professor Graham’s pre-	extit{Tome} proposal for amendment of Rule 801(d)(1)(B), like the proposal in this article, addressed several forms of impeachment, but used the following language:
foresee all possible methods of impeachment that can be rebutted in this way.\textsuperscript{150} “Improper motive” is deleted as redundant to “fabrication.” “Improper influence” is retained but repositioned, as its application in a non-“fabrication” context would be when one is impeached by the notion that one’s bias affected one’s perception or memory. In this situation, a prior consistent statement when one had no bias could refute the impeachment.

The Committee Note should point out the need for the court to employ Rules 403 and 611 and to exercise its discretion\textsuperscript{151} to curtail unnecessarily cumulative evidence, so as to avoid the prejudicial effect the Court’s majority found in \textit{Tome}.\textsuperscript{152} The proposed rule does not mention Rule 403 or Rule 611 in

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 . . . [c]onsistent with his testimony and the statement (i) rebuts an express or implied charge against him of partiality, (ii) supports an explanation or denial of a charge against him of self-contradiction, or (iii) rebuts an express or implied charge against him of lack of recollection or contrivance accompanying a charge of self-contradiction.

Graham, \textit{supra} note 54, at 616.\textsuperscript{150} See, e.g., MINN. R. EVID. 801(d)(1)(B) (stating that a statement is not hearsay if it is “consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness”).\textsuperscript{151} See \textit{Daigle}, \textit{supra} note 109, at 111 (“Permitting judicial discretion in the admissibility of post-motive prior consistent statements is appropriate . . . . A relevancy inquiry, where the value of the statement is balanced against the risks of admission, can competently address concerns about the cumulative or prejudicial effect of a child’s statements.”); Friedman, \textit{supra} note 29, at 315.

First the court should assess the rebuttal value of the prior statement. Rebuttal value requires both need to rebut the charge and effectiveness in doing so. Ordinarily, but not inevitably, a statement made after the alleged improper influence arose will not be effective in rebutting the charge that the witness’s trial testimony is the product of the influence. Second, if the prior statement appears to have substantial rebuttal value, the court should consider factors weighing against admissibility of the statement. These include expenditure of time and, if the prior statement includes an overhang of assertions not included in the witness’s trial testimony, the prejudice that this potentially creates, especially in hindering the party opponent’s ability to cross-examine the witness with respect to those statements. If the negative factors are substantial, the court should consider excluding the statement, redacting the statement, or otherwise limiting the information that may be presented about it or the use that the jury may make of it.


If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness’ in-court testimony results from recent
its text because those Rules potentially apply to all situations that are not governed by a mandatory rule. To mention Rules 403 and 611 in one Rule might misleadingly suggest that they were inapplicable to others.\textsuperscript{153}

\begin{quote}
fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak charge that A.T.’s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.’s detailed out-of-court statements to them . . . . At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.
\end{quote}

\textit{Id.} Professor Friedman would apply his approach to the Tome facts as follows:

How would this system work in Tome? If, as both the Court of Appeals and the Supreme Court believed, the charge of improper influence was a weak one, the need for rebuttal was correspondingly weak. The spontaneity of A.T.’s first statement, to her babysitter Rocha, might give that statement some rebuttal value, notwithstanding that the statement was made after the alleged influence arose. The subsequent pretrial statements, made after interrogation of A.T. began, have far less rebuttal value, and their incremental value would be less still if the first statement were admitted. Moreover, it was principally the subsequent statements that added information not contained in A.T.’s trial testimony. Though the first statement—"my father gets drunk and thinks I'm his wife"—added some substance to the current testimony, this could easily be suppressed from Rocha’s testimony. Thus, the trial court could have decided to admit the first statement, in some form, but not the others. I do not mean to suggest that this outcome would be indubitably correct, only that it would be plausible, within the trial court’s discretion.

