BYU Law Review

Volume 1987 | Issue 1 Article 3

3-1-1987

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A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.[1]

Ralph Waldo Emerson

Had Emerson written during the years which followed the enactment of the Federal Rules of Evidence, he might have included as among the adoring public, federal judges and trial lawyers who have shown an increasing devotion to the use of prior consistent statements in response to virtually any attack on a witness. This increasing proclivity of federal courts to permit the admission of prior consistent statements reveals a judicial homage for a type of evidence which has long been suspect and presumptively inadmissible unless several specific conditions were first satisfied.

Under the common law, a witness' prior statement which was consistent with his courtroom account was admissible only to rehabilitate the witness after he had been impeached or his courtroom account was challenged as fabricated. In addition, because the repetition of a consistent account was not more indicative of truth telling than of lying,[2] a witness' prior consistent

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1. R. W. EMERSON, *Self-Reliance*, in COLLECTED WORKS OF RALPH WALDO EMERSON 19 (Greystone Press).

2. It can scarcely be satisfactory to any mind to say that if a witness testifies to a statement to day [sic] under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath . . . . [T]he idea that the mere repetition of a story gives it any force or proves its truth, is contrary to common observation and experience that a *falsehood* may be repeated as often as the *truth*.

statement was admissible only if it specifically refuted the fabrication or impeachment charge. Traditionally, this required that the witness be charged with intentional falsification as a result of a motive which arose after the consistent declaration was made. This article will refer to this concept as the "traditional" or "time-line" analysis.

In 1975, the United States Congress promulgated the Federal Rules of Evidence, and in Rule 801 (d)(1)(B)[3] it codified the requirements for the admission of prior consistent statements. Although the Rule adopts the same language embraced by the common law, namely that a consistent statement is admissible only to rebut a "charge of recent fabrication or improper influence or motive," it has expanded the consequences of admissibility by permitting the statement to be admitted as non-hearsay or substantive evidence. Some courts have interpreted this dramatic change as merely creating a second category of admissibility for prior consistent statements which in no way intrudes upon admissibility for traditional rehabilitative purposes. Others have seen the promulgation of the Rule as a relaxation of the traditional standards which allows the admission of prior consistent statements for substantive purposes, rehabilitative purposes, or both.

Initially, this article will discuss the historical antecedents of the Rule governing prior consistent statements and will demonstrate that only by satisfying the traditional time-line analysis was a prior consistent statement relevant and therefore admissible under common law. Stated another way, the premise of this discussion is that the traditional underpinnings of the Rule permitted the admission of a prior consistent statement only where it predated the witness' alleged motive to fabricate. In response to the federal judiciary's relaxation of this tradi-

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State v. Parrish, 79 N.C. 610, 612-13 (1878) (emphasis in original). *See also* 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1123 at 254-55 (J. Chadbourn rev. ed. 1974).

3. Rule 801(d)(1)(B) provides as follows:

> (d) *Statements which are not hearsay.* A statement is not hearsay if—
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> (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 his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

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

tional standard and its misimpression that Rule 801(d)(1)(B) creates a new category of admissibility, this article argues that the judicial treatment of the rule has opened a Pandora's box of self-serving declarations that have served to confuse the issues at trial and permit trial lawyers to introduce evidence long regarded as unreliable and untrustworthy.

This article will also discuss the various approaches used at trial to develop a witness' motive to fabricate and will contrast the modes of impeachment and cross-examination, through federal cases and paradigms, which distinguish intentional falsification from consistent contradiction. The special categories of impeachment by prior inconsistent statements and lack of memory will also be analyzed.

This article concludes with a proposal to redraft Federal Rule of Evidence 801(d)(1)(B) and to draft an additional section (c) to Rule 613,[4] addressing the particular problems raised by this article. These proposed Rules present clear and employable predicates for the admission of prior consistent statements to rehabilitate credibility, basically incorporating the same guarantees as are found for prior inconsistent statements under Rule 801(d)(1)(A).[5] In addition, if adopted, these proposed Rules per-

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4. Rule 613 provides as follows:

Prior Statements of Witnesses.

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

FED. R. EVID. 613.

5. Rule 801(d) provides as follows:

(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 (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of

mit the admission of prior consistent statements only to refute the specific charge that a witness has lied as a result of a motive which arose after the consistent statement was made.

I. COMMON LAW ANTECEDENTS

Before the promulgation of the Federal Rules of Evidence in 1975,[6] the common law principles governing the admissibility of prior consistent statements[7] developed in three stages. Prior to the advent of the rules prohibiting use of hearsay testimony,[8]

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recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) *Admissions by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in the furtherance of the conspiracy.

FED. R. EVID. 801(d).

6. For an analysis of the common law of evidence, *see* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW (1898); Graham, *Prior Consistent Statement: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal,* 30 HASTINGS L.J. 575-78 (1979).

7. *See* 4 J. WIGMORE, *supra* note 2, § 1122, at 254.

> Under the head of explanation, in dealing with the various modes of impeachment (by character, bias, interest, corruption, contradiction, self-contradiction), it would have been logically proper to consider, with reference to each of these modes, how far the effect of the impeaching evidence might be explained away or rebutted by the circumstance that the witness had, at a former time, told a *consistent* or similar story.

Id. (emphasis added).

8. *See* 5 *id.* § 1364, at 12-29. The rule prohibiting hearsay testimony was not fully developed until the early 1700s. *Id.* at 12. Prior to that time, jurors were required, before trial, to inform themselves about the facts of the case. *Id.* at 13. They were not only permitted, but encouraged to talk with members of the community and even the litigants to determine their verdict. *Id.* at 13-14. "The ordinary witness, as we today conceive him, coming into court and publicly informing the jury, was (it must be remembered) in the 1400s a rare figure, just beginning to be known." *Id.* at 14 (quoting BRUNNER, THE ORIGIN OF JURY COURTS 427, 452 (1872)).

Circumstances began to change in the early 1600s and the jury began to rely on the in-court testimony of others. *Id.* at 15. As the jury's verdict became increasingly dependent on these in-court presentations, "it came to be asked whether a hearsay thus laid before them would suffice." *Id.* at 16 (emphasis deleted). Although during the 1600s, hearsay statements were "constantly received" they were admissible only if corroborated by non-hearsay declarations. *Id.* at 16-17. This practice was consistent with the notion of

the prevailing view was that a witness' in-court testimony could be corroborated without limitation[9] by earlier statements made by the witness that were consistent with the in-court account. These hearsay declarations were admitted as substantive evidence.[10] With the application of the hearsay rule,[11] the treatment of prior consistent statements underwent a second phase. No longer admissible for their truth or content, prior consistent statements remained admissible during the direct presentation of a party's case to corroborate live testimony.[12] Although the witness' credibility had not been attacked or impeached, prior declarations were admissible to independently corroborate the in-court presentation.[13]

The third stage of common law admissibility coincided with the development of the common law principle that a witness' credibility could not be accredited or supported unless called into question.[14] In the absence of an attack on credibility, a prior

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corroboration, prevalent at that time, supporting the belief that repetition of a witness' testimony added to the credibility of the statement. *Id.*

By the middle of the 1700s, however, the rule excluding hearsay was clearly established, and needed to be refined only in the development of its exceptions. *Id.* at 20. Hearsay statements were excluded at this time because they were made out of court, and therefore not subject to cross examination. *Id.* Wigmore defines the hearsay rule as

> that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it.

Id. at 12. This definition is clarified by Wigmore's example:

> [S]uppose that A, who does not profess to know anything about a robbery, is offered to prove that B, who did profess to know, has asserted the circumstances of the robbery; here B's assertion is not to be credited or received as testimony, however much he may know, unless B is called and deposed on the stand.

Id. at 13.

9. *See* 4 J. WIGMORE, *supra* note 2, § 1123, at 254: "This practice was based on a loose instinctive logic, popular enough today, that there is some real corroborative support in such evidence . . . ."

10. *See supra* note 8. Hearsay declarations were a regular aspect of jury trials in the 1400s.

11. For a definition of the hearsay rule see *supra* note 8.

12. *See* 5 J. WIGMORE, *supra* note 2, § 1364, at 20: "This limited doctrine . . . survived for a long time in a still more limited shape, i.e., in the rule that a witness' own prior consistent statements could be used in corroboration of his testimony on the stand . . . ."

13. *Id.*

14. *See* United States v. Holmes, 26 F. Cas. 349, 352 (C.C.D. Me. 1858) (No. 15,382) ("[T]estimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it."). This common law principle that credibility may not be

consistent statement was considered cumulative and no more probative than an in-court account.[15] Since "falsehood may be repeated as often as the truth,"[16] the witness' mere repetition of his story prior to trial made it no more likely that he was telling the truth in the courtroom.[17]

Pursuant to this view, prior consistent statements were no longer permitted on direct examination, but were admissible for rehabilitative purposes[18] on redirect examination or through the testimony of witnesses who heard them. Although, as was true in the second stage, the prior consistent statement was not admitted for its truthful content, it was admissible to assist the jury in

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supported unless first questioned has been codified in Rule 608 of the Federal Rules of Evidence, which provides:

> *Evidence of Character and Conduct of Witness*
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> (a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: . . . (2) evidence of truthful character is admissible *only after* the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

FED. R. EVID. 608(a)(2) (emphasis added).

15. *See* 4 J. WIGMORE, *supra* note 2, § 1124, at 255: "When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless . . . for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it." *See also* Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 429 (1836) (A witness' "testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertions does not carry his credibility further, if so far as his oath.").

16. State v. Parish, 79 N.C. 610, 613 (1878) (emphasis deleted). *Parish* further states that "the idea that mere repetition of a story gives it any force or proves its truth, is contrary to common observation and experience . . . ." *Id.*

17. United States v. Leggett, 312 F.2d 566, 572 (4th Cir. 1962) ("[A] person might concoct an entirely false account of some happening and, after relating this account to a dozen of his neighbors, might call them in corroboration when at a later time he told the same untruthful story on the witness stand.").

18. *See generally* Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439-40 (1836); Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 60 (2d Cir. 1972); United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972); Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969); Hanger v. United States, 398 F.2d 91, 102-05 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969); United States v. Fayette, 388 F.2d 728, 733-35 (2d Cir. 1968); Copes v. United States, 345 F.2d 723, 724 n.3 (D.C. Cir. 1964); United States v. Leggett, 312 F.2d 566, 572-73 (4th Cir. 1962); Ryan v. United Parcel Serv., Inc., 205 F.2d 362, 364 (2d Cir. 1953); United States v. Sherman, 171 F.2d 619, 622 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949); Affronti v. United States, 145 F.2d 3, 7-8 (8th Cir. 1944); Malone v. United States, 94 F.2d 281, 287 (7th Cir. 1938), *cert. denied*, 304 U.S. 562 (1938); Gelbin v. New York, N.H. & H.R.R., 62 F.2d 500, 502 (2d Cir. 1933); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931).

evaluating the witness' credibility,[19] but only in limited circumstances.[20]

Courts recognized that prior consistent statements, to become relevant even for rehabilitative purposes, had to meet specific predicates.[21] In developing these predicates, the courts focused on both the type of impeachment[22] and when the prior statement was made.[23] As a result, for a prior consistent statement to be admissible, the witness had to be charged with

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19. *See* Affronti v. United States, 145 F.2d 3, 8 (8th Cir. 1944) (prior consistent statements should only be admissible to aid the jury in its evaluation of the impeached witness' credibility); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931) (juries should be carefully instructed that prior consistent statements may not be considered as substantive evidence, but only as evidence of the witness' credibility).

20. *See infra* notes 21-27 and accompanying text. *See also* United States v. Quinto, 582 F.2d 224, 243 (2d Cir. 1978) (Courts for the past two hundred years have prohibited the use of prior consistent statements except in very limited circumstances.).

21. The Federal Rules of Evidence provide: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. *See Quinto*, 582 F.2d at 232 ("The rationale for excluding most, but not all, prior consistent statements being offered to establish the witness' credibility is one of relevancy."); *see also infra* notes 22-24 and accompanying text, for a discussion of relevance and how it is affected by the type of impeachment and the time of the prior statement.

