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## Recent Developments: Holmes v. State: Under Maryland Rule 5-802.1 (b), Prior Consistent Statements Offered to Rebut a Charge of Fabrication Must Precede the Motive to Fabricate

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*Holmes v. State*

**UNDER  
MARYLAND RULE  
5-802.1(b), PRIOR  
CONSISTENT  
STATEMENTS  
OFFERED TO  
REBUT A CHARGE  
OF FABRICATION  
MUST PRECEDE  
THE MOTIVE TO  
FABRICATE**

By Adam Cizek

The Court of Appeals of Maryland held that prior consistent statements which postdate an alleged fabrication, improper influence, or motive were inadmissible under Maryland Rule 5-802.1(b). *Holmes v. State*, 350 Md. 412, 712 A.2d 554 (1998). The court found, however, that prior consistent statements may be admissible to rehabilitate the witness under Maryland Rule 5-616(c)(2) where the fact that the statement was made detracts from the impeachment.

On June 20, 1995, Danise Harris ("Harris") and her roommate, Ellouise Thompson ("Thompson"), met the defendant, Holmes, as well as Antoine Awkard, and Miah Lewis ("Lewis"). Harris and Lewis separated from the group, and shortly thereafter, a shot was fired killing Harris. After the shooting, Thompson gave a written statement attesting that she did not see who shot Harris. Two days later, Thompson gave a second statement to police indicating that Holmes had murdered Harris. At trial, Thompson's testimony was consistent with her second statement.

Thompson testified on direct examination that she originally was scared to implicate the defendant in the shooting and that her fears were compounded by a visit from the defendant the day after the shooting. On cross-examination, Thompson's original

statement was admitted into evidence to impeach Thompson. On redirect, the trial court admitted Thompson's prior consistent statement over defense counsel's objection, and subsequently, the defendant was convicted and sentenced to thirty years imprisonment. The defendant appealed, arguing that the trial court erred by admitting Thompson's prior consistent statement.

On appeal, the Court of Special Appeals of Maryland affirmed the trial court's conviction of the defendant. The court ruled that Maryland Rule 5-802.1(b) did not codify the common law requirement that prior consistent statements, admitted to rebut a charge of fabrication, must precede the motive to fabricate. Therefore, the court of special appeals held that Thompson's prior consistent statement was admissible under

Maryland Rule 5-802.1(b). The Court of Appeals of Maryland affirmed the intermediate appellate court's ruling, but on different grounds.

The court of appeals began its analysis by noting that a witness' prior consistent statement is generally not admissible to buttress the witness' credibility. *Holmes*, 350 at 416-17, 712 A.2d at 556. An exception to this rule occurs when the witness' credibility is attacked by "an implication of fabrication or improper influence or motive." *Id.* at 417, 712 A.2d at 556 (citing *City Pass. Ry. Co. v. Knee*, 83 Md. 77, 79 (1896)). In such a situation, a witness' prior consistent statement is admissible if it precedes the alleged fabrication, or improper influence or motive to fabricate. *Id.*

The court continued its analysis by examining Maryland Rule 5-802.1(b) and the parallel Federal Rule of Evidence, 801(d)(1)(b). *Id.* at 418, 712 A.2d at 556. Maryland Rule 5-802.1(b) establishes that "[a] statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive," will not be excluded by the hearsay rule. *Id.* The court emphasized that neither rule addresses the timing of a prior consistent statement. *Id.*

## ***Recent Developments***

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Therefore, the court looked to the Supreme Court's interpretation of Federal Rule 801(d)(1)(b), from which Maryland Rule 5-802.1(b) was derived.

The court reviewed a United States Supreme Court decision that held that the federal rule codified the common law requirement that a prior consistent statement, admitted to rebut a charge of fabrication, must precede the alleged fabrication, improper influence, or motive. *Id.* at 418, 712 A.2d at 557 (citing *Tome v. United States*, 513 U.S. 150, 167 (1995)). The Supreme Court announced that "the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense." *Id.* at 419, 712 A.2d at 557 (quoting *Tome*, 513 U.S. at 158 ). The court of appeals reasoned that prior consistent statements which postdate an alleged fabrication or improper influence or motive carry little weight. *Id.* Therefore, the court concluded that prior consistent statements which do not precede an alleged fabrication, improper influence, or motive are inadmissible under Federal Rule 801(d)(1)(b). *Id.* at 418, 712 A.2d at 557 (citing *Tome*, 513 U.S. at 167).

Next the court of appeals examined the reasoning used by the court of special appeals that the omission of the word "recent" in Maryland Rule 5-802.1(b) signified an intention to break from the federal rules and common law. *Id.* at 424, 712 A.2d at 559.

The court opined that Maryland Rule 5-802.1(b) was ambiguous with respect to the timing of prior consistent statements. *Id.* at 423, 712 A.2d at 559. Therefore, the court reviewed the legislative history of the rule to determine its intent, and the court found that Maryland omitted the word "recent" because its use was inaccurate. *Id.* Under Maryland Rule 5-802.1 the alleged fabrication need not be newly created. *Id.* Thus, Maryland omitted the word "recent." *Id.* Furthermore, the court found that the rule based admissibility of prior consistent statements on relevance. *Id.* (citing Reporter's Note to the Rules Comm., 125th Report, regarding Rule 5-802.1, July 1993, at 188). Generally speaking, the court determined that prior consistent statements which do not precede the motive to fabricate are irrelevant to rebut a charge of fabrication. *Id.* Therefore, the court of appeals concluded that in order for a prior consistent statement to be admissible under Maryland Rule 5-802.1(b), it must precede the alleged fabrication, improper influence, or motive. *Id.* at 424, 712 A.2d at 559.

The court then addressed the applicability of Maryland Rule 5-802.1(b). *Id.* In order for 5-802.1(b) to apply, a prior consistent statement must be offered to rebut a charge of fabrication. *Id.* The court concluded that on redirect the State offered Thompson's prior consistent statement to rehabilitate

Thompson's credibility, not to rebut a charge of fabrication. *Id.* at 425, 712 A.2d at 560. Thus, the court held that Maryland Rule 5-802.1(b) was not applicable. *Id.* at 425, 712 A.2d at 559. However, the court held that Maryland Rule 5-616(c), which neither party had addressed, was applicable. *Id.* at 428, 712 A.2d at 562.

Under Maryland Rule 5-616(c), a prior consistent statement may be admitted to rehabilitate a witness when such a statement "detracts from the impeachment" of a witness. *Id.* at 427, 712 A.2d at 561. The court emphasized that when prior consistent statements are offered to rehabilitate the witness they are not hearsay because they are not offered for their substantive truth. *Id.* The statements are offered instead because the witness' credibility is increased as a result of the witness' prior statement. *Id.* In the instant case, the court concluded that Thompson's second statement to police detracted from the impeachment of her original statement, and was therefore admissible under Maryland Rule 5-616(c). *Id.* at 428, 712 A.2d at 562.

In *Holmes v. State*, the Court of Appeals of Maryland acknowledged an important loophole by which attorneys may have prior consistent statements admitted into evidence under Maryland Rule 5-616(c)(2). Although the prior consistent statements will not be admitted as substantive evidence, the practical effect on the jurors will be the

same. The use of prior consistent statements to bolster witness testimony and rehabilitate credibility will play a critical role in the ability of attorneys to sway juries.

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