Friedman, \textit{supra} note 29, at 315-16 (footnotes omitted). As to Professor Friedman’s point about suppressing the babysitter’s testimony that the four-year-old child had said, “[M]y father gets drunk and thinks I’m his wife,” this author would argue that the indirect phraseology added probative value for the jury that would be useful to it in its task of deciding the likelihood that the statement was made as a result of the child’s lying scheme to be removed from the father’s home, and thus whether the child’s trial testimony also sprang from such a poisoned well. \textit{Id.}

\textsuperscript{153} In this regard the proposed language differs from the model draft that Prof. Capra submitted to the Advisory Committee on Evidence Rules, reflecting Judge Bullock’s proposal (see \textit{supra} notes 14 and 147). That draft read:

\begin{quote}
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 admissible, subject to Rule 403, to rehabilitate the declarant’s credibility as a witness.
\end{quote}

Capra Memorandum, \textit{supra} note 14.
The Committee Note also should explain that the amendment is not intended to change the case law under the current Rule that permits extrinsic evidence of the prior statement, as long as the declarant also testifies and is subject to cross-examination about the statement.154 Because the old common law reluctance to let a declarant testify to his own prior consistent statement has faded from view,155 the Committee ought to suggest, however, that if the impeachment has occurred on cross-examination, the better practice ordinarily is to first raise the prior statement on the redirect of the declarant.156

Finally, the Committee Note should remind its readers that Rule 801(d)(1)(B) does not restrict admission of evidence under other Rules, such as the rule of completeness codified in Rule 106.157

E. Other Alternatives

If an agreement cannot be reached that Rule 801(d)(1)(B) should be amended in the manner proposed, then at least two other alternatives, besides inaction, remain. The less desirable alternative would simply be to make clear that failure of a prior consistent statement to fit within Rule 801(d)(1)(B) does

154 See supra note 50.

155 See, e.g., People v. Singer, 89 N.E.2d 710 (N.Y. 1949); State v. George, 30 N.C. 324 (1848) (per curiam) (discussing reluctance but permitting such proof) (over dissent).

156 See Graham, supra note 54, at 618-19 (stating that the "introduction of the consistent statement initially through the testimony of the declarant best serves the interests of justice," as well as the witness's "convenience"). Professor Friedman points out that the child in Tome was excused from the stand before the prosecution offered evidence of prior statements, which left the defense unable to cross-examine the child further as to them, unless it recalled her to the stand, which it did not, for legitimate tactical reasons. Friedman, supra note 29, at 300-01. Yet the defense already had solicited from the child either a denial or a showing of a failure of memory. The situation in Tome was atypical in that the declarant had first been examined about the statements on cross-examination. See supra note 29 (citing United States v. Owens) and note 50. It was defense counsel who first brought up the question of the child witness's prior statements (likely in an effort to suggest that she had been coached). The child "testified [on cross-examination] that the only person with whom she had discussed the alleged abuse was the prosecutor. Tr. 145. The child denied that she ever spoke with her babysitter about the alleged abuse; she either failed to respond or stated that she was unable to remember when asked about other out-of-court statements concerning the alleged abuse. Tr. 152-53." Brief for the Petitioner, at 5, Tome v. United States, 513 U.S. 150 (1995) (No. 93-6892); Reply Brief for Petitioner, Tome v. United States, 513 U.S. 150 (1995) (No. 93-6892).

157 See United States v. Mohr, 318 F.3d 613, 626 (4th Cir. 2003) (prior consistent statements were admitted properly under the rule of completeness); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979). But see Judith A. Archer, Note, Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule of Evidence 801(d)(1)(B), 55 FORDHAM L. REV. 759, 780-83 (1987) (arguing that Rule 106 does not permit substantive use of the prior statement, so that Rule 801(d)(1)(B) should apply). Note that, under the proposal made in this article, the availability of Rule 106 as another avenue of admissibility would not preclude admissibility under Rule 801(d)(1)(B) of a statement that rebuts either a charge of fabrication or impeachment by prior inconsistent statement.
not preclude admission for the limited purpose of rehabilitation of a witness's credibility. Amendment of Rule 613 to this effect (using language like that of Maryland Rule 5-616(c)(2),\textsuperscript{158} for example) would achieve this result, though it would continue the two-track approach to admissibility and the need for limiting instructions\textsuperscript{159} and would not assuage concomitant resulting confusion.