22. Common law courts found that prior consistent statements were relevant only to rebut certain types of impeachment. For instance, impeachment of a witness by his prior inconsistent declarations generally did not give rise to the admissibility of his prior consistent statements because mere repetition of testimony did not increase the likelihood of its truthfulness. *See* Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944); Gelbin v. New York, N.H. & H.R.R., 62 F.2d 500, 502 (2d Cir. 1933).

Prior consistent statements were similarly inadmissible following impeachment of a witness on the basis of moral character. The bad character indicates some probability of untrustworthiness; the evidence of repetition does not attempt to meet the charge of bad character, or diminish its effect, but evades it by retorting with the irrelevant fact that the witness has been consistent." 4 J. WIGMORE, *supra* note 2, § 1125, at 258. *See also* United States v. Toner, 173 F.2d 140, 142-43 (3d Cir. 1949) (evidence of a prior consistent statement is not relevant to rebut impeachment based on the witness' own admission that he perjured himself during an FBI interview). Professor Wigmore noted the need for limiting the types of impeachment which trigger prior consistent statement admissibility, stating "[t]he 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." 4 J. WIGMORE, *supra* note 2, § 1131, at 293 (emphasis in original) (footnote omitted). For a full discussion of the methods of impeachment which a prior consistent statement may effectively rebut, see 4 *id.* §§ 1125-1131, at 258-93.

23. See *supra* note 17 and *infra* notes 26-28 and accompanying text for a discussion of the time-line analysis and its effect on the prior consistent statement's competence in rebutting impeachment.

fabricating his trial testimony[24] *and* the prior consistent statement must have been made before any motive to fabricate arose.[25] Otherwise, the prior consistent statement was inadmissible.

The language of some common law decisions suggests the existence of two distinguishable charges giving rise to the admissibility of prior consistent statements:[26] recent fabrication or im-

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24. A charge of fabrication was found to exist if a design to misrepresent is charged upon the witness in consequence of his relation to the party, or to the cause, or from some motive or interest. *See* Conrad v. Griffey, 52 U.S. (11 How.) 480 (1850); Gelbin v. New York, N.H. & H.R.R., 62 F.2d 500, 502 (2d Cir. 1933) (impeachment alleging that the witness fabricated his testimony influenced by the motive to protect his employer from liability constitutes a charge of fabrication, and a prior consistent statement may subsequently be introduced to rebut the impeachment charge); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931) (witness' prior consistent statement is admissible to refute the allegation that he recently fabricated his testimony in order to protect himself from criminal prosecution); *see also* United States v. Zito, 467 F.2d 1401, 1403-04 (2d Cir. 1972); United States v. Leggett, 312 F.2d 566, 572-73 (4th Cir. 1962); Ryan v. United Parcel Serv., Inc., 205 F.2d 362, 364 (2d Cir. 1953); Malone v. United States, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938); Di Carlo v. United States, 6 F.2d 364, 366 (2d Cir. 1925).

Although prior consistent statements were admissible at common law almost exclusively to rebut a recent fabrication charge, another exception to the general rule of inadmissibility was set forth in Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944): "[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." This exception was subsequently adopted by the United States Court of Appeals for the District of Columbia in Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969) (portions of a witness' prior statement which are relevant to the subject of cross-examination are admissible to assist the fact finder in assessing the witness credibility).

25. *See* Conrad v. Griffey, 52 U.S. (11 How.) 480, 491-92 (1850); Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 60-62 (2d Cir. 1972); United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972); Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969); United States v. Fayette, 388 F.2d 728, 733 (2d Cir. 1968); United States v. Leggett, 312 F.2d 566, 572 (4th Cir. 1962); Lindsey v. United States, 237 F.2d 893, 895 (9th Cir. 1956); United States v. Grunewald, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); Ryan v. United Parcel Serv., Inc., 205 F.2d 362, 364 (2d Cir. 1953); United States v. Corry, 183 F.2d 155, 157 (2d Cir. 1950); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944); Malone v. United States, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938); Gelbin v. New York, N.H. & H.R.R., 62 F.2d 500, 502 (2d Cir. 1933); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931); Di Carlo v. United States, 6 F.2d 364, 366 (2d Cir. 1925); Thomas v. Ganezer, 137 Conn. 415, 417-21, 78 A.2d 539, 541-42 (1951).

26. *See* United States v. Leggett, 312 F.2d 566, 572 (4th Cir. 1962): "The exceptions arise where the credibility of the witness is impugned by the suggestion or contention that his story is one of recent fabrication or that it differs from accounts previously given by him or that he has a motive for testifying falsely." (emphasis added). *See also* Hanger v. United States, 398 F.2d 91, 103-04 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969)

proper motive. Despite this language which seemed to distinguish recent fabrication from improper motive, an examination of the common law decisions reveals that even where the court labeled the charge "recent fabrication," the prior consistent statement was still required to have been made at a time before the motive to fabricate existed. This indicates a coexisting motive element to the recent fabrication charge.[27]

(citing Annotation, *Admissibility for Purpose of Supporting Impeached Witness, of Prior Statements by Him Consistent with His Testimony*, 75 A.L.R.2d 909, 939 (1961)), which appears to distinguish recent fabrication from improper motive by stating:

> The admission of evidence of prior consistent statements of a witness who has been impeached by the imputation of bias or a motive to falsify constitutes an exception to the general rule which excludes such declarations made out of court. *Another* exception to that rule, quite similar in character, is recognized in the case of a witness whose testimony is assailed as a fabrication of recent date.

Id. at 104 (emphasis added). This annotation, however, cited as authority for this language the following cases: Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956); United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); Ryan v. United Parcel Serv., Inc., 205 F.2d 362 (2d Cir. 1953); Affronti v. United States, 145 F.2d 3 (8th Cir. 1944); and United States v. Keller, 145 F. Supp. 692 (D.N.J. 1956). None of these decisions define recent fabrication as a charge separate from improper motive. *See also Grunewald*, 233 F.2d at 566; *Keller*, 145 F. Supp. at 696. Both cases were also improperly relied on, since in both cases impeachment was based on an improper motive allegation, with no mention of recent fabrication. *Lindsey*, 237 F.2d at 895, was similarly misinterpreted because the witness was impeached with a prior contradictory statement and not charged with recent fabrication.

27. *See* Malone v. United States, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938) ("[T]he general rule [is that] where the testimony of a witness is assailed as a fabrication of a recent date, proof that he gave a similar account of the transaction when no motive existed, is admissible."); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944) ("[I]f the testimony is assailed as a fabrication, proof of the prior consistent statements of the witness (which ante-date the existence of motive to fabricate) may be admitted to sustain his credibility."); Ryan v. United Parcel Serv., Inc., 205 F.2d 362, 364 (2d Cir. 1953). In *Ryan*, the court refused to admit a prior consistent statement offered to show that the witness' testimony was not of recent fabrication, as such evidence is admissible only if a witness' "testimony has been assailed as a fabrication *and* the offered statement antedated the existence of a motive to fabricate." *Id.* (emphasis added). *See also* Copes v. United States, 345 F.2d 723 (D.C. Cir. 1964). *Copes* held admissible the prior consistent statement of a witness made when no motive to fabricate was found to exist. *Id.* at 725. This absence of motive indicated "that [the witness'] testimony at the trial [was] not mere recent fabrication," thus suggesting that a recent fabrication charge cannot stand alone. *Id.* In New York, the rule is that the testimony of an impeached witness may not be bolstered by showing that the witness has made similar consistent statements, but "[t]here is a recognized exception to the rule where the testimony of a witness is assailed as a recent fabrication. Then his testimony 'may be confirmed by proof of declarations of the same tenor before the motive to falsify existed.' " Crawford v. Nilan, 289 N.Y. 444, 450, 46 N.E.2d 512, 515 (1943) (quoting Ferris v. Sterling, 214 N.Y. 249, 254, 108 N.E. 406, 408 (1915)). *See also infra* notes 28-31 and accompanying text.

This principle is illustrated in *Dowdy v. United States*,[28] where a witness' declaration, made prior to the time of his arrest, was admitted to rebut a claim that his testimony was a "recent fabrication, *induced by* the motive on his part to shield himself as far as possible from his own previous criminal acts."[29] Also illustrative of this principle is the language of *United States v. Zito*,[30] where the court noted adherence to the "usual rule that prior consistent statements can only be introduced after a charge that the witness' story is a recent fabrication *and* where the statements were made before any motive to fabricate developed . . . ."[31]

Consequently, only those prior statements refuting the impeachment charge were admissible as relevant to rehabilitate the witness' attacked credibility. Those statements not meeting the substance of the charge, nor squarely meeting the mark of the impeachment, did not rebut the charge directed to the witness' credibility and therefore remained inadmissible.[32]

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28. 46 F.2d 417 (4th Cir. 1931).

29. *Id.* at 424 (emphasis added). The witness' prior consistent statements in *Dowdy* were made prior to his arrest. The court implied that the statements were therefore made before the motive to protect himself from his previous criminal acts arose. *Id.*

30. 467 F.2d 1401 (2d Cir. 1972).

31. *Id.* at 1403-04. Although the court did not specifically address whether the prior consistent statements were made before the witness' motive to fabricate developed, it is apparent from the facts that such was the case. The witness had participated in several illegal activities in an attempt to obtain money with which to repay the defendant. The alleged motive to fabricate was the witness' desire to obtain clemency for himself with respect to these crimes which induced him to lie in court and point the finger at the defendant. However, the court seems to suggest that the prior statements, which implicated the defendant, were made to the witness' family while he was hiding out from the defendant, and were therefore free from any such motive because at the time he was not even aware that he would be arrested for the crimes he had committed.

32. *See* Di Carlo v. United States, 6 F.2d 364, 366 (2d Cir. 1925) ("It is well settled that, when the veracity of a witness is subject to challenge because of motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose.") This principle is clearly illustrated in Gelbin v. New York, N.H. & H.R.R., 62 F.2d 500 (2d Cir. 1933). In *Gelbin*, the witness testified on behalf of his employer, the defendant railroad. His testimony included a statement that the defendant's railroad warning sign had been freshly painted at the time the plaintiff's decedent was killed at the crossing. Plaintiff's counsel "imputed to the witness a design to misrepresent from a motive of interest," *id.* at 502, since the witness was personally responsible for the condition of the sign which arguably caused the accident. To refute this allegation of motive, the witness' personal work log, containing a record of the witness' on the job activities, was admitted as a prior consistent statement. Since the entire document in the painting of the sign was found to have been made prior to decedent's accident, the court concluded that no motive could have existed at that time. The prior statement therefore served as proof that the witness was not fabricating his testimony due to interest or motive, because it was made at a time when

The common law requirement that a prior consistent statement was only admissible if it preceded the motive to falsify arose from the theory that when a witness was accused of falsifying his testimony due to a specific motivation, only a statement made before the existence of the alleged motivation could be relevant to refute the accusation. For instance, if it were alleged on cross examination that a witness falsified his testimony, induced by a motive to lie which allegedly arose on June 1, 1986, a statement made before that date would be relevant to refute the charge because it would serve as relevant evidence indicating that the witness could not have fabricated his testimony as a result of the alleged motive.[33] On the other hand, a statement

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the witness could not have had such a motive. *Id.* at 501-02.

The common law court's strict adherence to the time-line rule is further illustrated in Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956). In *Lindsey,* the government attempted to admit the prior consistent statement of a rape victim, which had been made under the influence of sodium pentothal. The court rejected the government's contention that the effects of the drug would have made it impossible for the witness to have had a motive to "nail" the defendant at the time she made the statement. The court stated that despite the effect of the drug, the motive could have asserted itself. *Id.* at 895-96.

A less stringent standard, however, was adopted by the Court of Appeals for the Second Circuit in United States v. Grunewald, 233 F.2d 556 (2d Cir. 1956), *rev'd on other grounds,* 353 U.S. 391 (1957), stating that if it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them." *Id.* at 566. *See also supra* note 25. *But see* Coltrane v. United States, 418 F.2d 1131 (D.C. Cir. 1969), where the prior consistent statement was admitted despite the probable existence of a motive to falsify at the time it was made. The 15 year old witness/victim alleged that the defendant had engaged him in sexual activity and had photographed him in the defendant's basement. *Id.* at 1132-33. Soon after the dates on which the witness stated the alleged incidents occurred, he was found to have contracted venereal disease. Although he refused to disclose the source of the disease to his mother and doctor, a friend of the witness revealed to the mother that he had implicated the defendant. The government presented a prior consistent statement that the witness gave to the police shortly after this time. The witness was apparently highly motivated at the time he gave the statement because he placed the blame for his disease on someone other than his actual partner, in an effort to shift the blame from himself, by pointing to the defendant.

Coltrane differs, however, from other cases requiring that the time line be met. This is because the prior statement was admitted pursuant to the standard set forth in Affronti v. United States, 145 F.2d 3 (8th Cir. 1944) (discussed *supra* note 24), admitting portions of prior statements which are relevant to rebut matters covered on cross examination involving the same statements. Since inconsistencies in portions of the witness' statement to the police were used to impeach him, the full statement was subsequently admitted to rebut the impeachment. However, although *Affronti* was based on this rarely used exception, the admitted prior statement was made before the motive to falsify arose. *Id.* at 7. No common law authority exists on which *Coltrane* could have based its decision to ignore the existing motive.

33. *See* 4 J. WIGMORE, *supra* note 2, § 1128, at 268 (emphasis added):

made after June 1, 1986, would not be relevant to refute the motive because that same motive could have influenced its utterance. Since there was no difference between the probative value of the prior statement made after the motive arose and that made in court, such a statement constituted mere repetition, and was therefore merely cumulative and inadmissible.[34]

II. THE ENACTMENT OF RULE 801(d)(1)(B)

In 1975, the United States Congress enacted the Federal Rules of Evidence.[35] The rule governing prior consistent statements, 801(d)(1)(B), codifies the traditional components required by common law for the admission of this "carefully confined"[36] class of statements. In general, a prior consistent

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A consistent statement, at a *time prior* to the existence of a fact said to indicate bias, interest or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence.

34. *See also Grunewald,* 233 F.2d at 566 (If a jury could reasonably infer "that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them.").

35. In 1965, the Supreme Court of the United States appointed an Advisory Committee to draft rules of evidence for the federal courts. The Committee's notes, which accompany and explain the rules, were sent to Congress and together with various Congressional reports and debates, comprise the legislative history of the Federal Rules of Evidence. Unless changes were made in the Supreme Court's proposal, the notes are generally accepted as representing the intent of Congress. *See* CLEARY, FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES at iii-iv (1984). Rule 801(d)(1)(B) conforms to the Supreme Court's original version. 28 U.S.C.S. § 801.3, at 95 (Law. Co-op. 1975). In its entirety, the Advisory Committee's note to 801(d)(1)(B) reads as follows:

> 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. If 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.

56 F.R.D. 183, 296 (1972). There is no other explanation provided for the employment of consequences of 801(d)(1)(B). *See* United States v. Check, 582 F.2d 668, 680 (2d Cir. 1978); Introductory Note to Article VIII, *Notes of the Advisory Committee on Proposed Rules of Evidence,* 56 F.R.D. 183, 289-96 (1972); 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 420, at 186-204 (1986); C. MCCORMICK, MCCORMICK ON EVIDENCE, § 251, at 744-49 (1984); 4 J. WEINSTEIN, EVIDENCE ¶ 801(d)(1)(B)[01] (1982); 4 J. WIGMORE, *supra* note 2, § 1124, at 255 n.2.

36. *See* United States v. Check, 582 F.2d 668, 680 (2d Cir. 1978) (quoting 56 F.R.D. at 296)):

> [T]he class of such prior statements which can potentially be so utilized as substantive evidence because of their exclusion from the definition of hearsay is carefully confined to those '[p]rior consistent statements [which] traditionally have been admissible [but only for the rehabilitative purpose of] re-

statement is inadmissible unless the declarant testifies at trial and is subject to cross-examination concerning the statement.[37] Moreover, once there is a predicate showing of an express or implied allegation[38] of recent fabrication[39] or of an improper motive or influence[40] made by the opponent of the witness,[41] the prior consistent statement is admissible. The prior consistent statement may be testified to by the witness himself or by anyone who heard it.[42]

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but[ting] charges of recent fabrication or improper influence or motive.'
See also United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978).

37. Rule 801(d)(1)(B) requires that the declarant testify as a witness before any prior consistent statement may be admitted. This condition markedly contrasts with Rule 613 which allows any out of court statement as long as the declarant is present in the courtroom and available for cross-examination. *See* FED. R. EVID. 613.

38. *See infra* notes 61-64 and accompanying text.

39. *See infra* notes 49-56 and accompanying text.

40. *See infra* notes 57-60 and accompanying text.

41. Before a consistent statement is admissible, the declarant's courtroom account must be attacked. "Corroborative testimony consisting of prior, consistent statements is ordinarily inadmissible unless the testimony sought to be bolstered has first been impeached." United State v. Weil, 561 F.2d 1109, 1111 (4th Cir. 1977). *See also* United States v. Smith, 746 F.2d 1183, 1185 (6th Cir. 1984); United States v. Lopez, 584 F.2d 1175, 1180 n.5 (2d Cir. 1978); United States v. Strand, 574 F.2d 993, 996 n.4 (9th Cir. 1978).

42. There remains virtually no dispute that 801(d)(1)(B)'s provision that the declarant be "subject to cross-examination" permits the proponent to introduce the prior consistency through the testimony of a third party who was present when the statement was made and does not require that the statement be introduced through the declarant. *See* United States v. Andrade, 788 F.2d 521, 531-33 (8th Cir.), *cert. denied*, 107 S. Ct. 462 (1986); United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir. 1986); United States v. Griggs, 735 F.2d 1318, 1325-26 (11th Cir. 1984); United States v. Nelson, 735 F.2d 1070, 1072 (8th Cir. 1984); United States v. Sutton, 732 F.2d 1483, 1493-94 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985); United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984); United States v. Parodi, 703 F.2d 768, 782 (4th Cir. 1983); United States v. Gonzalez, 700 F.2d 196, 202 (5th Cir. 1983); United States v. Parry, 649 F.2d 292, 294 (5th Cir. Unit B 1981); United States v. Provenzano, 620 F.2d 985, 1001 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); United States v. Dominguez, 604 F.2d 304, 311 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); United States v. Majors, 584 F.2d 110, 111 (5th Cir. 1978); United States v. Allen, 579 F.2d 531, 532-33 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978); United States v. Lanier, 578 F.2d 1246, 1255-56 (8th Cir.), *cert. denied*, 439 U.S. 856 (1978); United States v. Zuniga-Lara, 570 F.2d 1286, 1287 (5th Cir.), *cert. denied*, 436 U.S. 961 (1978); United States v. Wiggins, 530 F.2d 1018, 1022 (D.C. Cir. 1976).

In United States v. Maultasch, 596 F.2d 19, 24 (2d Cir. 1979), the United States Court of Appeals for the Second Circuit specifically reserved decision on this issue, finding that the opponent had waived this claim on appeal by failing to properly object at trial. Nevertheless, in a case decided before, and referred to in *Maultasch*, the court permitted the introduction of a prior consistent statement though a third party witness. *See* United States v. McGrath, 558 F.2d 1102, 1107 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978). The United States Court of Appeals for the Seventh Circuit also has taken an inconsistent approach to this issue. In United States v. West, 670 F.2d 675, 686-87

Before the prior statement may be admitted and presented to the jury, the court must preliminarily determine whether the statement is "consistent" with the courtroom account.[43] Because the consistency is relevant only to refute the alleged motive to falsify,[44] and not to reiterate the testimonial account, only so much of the prior declaration that rebuts the alleged falsification should be admitted. Significantly, 801(d)(1)(B) added a new dimension to how these statements were to be received. Where formerly admitted only for rehabilitative purposes, prior consistent statements are now admissible as *substantive* evidence.[45] In no other respect should the Rule be read to encroach upon or alter the pre-1975 evidentiary law governing the use of prior consistent statements. To the contrary:

(7th Cir.), *cert. denied*, 457 U.S. 1139 (1983), the court held that 801(d)(1)(B) requires that prior consistent statements be introduced only through the declarant, either on redirect examination or rebuttal. Nevertheless, in decisions decided before and after *West*, the court failed to address the third party witness issue, finding the prior consistent statements inadmissible on other grounds. *See* Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985); United States v. Guevara, 598 F.2d 1094 (7th Cir. 1979). However, in United States v. Harris, 761 F.2d 394 (7th Cir. 1985), Judge Bauer, the author of *West*, sustained the admissibility of a prior consistent statement which was introduced through a third party witness for rehabilitative purposes.

43. Preliminary questions concerning the admissibility of evidence are resolved by the court, often out of the hearing of the jury. *See* FED. R. EVID. 104(b). *See also* Christmas v. Sanders, 759 F.2d 1284, 1287-89 (7th Cir. 1985); United States v. Sutton, 732 F.2d 1483, 1493-94 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985); United States v. Rohrer, 708 F.2d 429, 433 n.4 (9th Cir. 1983).

44. *See* United States v. Dennis, 625 F.2d 782, 797-98 (8th Cir. 1980); *infra* notes 133-140 and accompanying text.

45. The Advisory Committee Note to 801(d)(1)(B) underscored the admissibility of prior consistent statements as substantive evidence and stated that "no sound reason is apparent why [they] should not be [so] received . . . ." 56 F.R.D. 183, 296 (1972). *See supra* note 35. In its discussion of 801(d)(1), the Committee further noted that this new departure was a "judgment [which] is more of experience than of logic." 56 F.R.D. at 296. In their *Federal Rules of Evidence Manual*, Professors Saltzburg and Redden analyzed the legislative process whereby the Senate's version of 801(d)(1)(B) (in which prior statements would not have been accepted for substantive purposes) was rejected in favor of the House proposal:

> The answer lies in practical aspects of testimony. Once a witness testifies and an attack is made on the witness' credibility, if the cross-examiner manages to impeach the witness or to break down the witness' story, it is likely that any prior consistent statement will fall with it. If the trial testimony is rejected as unbelievable by the trier of fact, an identical out-of-court statement also will be rejected.

S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 722-23 (4th ed. 1986); United States v. Gonzalez, 700 F.2d 196, 202 (5th Cir. 1983). This analysis is flawed. If the prior consistent statement was made before the motive to fabricate arose and thus directly responds to the impeachment, the theory of attack has been undermined and the trial testimony corroborated.

> the class of such prior statements which can potentially be so utilized as substantive evidence because of their exclusion from the definition of hearsay is carefully confined to those "[p]rior consistent statements [which] traditionally have been admissible [but only for the rehabilitative purpose of] rebut[ting] charges of recent fabrication or improper influence or motive."[46]

Certainly, to the extent that a prior consistent statement may be used for rehabilitative purposes, the Federal Rules have in no way altered prior law. Rule 801(d)(1)(B) employs the precise language—"rebut[ting] . . . charge[s] . . . of recent fabrication or improper influence or motive"—consistently used in the panoply of pre-1975 decisions. Moreover, the vast majority of decisions concerning 801(d)(1)(B) have relied upon the traditional time-line analysis, regardless of whether the prior consistent statements have been admitted for substantive or rehabilitative purposes. Therefore, while the Rule codified the traditional common law predicates regarding admissibility of prior consistent statements, it also expanded their uses once they are admitted.[47] Remarkably, 801(d)(1)(B) makes "substantive" what was formerly exclusively rehabilitative or corroborative. However, by removing the hearsay label from prior consistent declarations, 801(d)(1)(B) has not broadened the parameters of what is fundamentally a rule of exclusion;[48] but it has expanded the *effect* of their use. As this article will discuss, this major change was ill-conceived in its general purpose and improperly designed in its drafting.

III. The Components of Rule 801(d)(1)(B)

A. General Considerations

The relevancy of a prior consistent statement is that it is offered to rebut an express or implied charge of "recent fabrication *or* improper influence or motive."[49] Although the rule

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46. United States v. Check, 582 F.2d 668, 680 (2d Cir. 1973).