In recognition of the fact that many jurors view sexual allegations with special suspicion,\textsuperscript{160} it would be preferable to complement this general, less-than-ideal approach by adding a special rule permitting the admissibility, as substantive evidence, of prior consistent complaints of sexual assault when the victim testifies at trial and is subject to cross-examination concerning the complaint. Though this approach may be criticized on the ground that society should not be automatically suspect of allegations of sexual assault,\textsuperscript{161} the common law rule admitting "prompt" complaints of rape (by definition, then, prior to the victim's trial testimony) has had practical and beneficial effects for victims in many prosecutions.\textsuperscript{162} The common law rule's codification in Maryland Rule 5-802.1(d),\textsuperscript{163} for example, and its extension there to all sexual assaults, including child abuse, has permitted the admission of some of a child's prior consistent statements as substantive evidence when they would not have been admissible under Tome's construction of Rule 801(d)(1)(B).\textsuperscript{164}

The requirement of "promptness" is not without its difficulties as many sexual assault victims, especially young victims, are reluctant to confide in anyone about the assault. Their hesitation may result from fear of the abuser, shame, or simply a lack of understanding that what has happened to them is wrong.\textsuperscript{165} Therefore, deletion of the promptness requirement and a provision

\textsuperscript{158} Maryland Rule 5-616(c)(2) provides: "A witness whose credibility has been attacked may be rehabilitated by . . . [e]xcept as provided by statute, evidence of the witness' prior statements that are consistent with the witness' present testimony, when their having been made detracts from the impeachment. . . ." Md. Rule 5-616(c)(2).

\textsuperscript{159} Holmes v. State, 712 A.2d 554 (Md. 1998).


\textsuperscript{161} See, e.g., Kathryn M. Starich, The Paradox a/the Prompt Complaint Rule, 37 B.C. L. Rev. 441, 443-44 (1996).


\textsuperscript{163} Maryland Rule 5-802.1(d) provides—under the same preconditions as Federal Rule 801(d)(1), that the declarant testify at the trial and be subject to cross-examination concerning the statement—for the admissibility as substantive evidence of "[a] statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony." Md. Rule 5-802.1(d). See LYNN McLAIN, 6A MARYLAND EVIDENCE: STATE AND FEDERAL § 801(3):2 (2d ed. 2001 & Supp. 2004). A complete discussion of this Rule and its corollaries in a vast majority of the states is beyond the scope of this article.


instead for the admissibility of any prior consistent complaint of sexual assault, subject to Rules 403 and 611, would be fairer.

Of course, rather than a Rule change addressing only sexual assaults, it would be preferable to amend Rule 801(d)(1)(B) to create a properly flexible rule that would work well for all types of situations by permitting the substantive use of all relevant prior consistent statements, subject to exclusion in the court's discretion under Rules 403 and 611.

V. CONCLUSION

Federal Rule of Evidence 801(d)(1)(B)'s underinclusiveness regarding admissibility, as substantive evidence, of a witness's out-of-court statements consistent with the witness's in-court testimony, has resulted in an unsatisfactory and inefficient dual track system for admissibility. Under the current approach many prior consistent statements must carefully be admitted only for the limited purpose of rehabilitating the witness's credibility—else reversible error may result. This two-tiered system is constitutionally unnecessary, as Crawford has recently affirmed that the Confrontation Clause is met by the witness's testifying and being subject to cross-examination at the trial. The best way to prevent the unnecessary creation of error when a witness's prior consistent statements are admitted for substantive purposes, rather than for the limited purpose of evaluating the credibility of the witness's in-court testimony, is to amend the Rule to permit the substantive use of prior consistent statements that the trial court finds, under Rule 104(a), would be helpful to the fact-finder.

The Rule should be amended to permit the admission, subject to Rule 403, of all prior consistent statements that a jury would reasonably find helpful in assessing what weight to give to the witness's trial testimony. If an opponent's allegation that a witness has a motive to lie is neither based on an objective fact that the witness concedes to be true, nor can be traced to a determinable time that would have provided a window for earlier statements on the topic, the judge ordinarily should permit the jury to hear one or two of the witness's prior consistent statements, to aid it in deciding whether such a motive existed and affected the witness's testimony.

Short of such an amendment, the Federal Rules of Evidence should be amended to include a hearsay exception for prior consistent complaints of sexual assault and to explicitly provide for limited admissibility, as to credibility, of a testifying witness's other prior consistent statements that do not qualify under Rule 801(d)(1)(B) but are nonetheless helpful to an evaluation of the witness's credibility.

167 See supra note 29 and accompanying text.