47. United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978); M. Graham, Handbook of Federal Evidence 721 n.83 (1981); 4 D. Louisell & C. Mueller, *supra* note 35, ¶ 420, at 187; 4 J. Weinstein, *supra* note 35, ¶ 801(d)(1)[01] (1985).

48. *See infra* notes 172-177 and accompanying text.

49. Fed. R. Evid. 801(d)(1)(B) (emphasis added) (full text *supra* note 3). In this respect, prior consistent statements under 801(d)(1)(B) function similarly to evidence of truthful character under Rule 608(a)(2) which is admissible only after the character of the witness for truthfulness has been challenged.

appears to propose two different types of charges as challenges to the credibility of a witness, most courts have interpreted these phrases as complimentary and have used them interchangeably,[50] even sometimes inconsistently.[51] Draftsmen should have expected these phrases to be understood as inextricably tied together because, as one commentator has observed, "improper motive or influence is an underlying reason for the fabrication, not really a separate charge."[52]

Consistently, the federal courts have applied the time-line analysis as a predicate to a consistent statement which has been "offered to rebut . . . a charge . . . of recent fabrication or improper . . . motive."[53] The courts have not distinguished between "improper motive" and "recent fabrication" as anything other than describing a charge of intentional falsification as a result of an improper motive.[54] Whether the falsification must have come as a result of a motive which was not present when the consistent statement was made is dependent only on whether the time-line analysis applies, not on whether recent fabrication is a separate charge.

While the term "recent" may appear to be superfluous and certainly relative,[55] it purposefully introduces the crucial element of the time frame during which the alleged motive to lie emerged. If improper influence or motive is the basis for the intentionally fabricated testimony, "recent" fabrication requires that the motive occur after the consistent statement was made. Thus, the phrase "recent fabrication" introduces two elements: first, with regard to "fabrication", an intentional or purposeful falsification; second, with respect to "recent", a falsification

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50. *See* United States v. Anderson, 782 F.2d 908 (11th Cir. 1986); United States v. Pierre, 781 F.2d 329 (2d Cir. 1986); United States v. Andrews, 765 F.2d 1491 (11th Cir.), *cert. denied*, 106 S. Ct. 815 (1986); United States v. Feldman, 711 F.2d 758 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983); United States v. Patterson, 644 F.2d 890 (1st Cir. 1981); United States v. Allen, 579 F.2d 531 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978).

51. *See* United States v. Nelson, 735 F.2d 1070 (8th Cir. 1984); United States v. Andrade, 788 F.2d 521 (8th Cir.), *cert. denied*, 107 S. Ct. 462 (1986).

52. Graham, *supra* note 6, at 583.

53. FED. R. EVID. 801(d)(1)(B).

54. *See* Breneman v. Kennecott Corp., 799 F. 2d 470 (9th Cir. 1986); United States v. Bowman, 798 F. 2d 333, 338 (8th Cir. 1986); United States v. Blankinship, 784 F.2d 317 (8th Cir. 1986); United States v. Pierre, 781 F.2d 329 (2d Cir. 1986); United States v. Andrews, 765 F.2d 1491 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 815 (1986); United States v. Feldman, 711 F.2d 758 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983); United States v. Knuckles, 581 F.2d 305 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978); United States v. Scholle, 553 F.2d 1109 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977).

55. Graham, *supra* note 6, at 583.

which results from a motive that developed after the statement was made.

B. The Motive to Fabricate

One of the most complex and conceptually difficult problems in the Rule's application is the way courts evaluate whether the impeachment is sufficient to trigger the operation of the Rule. Perhaps even more perplexing are two additional considerations. The first is the identification of the underlying motive to falsify. The second consideration is the tracing or dating of this motive to a particular time frame. Recognizing when the motive first arose is, of course, alone determinative of whether the prior consistent statement could have preceded it.[56]

The charge that a witness has a motive to lie and has fabricated his testimony is very common on cross-examination. Although most cross-examinations seem to employ this motive and most jurors seem to expect it, there are many notable and purposeful exceptions to the norm. "Motive" is without definition in the Federal Rules of Evidence.[57] The term has been defined by commentaries and cases as any state of mind that causes or induces a witness to testify falsely or incompletely.[58] While some have attempted to distinguish "influence" from "motive,"[59] the cases have consistently referred to the phrase

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56. *See infra* notes 102-108 and accompanying text.

57. The term "motive" appears only in Rule 801(d)(1)(B) and in Rule 404(b) of the Federal Rules of Evidence.

58. Motive is "[t]he inducement, cause or reason why a thing is done." BOUVIER'S LAW DICTIONARY 823 (Stud. ed. 1934). The motives which have been ascribed to witnesses for lying are multivarious and include the following examples: United States v. DeColto, 764 F.2d 690, 694 (9th Cir. 1985) (fear of prosecution); United States v. Crosby, 713 F.2d 1066, 1070-71 (5th Cir.), *cert. denied*, 464 U.S. 1001 (1983) (tailoring testimony to fit legal theory for acquittal); United States v. Rohrer, 708 F.2d 429, 433 (9th Cir. 1983) (attempt to strike a deal with the government); United States v. Parodi, 703 F.2d 768, 784 (4th Cir. 1083) (hope of leniency from government); United States v. Provenzano, 620 F.2d 985, 1001 (3d Cir. 1980), *cert. denied*, 449 U.S. 899 (1980) (attempt to gain release from prison); United States v. LeBlanc, 612 F.2d 1012, 1017 (6th Cir.), *cert. denied*, 449 U.S. 849 (1980) (plea agreement); United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979) (attempt to gain payoff as government informant); United States v. Lanier, 578 F.2d 1246, 1255-56 (8th Cir.), *cert. denied*, 439 U.S. 856 (1978) (attempt to avoid implication in theft); United States v. Scholle, 553 F.2d 1109, 1122 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977) (reconsideration of prison sentence); United States v. Lombardi, 550 F.2d 827, 828-29 (2d Cir. 1977) (conviction of defendant).

59. Professor Graham notes that "motive" represents "an emotional state . . . such as racial prejudice, greed, love or revenge," while "influence" is defined "as an outside force such as a bribe." Consequently, Professor Graham states that " 'motive' is the thrust of our concern" while " 'influence' as an independent ground for permitting rebut-

"improper influence or motive" as providing virtual correlatives in describing the multifarious charges that have triggered the admission of prior consistent statements under 801(d)(1)(B).[60]

A witness may be charged with intentional fabrication either directly or by implication.[61] Most often charges are raised

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tal is superfluous and confusing." Graham, *supra* note 6, at 584. To the extent that Professor Graham suggests that it is the witness' state of mind that alone triggers 801(d)(1)(B), regardless of what self-generated emotion or independent circumstance prompted or induced it, his analysis in consistent with the historical and current logic of the Rule. A witness has falsified, within the meaning of the Rule, when he has been charged, either directly or by implication, with intentional or purposeful fabrication that is traceable to a particular episode or circumstance. In Professor Graham's parlance, the "influence" is dispositive because it, alone, determines if and when the witness was induced or prompted to fabricate. A witness who testifies falsely because she has always hated Jews or has long carried a burning torch for the defendant is not aided by the fact that while operating under the identical spell she falsified previous accounts as well. If, however, her religious prejudice or infatuation may be traced to a time *after* which she made the consistent statement, the prior account effectively refutes the allegation of recent fabrication and the Rule may be invoked. Professor Graham astutely points out that the triggering mechanism may be tripped by any prong within Wigmore's emotional trinity, which Wigmore calls "untrustworthy partiality" (bias, interest, corruption) to which Graham adds as an additional component "coercion." *Id.* at 584-85. While the "[p]artiality of a witness may be evidenced either by the circumstances of the witness' situation, or by the conduct of the witness himself," Professor Graham improperly ignores the crucial time-line analysis when he says that a prior consistent statement under 801(d)(1)(B) is admissible whenever a jury "might naturally infer partiality in any of [these] four senses . . . ." *Id.* at 585. Graham, however, clarifies the issue by later noting that the Rule requires that the consistent statement be made prior to the alleged partiality so that it cannot be claimed that the same influence(s) produced both the in-court as well as the out-of-court accounts. "[A] prior consistent statement that occurred after the fabricating influence or motive arose does not rebut the charge that partiality prompted the witness' testimony." *Id.* at 587. In fact, Professor Graham again quotes Wigmore for this contention:

> A consistent statement, at a *time prior* to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence.

Id. at 587 n.41 (*quoting* 4 J. WIGMORE, *supra* note 2, § 1128, at 268).

60. *See supra* note 27.

61. *See* United States v. Andrade, 788 F.2d 521, 533 (8th Cir.), *cert. denied*, 107 S. Ct. 462 (1986) (lingering suggestion about collaboration); United States v. Andrews, 765 F.2d 1491, 1501-02 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 815 (1986) (witness could not see adequately out of window); Christmas v. Sanders, 759 F.2d 1284, 1289 (7th Cir. 1985) (witness made up a new story continuing equivocation); United States v. Griggs, 735 F.2d 1318, 1324-27 (11th Cir. 1984) (witness working for the government to trap the defendant); United States v. Crosby, 713 F.2d 1066, 1071-72 (5th Cir.), *cert. denied*, 464 U.S. 1001 (1983) (witness made up story about effects of PTSD syndrome); United States v. Feldman, 711 F.2d 758, 766 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983) (deal with the government); United States v. Gonzalez, 700 F.2d 196, 204 (5th Cir. 1983) (witness contrived the defense of lack of criminal intent); United States v. Duncan, 693 F.2d 971, 980 (9th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983) (false statements made to customs agents); United States v. Coleman, 631 F.2d 908, 914 (D.C. Cir. 1980) (witness embel-

by impeachment of the witness on cross-examination. The methods employed to attack the witness' credibility may take various forms. Customarily, the impeaching attack occurs as impeachment by prior inconsistent statement or impeachment by omission. Impeachment by prior inconsistent statement[62] is a challenge that the witness has previously said something inconsistent or contradictory to his courtroom testimony. Impeachment by omission[63] is an assertion through cross-examination that the witness has failed to previously relate the same account given at trial. Although these techniques often suggest that the witness has intentionally falsified, they are not necessarily sufficient to create the required inference. Without further attribution of a specific and articulable motive to fabricate, these forms of impeachment should not satisfy the conditions precedent for invoking the Rule.[64]

The charge that a witness has consciously lied may also be asserted through the testimony of a witness or the production of documents. Often, the charge of motive is unmistakable and is readily traceable to a particular time during the witness' involvement. There are, however, occasions when the charge of recent fabrication is not at all clear from the cross-examination.[65] In this situation, courts have relied on the cross-examiner's opening statement,[66] anticipated closing statement, and overall

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lished description); Garcia v. Watkins, 604 F.2d 1297, 1299 (10th Cir. 1979) (witness lied to collect insurance money); United States v. Baron, 602 F.2d 1248, 1252 (7th Cir.), *cert. denied*, 444 U.S. 967 (1979) (motive to frame defendant).

62. *See infra* notes 107-132 and accompanying text.

63. *See* Hewitt v. Corey, 150 Mass. 445, 23 N.E. 223 (1890). Impeachment by omission occurs when an "attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the facts to which he has now testified." *Id.* at 446, 23 N.E. at 223.

64. *See* Christmas v. Sanders, 759 F.2d 1284, 1288-89 (7th Cir. 1985) ("consistent equivocation" is not necessarily "recent fabrication"); United States v. Nelson, 735 F.2d 1070, 1072 (8th Cir. 1984) ("differing explanations on prior occasions" differs from recent fabrication). *Compare* United States v. Stuart, 718 F.2d 931, 934-35 (9th Cir. 1983) (recent fabrication motive called into question) *with* Garcia v. Watkins, 604 F.2d 1297, 1299 (10th Cir. 1979) *and* United States v. Herring, 582 F.2d 535, 540-41 (10th Cir. 1978). *But see* United States v. Blankinship, 784 F.2d 317, 320 (8th Cir. 1986); *cf.* United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986).

65. *See* Christmas v. Sanders, 783 F.2d 1284, 1288-89 (7th Cir. 1985). *See also infra* note 71.

66. United States v. Baron, 602 F.2d 1248, 1250 (7th Cir.), *cert. denied*, 444 U.S. 967 (1979); United States v. Allen, 579 F.2d 531, 532 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978); United States v. Simmons, 567 F.2d 314, 321-22 (7th Cir. 1977).

case theory[67] in determining whether the attack raised the implication of conscious deceit.

If the charge of improper motive is made through insinuation, suggestion, inference, or imputation, and the jury may infer that the alleged motive was recently fabricated, a prior consistent statement should be admissible.[68] Often, the charge includes more than a single motive; the cross-examiner challenges different aspects of a witness' account on the basis of different motivations.[69] In these instances, the court must discern whether

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67. United States v. Wright, 783 F.2d 1091, 1099 n.5 (D.C. Cir. 1986); Christmas v. Sanders, 759 F.2d 1284, 1287-88 (7th Cir. 1985); United States v. Feldman, 711 F.2d 758, 766 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983); Garcia v. Watkins, 604 F.2d 1297, 1299 n.2 (10th Cir. 1979).

68. *See* United States v. Coleman, 631 F.2d 908 (D.C. Cir. 1980). There the court held that even though the question on cross-examination which raised the implication of recent fabrication was withdrawn by the cross-examiner, the "inference" was "necessarily left lingering," and a prior consistent statement was admissible to defeat that inference. *Id.* at 914. A similar position was taken by the court in United States v. Andrade, 788 F.2d 521 (8th Cir.), *cert. denied*, 107 S. Ct. 462 (1986), where "the cross-examination . . . deliberately created the inference of inaccuracies and left the lingering suggestion of collaboration between [the two Detectives]." *Id.* at 533. *See also* United States v. Baron, 602 F.2d 1248, 1253 (7th Cir.), *cert. denied*, 444 U.S. 967 (1979) (intent to imply recent fabrication not relevant if inference "fairly arises from the line of questioning").

69. One of the more vexing problems has been the identification of the "motive to fabricate" and the concomitant "time" or date when that motive first arose, especially when the cross-examiner's theory infers more than one motive to fabricate. If the challenged motive has been clearly expressed or implied, the time-line analysis may be applied without much difficulty. When the cross-examiner's theory has been more subtle or there appears to be a number of potential motives—some of which predate, other which postdate the prior consistent statements—courts have resolved this inquiry at times illogically and often inconsistently.

In Christmas v. Sanders, 754 F.2d 1284 (7th Cir. 1985), the United States Court of Appeals for the Seventh Circuit held that the trial judge did not abuse her discretion in finding no charge of recent fabrication since the impeachment suggested the "charge that the witness is a liar as well as a charge that the witness is making up a new story. *Id.* at 1288. The court found it significant that the cross-examiner "maintain[ed] that he never intended to show recent fabrication [but] rather [that the witness] had consistently equivocated on her version of the events and hence could not be believed." *Id.* Had the jury been able to conclude that the witness concocted her "new story" as a result of a motive which did not exist when she gave her prior consistent account, a finding of recent fabrication would have been appropriate and the prior consistent statement admissible. In *Baron*, however, the court noted that the cross-examiner's intent "is irrelevant if [the inference of recent fabrication] fairly arises from the line of questioning he pursued." *Baron*, 602 F.2d at 1253. Similarly, in United States v. Doyle, 771 F.2d 250 (7th Cir. 1985), the mere allegation by defense counsel that the motive to lie existed at the time of the consistent statement was not, necessarily, sufficient to preclude the admission of the statement. The consistent statement in *Doyle* was a conversation between the impeached witness and a co-conspirator about the defendant's role in a bombing. No evidence was presented by the defendant of his claim, first introduced on appeal, that the witness had the same motive to lie to his co-conspirator that he had at trial. The

the challenged influences are merely old wine in new bottles, thereby offering the witness the same inducement to tell a similar story. In these types of situations, a change in the witness' circumstances, although not present when the witness told the consistent account, has not presented a different reason for allegedly falsifying than was already present; therefore, the in-

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court relied on its analysis in *Feldman*, 711 F.2d at 758, a case in which the court purported to embrace the time-line analysis but twisted it beyond recognition.

In *Feldman*, the government presented the defendant's former co-conspirator who was cross-examined about his plea agreement. The clear implication of the impeachment was that the witness was motivated to lie by "a desire to gain favorable treatment in exchange for implicating the defendant." *Doyle*, 771 F.2d at 257. In response, the government was permitted to introduce a statement the witness had made to FBI agents prior to his formal acceptance of the plea agreement which was consistent with his trial testimony because "there was no evidence of such a motivation [to lie to the FBI] . . . ." *Id.* With approval, *Doyle* quotes *Feldman* that "[t]he statement made to the FBI prior to entering into a plea agreement was therefore relevant to rebut inferences of recent fabrication motivated by the agreement." *Id.* (quoting *Feldman*, 711 F.2d at 766). The only conceivable implication developed by the cross-examination, however, was that the co-conspirator lied to the FBI to obtain a favorable plea bargain which, presumably, contained a provision that he would continue to tell the truth" or the "same story" he had consistently related. The witness' motivation to lie after the plea bargain was formalized must have been the same as when he first talked to the FBI, since this witness spoke with the FBI the "same story" so that he would receive leniency.

In virtually every case in which any witness confesses to government officers and further implicates other individuals in an effort to obtain a deal, the same or very similar motivations are operating. Only where the evidence suggests that the interview took place without regard to a plea agreement or the promise of favorable treatment or consideration would the consistent statement predate the motive to lie at trial and therefore be relevant. *See* United States v. Weil, 561 F.2d 1109, 1111 (4th Cir. 1977) (prior consistent statement is material only if given before promise of leniency).

In United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984), the court was presented with a similar situation. In *Henderson*, a government witness made a statement to the FBI at the time of his arrest which was ultimately consistent with his trial testimony which, itself, was induced by a plea agreement. The court concluded that Weil did not mandate reversal because of the "distinction . . . between statements made to police after arrest but before a bargain and statements made after an agreement is reached." *Id.* at 139. Although at trial, the defense contended that the witness' statement and motive arose at the initiation of the plea agreement, on appeal the defense contended that the witness' motive to lie arose at the time of his arrest and remained consistent throughout the trial. The court rejected this contention, noting that "by definition such [post-arrest] statements would never be prior to the event of apprehension or investigation by the government which gave rise to a motive to falsity . . . [and would] eviscerate the rule." *Id.*

The court's analysis goes too far. Certainly, a witness' statement to agents or officers following his arrest before any evidence or inference of cooperation has been presented is prior to the motive to fabricate and should be admissible. However, where the witness speaks to the FBI following his arrest because he hopes to work out a plea bargain or where the subject of cooperation is discussed, such statements should not be admissible. *Contra* United States v. Parodi, 703 F.2d 768, 784 (4th Cir. 1983) ("hope of leniency" is too insubstantial to constitute a motive to fabricate).

court account cannot be said to have been recently fabricated.[70] Trial courts should therefore carefully examine the theory underlying the charge of improper motive before admitting the prior consistency.

The following hypothetical case, *United States v. Greenpockets,* a prosecution for bank robbery, illustrates these considerations. A witness, Weasel, observes a bank robbery and then watches the perpetrators flee from the scene in the getaway car. The defendant, Greenpockets, is known to deal in Cadillacs. Several hours after being informed that he is suspected of being Greenpockets' accomplice, Weasel told police that the perpetrators fled in a Cadillac. Three weeks after this interview, Weasel testified before a grand jury that he saw the robbers leave the area in a Chevrolet. Approximately two months after this grand jury appearance, Weasel is seen by undercover agents having dinner with Greenpockets' counsel in a small but elegant French restaurant. At trial, Weasel testifies that he watched the robbers speed away in a Chevrolet. If at trial the prosecution impeaches Weasel with his earlier "inconsistent" statement and alleges that Weasel is lying in an effort to distance himself from the defendant and avoid suspicion, Weasel's prior consistent statement made before the grand jury is inadmissible. Under this attack on his credibility, Weasel has merely given either an inconsistent or contradictory account as a result of a motive which was similarly

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70. In United States v. Lombardi, 550 F.2d 827 (2d Cir. 1977), the court found that "the hopes of leniency" which provided the witness with the motive to lie at the first trial involving the codefendants, was not the same motive as "want[ing] to get a conviction [in the trial of the defendant] so that he can get the best possible deal." *Id.* at 828-29. Here too, the witness testimony was the result of the same inducement—cooperation meant a better deal. Cooperation, as was presumably made clear at the outset, however, included testimony in all trials against all defendants. Otherwise, the government could simply elect to try co-conspirators separately in order to use the prior statements of a witness. *See also* United States v. James, 609 F.2d 36, 49-50 (2d Cir. 1979), *cert. denied,* 445 U.S. 905 (1980) (requirement that witness cooperate at future trials was different than motive during grand jury testimony); United States v. DeCoito, 764 F.2d 690, 694 (9th Cir. 1985) (statement by witness when he neither anticipated nor feared prosecution at that time could not have been motivated by the chance to avoid prosecution).

Although a witness may have been cooperating with the government when the prior consistent statement was made, if the nature of the cooperation changes, a new or different motive may be implied thus satisfying the time-line analysis. *See* United States v. Shulman, 624 F.2d 384, 393 (2d Cir. 1980) (defense suggested that the motive to falsify arose two weeks after the signed cooperation agreement); United States v. Scholle, 553 F.2d 1109, 1122 (8th Cir.), *cert. denied,* 434 U.S. 940 (1977) (motive to obtain favorable sentence by testifying before grand jury is different than motive to obtain reconsideration of sentence).

present when he testified before the grand jury.[71] If however, the prosecution cross-examines Weasel concerning his dinner at the French restaurant with Greenpockets' counsel and suggests a motive of bribery or coercion, the grand jury testimony is admissible because it occurred before the restaurant meeting. The mo-

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71. If the credibility or reliability of a witness is challenged on cross-examination with no implication that the consistent account was offered before the witness developed these flaws, the statement should not be admissible, as the following paradigmatic cross-examination illustrates:

Q: Mr. Weasel, you were standing in a teller's line during the bank robbery, were you not?

A: Yes.

Q: You were in line number two, the next line over, standing at the head of the line—closest to the teller?

A: That's correct.

Q: And the robbery took place in the next line, line number three, didn't it?

A: It did.

Q: The robber was standing at the head of line number three, wasn't he?

A: Yes.

Q: Now, Mr. Weasel, prior to the day of the robbery, you knew the defendant, Marvin Greenpockets, didn't you?

A: Not really.

Q: You had done business with him, hadn't you?

A: Not with him directly.

Q: You had both been part of several business arrangements?

A: You could say that.

Q: You both had business acquaintances in common?

A: I suppose so.

Q: You knew that Greenpockets dealt in Cadillacs?

A: A lot of people deal in Cadillacs.

Q: And Greenpockets dealt in Cadillacs.

A: He still does.

Q: You bought a Cadillac from Greenpockets.

A: Yes.

Q: In fact, over the years, you have bought three Cadillacs from the defendant, haven't you?

A: Yeah.

Q: And have sent him a number of your clients who have also bought cars from him.

A: Yeah.

Q: You know him to be one of the area's largest Cadillac dealers, don't you?

A: Right.

Q: And you consider yourself to be one of his biggest clients, don't you?

A: Never really thought about it.

Q: You did think about the description of the robbers and their car that you gave to the police when you were questioned after the robbery, didn't you?

A: Sure.

Q: And having thought about the description of the car, you lied to the grand jury, didn't you?

A: Yes.

Q: One of the lies you told them was that the getaway car was a Chevrolet.

tive to falsify arose after the prior consistent statement was given.

C. *The Modes of Impeachment*

More than occasionally, courts have erroneously permitted the admission of a prior consistent statement *whenever* a witness has been impeached or challenged.[72] Certain modes of impeachment, however, can in no way constitute the type of improper motive that triggers admissibility of a prior consistent statement. Attacking the credibility of a witness through opinion or reputation evidence of untruthful character,[73] specific instances of misconduct[74] or a criminal conviction[75] should not permit the employment of 801(d)(1)(B).

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72. United States v. Blankinship, 784 F.2d 317, 320 (8th Cir. 1986); United States v. Pierre, 781 F.2d 329, 333-34 (2d Cir. 1986); United States v. Harris, 761 F.2d 395, 398-99 (7th Cir. 1985); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980).

73. *See* Rule 608(a), which provides as follows:

> (a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

FED. R. EVID. 608(a).

74. *See* Rule 608(b), which provides as follows:

> (b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608(b).

75. Rule 609 provides as follows:

> *Impeachment by Evidence of Conviction of Crime*
>
> (a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) *Time limit.* Evidence of a conviction under this rule is not

Similarly, a cross-examination which implies that a witness is mistaken, in error, or simply wrong does not implicate a motive to falsify. For example, a much used weapon in the trial lawyer's arsenal is the cross-examination which establishes the theory of mistaken identification.[76] Although statements of iden-

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admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever, is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

FED. R. EVID. 609.

76. A cross-examination which impeaches an identification witness when conducted properly in a case like *Greenpockets* where the cross-examiner has ample ammunition to reinforce her theory, is a delicate and time-consuming exercise. The following is an example of a small portion of this type of cross-examination:

Q: Mr. Weasel, while you were standing in line at the bank you were concerned that you were already late for a business meeting?

A: That's correct.

Q: In fact, you entered the bank only because the cash machines outside were undergoing repair?

A: That's right.

Q: And while waiting in line you asked the person ahead of you to watch your place while you called your office to inform them you would be late?

A: Yes.

tification are no longer hearsay declarations and are admissible without additional foundation,[77] an attack that establishes an inference that the witness could not adequately see or had limited opportunity to observe,[78] and is therefore mistaken in his conclusion, should not lay the groundwork for the admission of the witness' previous description of either the perpetrator or the event. Suppose that in our hypothetical case involving Greenpockets' prosecution for bank robbery, Weasel is interviewed immediately after the incident and provides the following description of one of the perpetrators: "White male, about 35-36 years old, 140 lbs., short brown hair, wearing blue jeans, dark blue

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Q: When you returned to the line your place had been passed?

A: That's true.

Q: And you argued with the individual who was to be served next that your place had been saved.

A: I wouldn't say argued, I'd say "discussed."

Q: And it was during this conversation or discussion that you first realized something was wrong in the line next to you?

A: Yes.

Q: As you looked to your left you saw an individual whom you told us was not wearing a hat walk away from this other line?

A: Yes.

Q: When you looked up, this person was walking toward the door?

A: Yeah, but I saw him.

Q: What you saw, you would agree, was a fleeting glance?

A: I guess you might call it that.

Q: Mr. Weasel, you have also called it that, haven't you Sir?

A: Yes.

Q: You spoke with Detective Strapp several hours after the robbery?

A: That's correct.

Q: And Detective Strapp told you to try and picture the robber as clearly as you could and to give him a description of what you remembered the robber looked like?

A: Something like that.

Q: Detective Strapp asked you if you would be able to make an identification of the robber, didn't he?

A: Yes.

Q: And you answered that question for him didn't you?

A: Yes.

Q: You answered him truthfully?

A: Of course.

Q: You told Detective Strapp that you didn't think that you would recognize the person who robbed the bank if you saw him again. Isn't that what you stated to Detective Strapp?

77. FED. R. EVID. 801(d)(1)(C). *See supra* note 5.

78. Any attack or impeachment of a witness that challenges the witness' ability to perceive or to use any of his senses, or his basic competency or capacity, will not, on its own, permit rehabilitation by a prior consistent statement. Invariably, a witness' inability to perceive or lack of competency has been frozen in time and, with the exception of mental capacity, cannot change. Consequently, the traditional time-line predicates are irrelevant to any consideration in this area.

sweater with side buttons and a red baseball cap with a Mickey Mouse emblem." He is not specifically asked nor does he volunteer information about height. In fact, Greenpockets is approximately 5 ft. 10 in. tall, and in all other respects matches the physical description. In response to the question as to whether he could make an identification, Weasel admitted he got "a fleeting glance" and "does not think he would recognize the robber if he saw him again." On direct examination at trial, Weasel described the robber consistent with his earlier description, but stated that the perpetrator was 5 ft. 10 in. tall and was not wearing a hat. He also testified that he watched the robbers for several minutes and "dreams about those men every night." At the conclusion of the direct examination, Weasel identified Greenpockets as one of the men who robbed the bank. In a cross-examination that is designed to suggest to the jury that Weasel had insufficient opportunity to observe the bank robbers,[79] Weasel is impeached with his inconsistent statements about the baseball cap and with his omission about the height of the robber. He is also cross-examined about his observation of the perpetrators and his statement that he would not recognize the perpetrator if seen again, as indications of his uncertainty about what he actually saw. Under this type of cross-examination, Weasel's prior consistent statement would be inadmissible.[80] Because this line of questioning does not establish that the witness has intentionally or consciously falsified, but that he is honestly mistaken or confused, the prior consistent description is as much a product of misjudgment as is the conclusion testified to in the courtroom. Similarly, if on cross-examination the witness is accused of imagining or fantasizing, only a consistent statement that predates the genesis of the fantasy is relevant to rebut the charge of recent fabrication.

Before the enactment of the Federal rules of Evidence, many commentaries[81] and a few courts[82] suggested that if a wit-

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79. *See supra* note 76.

80. A witness' prior statement of a description should not be confused with a prior statement "of identification of a person made after perceiving him," which, under the Federal Rules of Evidence, is not hearsay and therefore admissible for its truth. FED. R. EVID. 801(d)(1)(C). Accordingly, any individual who heard the statement of identification would be permitted to testify to the event.

81. *See* C. MCCORMICK, *supra* note 35, § 49, at 120. If impeachment amounts to charge of inaccurate memory, the consistent statement made when the event was recent and memory fresh should be received in support. *Id.* at 120 n.88. Significantly, Professor McCormick's single basis of support for this proposition is Jones v. Jones, 80 N.C. 246

ness' live testimony is challenged as the product of an inaccurate memory or a faulty recollection, a prior consistent statement may legitimately be offered to rebut the attack. However, only two circuit court decisions since the advent of 801(d)(1)(B) have ostensibly endorsed this view.[83]

(1879). *Jones* places this issue in its broadest context by stating "*any imputations* upon the credibility of the witness" give rise to the admissibility of a prior consistent statement. *Id.* at 249-50. Moreover, *Jones* was produced in a jurisdiction which had taken a notably permissive or open approach to the admission of prior statements, allowing them to follow any type of impeachment. *Id.* at 250. This view is clearly contradictory to that taken by the vast majority of cases which both predate and follow the Federal Rules and which permit the admission of prior consistent statements only after certain types of impeachment.

A challenge to or attack of a witness' memory traditionally has not been within this type of impeachment domain. Judge Weinstein's comments are further indicative of the uncertainty surrounding the issue of whether a prior consistent statement is relevant to rebut a loss of memory charge. 4 J. WEINSTEIN, *supra* note 35, ¶ 801(d)(1)(B)[01], at 801-152 to -154. Judge Weinstein points out that the Advisory Committees do not address the question of whether the substantive effect of 801(d)(1)(B) extends to situations where the imputation is one of inaccurate memory. He further notes that fabrication, influence, and motive may well have been intended to implicate situations where the witness deliberately changes or consciously alters his story. *Id.* at 801-158 to 159 & n.14.

The issue of whether the substantive effect of 801(d)(1)(B) extends to charges of inaccurate memory is also addressed by Louisell and Mueller. They write that admissibility in this circumstance "plainly serves the rule although it stretches its language beyond its apparent meaning." D. LOUISELL & C. MUELLER, *supra* note 35, § 420, at 196-97.

82. Felice v. Long Island R.R., 426 F.2d 192, 197 n.6 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970), addresses the issue in a footnote by quoting McCormick's suggestion that a charge of faulty recollection may give rise to the admissibility of a prior consistent statement. In *Felice*, however, the witness was impeached by omission which was not necessarily the result of faulty recollection. Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 60-62 (2d Cir. 1972), quotes both *Felice* and Professor McCormick in support of admissibility. There was no issue of faulty recollection in *Applebaum*, however, since the witness was impeached with an improper motive, not an inaccurate memory.

In United States v. Keller, 145 F. Supp. 692 (D.N.J. 1956), the court confronted the issue of memory even though it was not raised by either party. "Where the judge construes a line of questioning to be directed towards impugning the memory of a witness, then he will allow a consistent statement made when the event was recent and memory fresh to be received in support." *Id.* at 697-98. Nevertheless, as the court points out, the impeachment of the witness was not a charge of faulty memory, but a charge of contrivance.

83. *See* United States v. Coleman, 631 F.2d 908, 914 (D.C. Cir. 1980); United States v. Baron, 602 F.2d 1248, 1251 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979); Baker v. Elcona Homes Corp., 588 F.2d 551, 559 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979). In *Coleman*, the prior consistent statement was admitted to rebut an implied charge that the witness' description had been recently fabricated or embellished for trial. In dictum, the court, ostensibly *sua sponte*, proceeded to raise the issue of faulty memory: "Even where the suggestion of contradiction is only imputation of an inaccurate memory, a prior consistent statement is admissible to rebut the inference." *Id.* at 914. For its authority, *Coleman* relied upon *Applebaum* and United States v. Knuckles, 581 F.2d 305 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978), two decisions which seem to have absolutely nothing to do with recollection.

In one of these cases, *Baker v. Elcona Homes Corp.*,[84] the United States Court of Appeals for the Sixth Circuit suggested that a consistent statement made prior to the time when the cross-examiner charges loss of memory or faulty recollection is relevant to rebut the attack and therefore admissible under 801(d)(1)(B). In *Baker*, the witness was "vigorously cross-examined about his recollection of the accident" and ostensibly impeached with a prior inconsistent statement. Because the cross-examiner was, in effect, implying that the witness' recollection was more accurate when he gave this inconsistent statement than it was at trial, a second statement, given to the police while the witness was hospitalized following the accident and *prior* to the time that his recollection became faulty, was admissible. Rather than the witness volunteering his faulty recollection as an explanation or excuse for either the inconsistent statement or other impeaching evidence, the cross-examiner was directly attacking the witness' ability to recall particular events at or near the time that the consistent statement was made.[85] Consequently, the consistent statement was not a self-serving declaration offered by the witness to account for the inconsistency, but was a direct response to the charge of faulty memory.

Because a prior consistent statement becomes relevant only in response to an impeachment or challenge and only if the consistency refutes the cross-examiner's specific charge, a prior consistent declaration may rehabilitate a witness' account only if the consistent statement was made at a time when the cross-examination has expressly or impliedly charged that the witness' memory was more accurate. *Baker* seems to embrace this analy-

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In *Applebaum*, the court permitted the admission of a prior consistent statement to rebut the cross-examiner's charge of recent fabrication because it "fail[ed] to find any support for the [trial court's] conclusion that the [statement] should have been excluded because a motive to fabricate had existed 2-½ years earlier, when it was given." *Applebaum*, 472 F.2d at 61. On the basis the predicates of the traditional time-line analysis were satisfied and the consistent statement was admitted. Despite this holding, however, the court cited the 1954 edition of Professor McCormick's treatise: "[E]ven when the self-contradiction amounts only to an imputation of inaccurate memory a 'consistent statement made when the event was recent and memory fresh should be received in support.' " *Id.* at 61 (citation omitted).

In *Knuckles*, the court simply admitted the prior declaration because it was "made prior to the suggested motive for falsification." 581 F.2d at 314. In not one of these cases does faulty recollection figure in the cross-examiner's charge, let alone trigger the admission of the prior consistent statement.

84. 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

85. *Id.* at 559.

sis. Therefore, the admission of a prior consistent statement is appropriate when recollection is attacked, but only when the cross-examiner raises the inference by challenging the witness' present memory.[86]

This situation commonly arises when the cross-examiner suggests, and the witness agrees, that his memory has not improved with age and that his recollection was fresher at the time when the inconsistent statement or other impeaching event occurred.[87] In this type of circumstance, a statement preceding the

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86. *See* C. MCCORMICK, *supra* note 35, § 49, at 118: "[I]f the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember . . . the prior consistent statement has no relevancy to refute the charge unless [it came] before the source of the bias, interest, influence or incapacity originated."

87. Compare the following cross-examination technique which demonstrates the cross-examiner's theory that the witness' memory has deteriorated since the witness made what has turned out to be a prior inconsistent statement.

Q: Detective Strapp, you interviewed the teller, Mr. Scatterbrains, immediately following the bank robbery, about one year ago, isn't that correct?

A: Yes, Sir, 13 months ago, to be exact.

Q: You, of course, were interested in getting as detailed a description from him about the man who robbed him, isn't that right?

A: That's correct.

Q: As so, you asked him to describe the robber in as much detail as he could remember, didn't you?

A: Yes, in words to that effect.

Q: That of course is standard police procedure in cases where the identity of the perpetrator is unknown?

A: That's correct.

Q: You then wrote down the information that he gave you?

A: Yes.

Q: And within two days of your interview with Mr. Scatterbrains, you included that information in your police investigation report, didn't you?

A: That's correct.

Q: You relied, in part, on your notes of your interview with Mr. Scatterbrains when you wrote your report, didn't you?

A: Yes.

Q: And you also remembered what he had told you within those last two days, isn't that true?

A: Yes.

Q: When you wrote your report, you remembered what he had told you about what the robber had looked like?

A: Yes.

Q: His description was fresh in your mind?

A: It was.

Q: You had no difficulty recalling his words, did you?

A: No.

Q: In the year since you had interviewed Mr. Scatterbrains, you have conducted numerous interviews.

A: Many.

Q: Of civilian witnesses, police officers—all types of witnesses in many different

impeaching event is a relevant rebuttal because it is the only evidence to refute the implication developed on cross-examination that the witness cannot be believed because the in-court account is the result of a memory gone awry. If, however, there has been no charge that the witness' recollection has deteriorated over time, or if the witness volunteers a lack of memory as an explanation for an impeaching event, a prior consistent statement is not relevant because it is only marginally probative of the focused inquiry—whether the in-court explanation of faulty recollection is credible.[88]

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kinds of cases.

A: That's true.

Q: You would agree, would you not, Detective, that your recollection of what Mr. Scatterbrains told you was clearer when you wrote your investigation report than it is here in court today?

A: Probably.

88. Professor Graham has embraced the view that a prior consistent statement is relevant to "explain" a loss of memory in two other situations. The first is where the witness volunteers the loss of memory to explain the presence of an inconsistent account. The second is where the witness' testimony has been challenged as the product of a faulty recollection, but the cross-examination does not allege or imply that the witness' memory has either been intact or has deteriorated since the making of the inconsistent statement or other impeaching event.

To support these views, Professor Graham discussed Thomas v. Genezer, 137 Conn. 415, 78 A.2d 539 (1951). Graham, *supra* note 6, at 604-06. In *Thomas*, the defendant's witness was impeached with a prior inconsistent statement which he gave to the plaintiff's investigator five years after an accident. To explain this inconsistency, the witness volunteered that he suffered a lapse of memory and had failed to refresh his recollection with a prior statement he had made 36 days after the accident. This prior statement was consistent with the witness' testimony and was admitted at trial. Professor Graham contends that the consistent statement was "relevant to rebut the implied charge raised by the cross-examiner as to the accuracy of the witness' recollection" at trial. Graham, *supra* note 6, at 606. Had the cross-examination adopted this theory, the prior statement would refute the challenger's assertion and would have been admissible.

In *Thomas*, however, there was no charge by the cross-examiner of memory loss. Rather, it was the witness who volunteered a lapse of memory for the prior inconsistent account and stated that he had made an earlier statement during a time when his recollection was intact. This author contends that in the absence of a charge of faulty recollection or of a suggestion that the witness' recollection was more accurate during an earlier period, the consistent account is purely self-serving. The account is not relevant because it does not serve to refute any charge since none has been offered. This analysis is in accord with Rule 612 of the Federal Rules of Evidence, which provides as follows:

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, *an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to in-*

The impeachment of a witness by the contradictory account of another "[is] not, and historically [has] not been, a sufficient basis for admitting prior consistent statements."[89] Consistent

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> *troduce in evidence those portions which relate to the testimony of the witness.* If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

FED. R. EVID. 612 (emphasis added). Since the writing may be simply a self-serving consistent account of the witness' courtroom presentation, it does not become relevant unless the cross-examination challenges the witness' recollection.

As further support for his theory, Professor Graham relies on Annotation, *Admissibility, for Purpose of Supporting Impeached Witness, of Prior Statements by Him Consistent with His Testimony,* 75 A.L.R.2D 909, 929 (1961); Annotation, *Admissibility, for Purpose of Supporting Impeached Witness, of Prior Statements by Him Consistent with His Testimony,* 140 A.L.R. 21, 48 (1942); C. MCCORMICK, *supra* note 35, § 49, at 105 n.88; and *United States v. Keller,* 145 F. Supp. 692 (D.N.J. 1956). Neither annotation provides any federal case support for this proposition besides *Keller. Keller,* however, had nothing to do with memory or recollection. *Keller* was resolved on the traditional predicate of the time-line analysis, as the following passage makes clear:

> *Where the judge construes a line of questioning to be directed towards impugning the memory of a witness,* then he will allow a consistent statement made when the event was recent and memory fresh to be received in support. But in the case at bar, the impeachment of [the witness] was not directed to his memory but to impeachment interpretable as a charge of contrivance. The only time sequence pertinent here . . . is whether the prior consistent statement was made before the plan or contrivance to give false testimony arose. Judge Learned Hand pointed out in *Di Carlo* that "[i]t is well settled that, when the veracity of a witness is subject to challenge because of motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose."

Keller, 145 F. Supp. at 697-98 (emphasis added) (citations omitted). In dictum, however, *Keller* supports the theory that only when recollection has first been attacked is a consistent statement admissible to refute the challenge to memory.

The A.L.R.2d commentary furthers mentions *Thomas* as well as Jones v. Jones, 80 N.C. 246 (1879), in which the court supports admissibility of prior consistent statements not only following a charge of faulty recollection, but following any type of impeachment. Finally, Professor Graham relies on McCormick's proposition that "consistent statement[s] made when the event was recent and memory fresh" should be admissible when the charge amounts to one of inaccurate memory. C. MCCORMICK, *supra* note 35, § 49, at 120. McCormick relies primarily on *Jones* as authority for this assertion. *See supra* note 81.

89. United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978).

statements in no way respond to the assertion that the witness' testimony should be rejected in favor of the testimony of others. A witness may be as consistently wrong in the retelling of his tale as he was the first time he told it:

> A former consistent statement helps in no respect to remove such discredit as may arise from a contradiction by other witnesses. When B is produced to swear to the contrary of what A has asserted on the stand, it cannot help us in deciding between them, to know that A has asserted the same thing many times previously. If that were an argument then the witness who had repeated his story to the greatest number of people would be the most credible.[90]

Impeachment by contradiction, however, rarely stands alone; it is generally accompanied by evidence of a contradictory or alternative theory. The witness cannot be believed not only because his account is unbelievable, but because the other witness' testimony is the true factual rendition. In this respect, the evidence serves a dual purpose. On the one hand, the witness' testimony has been impeached and challenged as incredible. On the other hand, and perhaps of primary importance, the evidence is offered as a substantive or truthful account which, if nothing more, may complete or present a prima facie presentation.[91]

This type of general attack on a witness' credibility differs from the charge of recent fabrication precisely because an improper motive is absent. The denial of contradictory allegations in this context cannot refute what the cross-examination never presented. Consequently, in *United States v. Wright*,[92] a case in which the defendant denied his co-defendant's allegations of duress and thereby attacked his credibility, but presented no suggestion that the duress defense was "recently" concocted, the court properly concluded that a charge of recent fabrication had not been made.[93] When the basis of an attack on a witness' cred-

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90. *Quinto*, 582 F.2d at 234-35. *But see* United States v. Iaconetti, 406 F. Supp. 554, (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir.), *cert. denied*, 429 U.S. 1041 (1976), discussed in Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 891-92 (1982).

91. *See infra* notes 135-138 and accompanying text.

92. 783 F.2d 1091 (D.C. Cir. 1986).

93. In *Wright*, two defendants, Wright and Moss, were convicted of kidnaping Edith Rosenkranz. Moss admitted his principal role in the abduction, but claimed that he acted under duress created by Wright. Wright presented an insanity defense and denied Moss' allegations of duress. The prosecution suggested that Moss invented his story after

ibility emphasizes the inherent unbelievability and contradictory nature of the testimony in seeking to paint the witness with broad strokes as a "liar," a prior consistent statement will be admissible only so long as a specific motive to lie, which was not present when the consistent statement was made, is evident from the cross-examination.[94]

The assertion that a witness generally has falsified his testimony should not be confused with the assertion that the defendant has fabricated his trial defense.[95] If the imputation is that the defendant has lied at trial to tailor his presentation to conform with a newly learned legal theory, a prior consistent statement made before the trial strategy was developed should be admissible. *United States v. Crosby*[96] is instructive on this issue. Mr. Crosby was charged with multiple counts of kidnaping and assault when he held hostage several staff members of the Veterans Administration Hospital. As a defense, he contended that he was suffering from Post Traumatic Stress Disorder (PTSD) at the time of the episode. Although the government "denied any attempt to charge Crosby with fabrication," the clear implication of the prosecutor's cross-examination was that Crosby had recently adopted this defense "after learning the characteristics

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consulting with jailhouse lawyers. Moss sought to introduce two statements he made to Mrs. Rosenkranz and a note he had written to her to rehabilitate his credibility from the attack by Wright. The trial court held that the statements were not admissible under this theory because an attack on a witness' credibility by presenting a contradictory account does not constitute recent fabrication. The court of appeals agreed with this holding, but implied that had Moss attempted to introduce these prior statements in response to a specific government attack of recent fabrication, they would have been admissible. 783 F.2d at 1099 n.5.

94. In Christmas v. Sanders, 759 F.2d 1284, 1287-88 (7th Cir. 1985), the court focused precisely on this issue. The United States Court of Appeals for the Seventh Circuit affirmed the judgment and upheld the exercise of the trial court's discretion in excluding the prior statements, noting that the line between charging that a witness is a liar as distinguished from charging that he made up a new story is often murky. The court further remarked that the impeachment was minimally "effective" and tended to suggest that the witness "consistently equivocated" rather than recently fabricated. *Id.* at 1288. If, however, an impeachment of a witness is susceptible to differing interpretations, one of which includes recent fabrication or improper motive, courts have properly held that prior consistent statements which meet the time-line predicates are admissible. United States v. Feldman, 711 F.2d 758, 766 (7th Cir.), *cert. denied,* 464 U.S. 939 (1983); Breneman v. Kennecott Corp., 799 F. 2d 470 (9th Cir. 1986). *See supra* note 69 and accompanying text.

95. An "interesting" perspective of the way in which an attorney-client relationship can lead a defendant to manufacture a defense for trial is described in R. TRAVER, ANATOMY OF A MURDER (1958).

96. 713 F.2d 1066 (5th Cir.), *cert. denied,* 464 U.S. 1001 (1983).

of PTSD from books and pamphlets provided to him at the Veterans Outreach Center."[97] To rebut what he claimed was a charge of "recent fabrication," Crosby sought to introduce his personal journal, reflecting his writings over a ten-year period which, the defense claimed, would refute the government's theory. Holding that the trial court properly excluded the evidence for a variety of Rule 403 reasons,[98] the United States Court of Appeals for the Fifth Circuit painstakingly pointed out that the content of the writings was presented to the jury through the testimony of several witnesses. Significantly, the court did not rest its analysis on the basis that exclusion of the evidence was proper because, as the government contended, no motive to recently fabricate was charged. To the contrary, the court's discussion noted that a substantial portion of the defense presentation adequately responded to what it agreed by implication was the government's charge of recent fabrication.[99] Because the court resolved the dispute on Rule 403 grounds,[100] it did not proceed to discuss the second requirement of the Rule's preconditions: whether Crosby's writings preceded his reading of the Center's books and pamphlets as he contended, or whether they were products of the available literature and thereby arose after the challenged motive to lie.[101]

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97. *Id.* at 1071 n.5.

98. Rule 403 provides as follows:

> Although relevant, evidence may be excluded 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.

FED. R. EVID. 403.

99. The court summarized the record as follows:

> A review of the record reveals that Crosby's wife, who had read the journals, testified in detail about their contents, as well as about the problems Crosby had suffered since he returned from Vietnam. Crosby's own expert witness, Dr. C. W. Scrignar, also had reviewed the writings and referred to them repeatedly during his testimony . . . . Crosby's mother, brother, friends, and Crosby himself described complaints of sleeplessness and nightmares and the changes in Crosby's personality which had occurred subsequent to his return from Vietnam. It is clear that whatever probative value the writings may have had was established by the testimony of other witnesses.

Crosby, 713 F.2d at 1072. In *Crosby*, the court found that the statements were properly excluded under Rule 403 since they were "convoluted and voluminous, their reliability questionable, and it was not established that they consisted of all such documents." *Id.* at 1072.

100. *See supra* note 98.

101. Significantly, most of the statements "came in" through other routes. *See supra* note 98. *Crosby* presents the issue of rehabilitation through prior consistent state-

The assertion that a witness has repeatedly offered inconsistent accounts or different versions of an episode also does not satisfy the preconditions for admission of other statements consistent with the courtroom version. The Seventh Circuit concluded that 801(d)(1)(B) prohibited the admission of a prior consistent statement when the cross-examination is merely a general assault on a witness' credibility by demonstrating prior inconsistent statements;[102] but like its sister circuit,[103] the Seventh Circuit failed to appreciate the time-line component often necessary in determining motive. In *Christmas v. Sanders*,[104] the court noted that the motive to falsify is not sustained if the cross-examination simply demonstrates that the witness "had consistently equivocated on her version of the events and hence could not be believed."[105] The analysis, however, improperly attempts to distinguish between an impeachment that asserts that the witness was "making up a new story" and an assertion that the witness "is a liar" without consideration of the time-line. Although properly noting that these two themes are often "equivalent", the court erroneously concluded that if the jury might recognize either interpretation, the consistent statement may not be admitted.[106] These themes in *Christmas* were, in

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ments in a different context than from where the issue generally arises. Accordingly, in *Crosby*, if the actual "statements" themselves are not the same as those offered by the witness (Crosby) in his courtroom presentation, they are technically not prior consistent statements. Where, however, the prior statements are similar in form, syntax, and substance to Crosby's testimony, they serve to rebut the prosecution's theory that Crosby began to use the relevant expressions only after having read the hospital literature. The court properly refused to permit the admission of the statements under Rule 803(3) as a "then existing state of mind, emotion, sensation, or physical condition," since the writings reflected a ten-year period. *Id.* at 1072 n.7. Surprisingly, however, there was no discussion as to whether Crosby's writings were admissible pursuant to Rule 703 which permits the admission of the "facts or data" relied upon by an expert in forming his opinion. FED. R. EVID. 703.

102. Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985). *See supra* note 94.

103. The United States Court of Appeals for the Fifth Circuit has similarly rejected the time-line analysis as a predicate for the admissibility of statements under 801(d)(1)(B). *See* United States v. Parry, 649 F.2d 292, 295-96 (5th Cir. Unit B 1981); United States v. Mock, 640 F.2d 629, 632 (5th Cir. Unit B 1981); United States v. Cifarelli, 589 F.2d 180, 185 (5th Cir. 1979); United States v. Williams, 573 F.2d 284, 289 n.3 (5th Cir. 1978).

104. 759 F.2d 1284 (7th Cir. 1985).

105. *Id.* at 1288.

106. *Id.* In *Christmas*, a civil rights action against a female police officer, the plaintiff claimed that Officer Sanders assaulted him without provocation and used excessive force. Sanders' defense was that in the course of placing Christmas under arrest, he resisted her efforts, struck her in the face and chest, and that in the ensuing struggle the gun accidently discharged into Christmas' abdomen. Sanders was cross-examined, in

fact, two sides of the same coin. Consequently, the court properly excluded the prior consistent statement because it was able to determine *when* the alleged "new story" was fabricated. In *Christmas,* not only was there no specific motive to falsify the questioned accounts, but more significantly, whatever reasons the witness had for fabricating her trial testimony were obviously present when she told her "consistent account."

D. Prior Inconsistent Statements

In *United States v. Harris,*[107] decided less than three weeks after *Christmas,* the court reiterated its position that 801(d)(1)(B) requires both a motive to lie and a consistent statement made before the motive existed. Because the cross-examination challenged the credibility of the witness merely through impeachment by prior inconsistent statements without attributing a motive to lie, the court correctly concluded that the requirements of 801(d)(1)(B) were not met.[108] A general attack on credibility, regardless of the cross-examination technique, does not sufficiently allege the motive underlying the falsification. Without this challenge, the fabrication is not recent fabrication and 801(d)(1)(B) is not implicated. Nevertheless, the court held the admission of the prior consistent statements proper as rehabilitative evidence without regard to 801(d)(1)(B), a position not considered in *Christmas.*[109]

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part, on the basis of a statement she gave shortly after the shooting in which she stated that she had "probably let Christmas go at some point" during the struggle. The court found that there was "very little inconsistency in [the] two statements . . . ." *Id.* By making this preliminary determination, pursuant to Rule 104(b), evidence of a prior consistent statement would not be relevant since there was no inconsistency to rebut. *Cf.* United States v. Feldman, 711 F.2d 758 (7th Cir.), *cert. denied,* 464 U.S. 939 (1983); *supra* note 69.

107. 761 F.2d 394 (7th Cir. 1985).

108. In *Harris,* the defendant and her sister were convicted of illegally receiving government funds based on their forgeries of documents for a government sponsored Comprehensive Employment and Training Act (CETA) program. One of the government witnesses, Harold Branch, testified to his knowledge of Harris' participation in the scheme to defraud the CETA program. In her case, Harris called agent John Huheey to impeach Branch with statements he had made to Huheey which were inconsistent with his courtroom account. Over objection, the government was permitted to elicit from Huheey during cross-examination statements made by Branch during the same interview with Huheey that were consistent with the trial testimony. Ostensibly, whatever "motive" induced Branch to "fabricate" in the courtroom was present when he spoke with Huheey. Consequently, the prior consistent statements were not made before "the motive" arose. *Id.* at 398.

109. Although the court in *Christmas* found that there was "little, if any, effective

As was true in *Harris, Christmas*, and multiple other cases, a general attack on a witness' credibility is customarily supported by evidence of the witness' prior inconsistent statements.[110] In this style of cross-examination, the witness is impeached with either his own prior contradictory or inconsistent account[111] or by his failure to account for all or some of the details now related.[112]

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impeachment" presumably because there was "very little inconsistency in the two statements," the court implied that prior fabrication was charged. "[W]hen there is no clear charge of recent fabrication [the admission of prior consistent statements] would undermine the very purpose of [the rule] excluding [them]." *Christmas*, 759 F.2d at 1288-89.

110. *See supra* notes 61-64 and accompanying text.

111. Impeachment by prior inconsistent statements may take a variety of forms, one of which is presented here:

Q: Mr. Weasel, several hours after the robbery you were interviewed by Detective Strapp?

A: Approximately.

Q: And Detective Strapp asked you to describe the robbers in as much detail as you could remember?

A: Words to that effect.

Q: You tried to describe the robber as accurately as you could, didn't you?

A: Of course.

Q: You remember that the robber was not wearing a hat?

A: That's correct.

Q: And today you told us that the robber was not wearing a hat, isn't that what you've told us?

A: Yes.

Q: Several hours after the robbery, you told Detective Strapp that the robber *was* wearing a hat, didn't you?

A: I think so.

Q: And you described that hat in detail didn't you?

A: I may have.

Q: You told Detective Strapp that the robber was wearing, "a red baseball cap with a Mickey Mouse emblem," didn't you, Mr. Weasel?

Note that when two or more conflicting statements are presented, the cross-examiner should (although many trial lawyers fail to) take a position that one of the statements is the "true account" or that both statements are false and that the witness cannot be believed at all. The theory of the impeachment may often dictate whether the "consistent statement" meets the time-line predicates.

112. Impeachment by omission is another form of impeachment by prior inconsistent statement. Although much of the foundation work which sets up the impeachment is the same, the cross-examiner must be certain to show that the witness would or should have been expected to include the previously omitted information in his earlier statement. An example of this type of foundation is presented here:

Q: Mr. Weasel, shortly after the robbery, you spoke with a police officer inside the bank, didn't you?

A: A number of police officers.

Q: And you were told that you would be asked to go to the police station to be interviewed about what you had seen?

A: Yes.

Q: You were also told that you would be asked to look at some pictures or mug shots

Impeachment by prior inconsistent statements is one of the most frequently used cross-examination techniques by the trial lawyer.[113] Where, however, this form of impeachment neither asserts nor implies that the in-court account is the product of an improper motive not present when the consistent statement was made, the consistent statement should not be admissible.[114] No circuit has held that impeachment by a prior inconsistent state-

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to see if you could identify any of the pictures as the robbers?

A: I don't think I was specifically told that.

Q: You anticipated that you would be asked to give a description about what the robbers looked like, didn't you?

A: Yes.

Q: You assumed that the robbers had gotten away, didn't you?

A: We were told that they had.

Q: And you understood that the descriptions that you and the others gave would help the police in attempting to locate these men?

A: Yes.

Q: Detective Strapp interviewed you and took your statement, didn't he?

A: Yes.

Q: He asked you to be as complete in your description as you could be?

A: Yes.

Q: And he asked you to be accurate as well, didn't he?

A: He didn't have to tell me that.

Q: Because you planned to be accurate?

A: Of course.

Q: And you were, in fact, complete and accurate in your description as you remember it then?

A: Yes.

Q: The complete and accurate description of the robbers that you gave to Detective Strapp was as follows: "White male, about 35-36 years old, 140 lbs., short brown hair, wearing blue jeans, dark blue sweater with side buttons and a red baseball cap with a Mickey Mouse emblem." Wasn't that it?

A: Sounds right.

Q: You did not tell Detective Strapp something about the man you said you saw that you told us today?

A: The height?

Q: Yes, the height. You did not tell the Detective that the robber was 5 ft. 10 in. tall, did you?

A: I don't think so.

Q: In fact, you didn't tell Detective Strapp anything about the robber's height did you?

113. *See* T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 268-84 (1980); 3 J. WEINSTEIN, *supra* note 35, at ¶¶ 607[06], 613[01]-[06]; Natali, *Cross-Examination*, 7 AM. J. TRIAL ADVOC. 19, 25-26 (1983).

114. *See* United States v. Stuart, 718 F.2d 931, 934-35 (9th Cir. 1983); United States v. James, 609 F.2d 36, 49-50 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980); Garcia v. Watkins, 604 F.2d 1297, 1299 (10th Cir. 1979); United States v. Consolidated Packaging Corp., 575 F.2d 117, 129-31 (7th Cir. 1978); United States v. Scholle, 553 F.2d 1109, 1121-22 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977); United States States v. Lombardi, 550 F.2d 827, 828-29 (2d Cir. 1977); *cf.* United States v. Hamilton, 689 F.2d 1262, 1273-74 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983).

ment automatically "opens the door" for the admission of prior consistent statements for either rehabilitative or substantive purposes.[115] To trigger 801(d)(1)(B) and the admissibility of a

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115. Several recent decisions, however, can only be understood by following Judge Friendly's analysis presented in his concurring opinion in United States v. Rubin, 609 F.2d 51, 66 (2d Cir. 1979), *aff'd*, 449 U.S. 424 (1981), that abandonded the time-line predicate by permitting the admission of prior consistent statements without regard to whether a motive to lie existed.

In two of its decisions, the United States Court of Appeals for the Eighth Circuit appears to be alone in suggesting that if a witness is impeached with a prior inconsistent statement, a prior consistent statement may be admitted pursuant to 801(d)(1)(B) as substantive evidence. *See* United States v. Blankinship, 784 F.2d 317, 320 (8th Cir. 1986) (testimony inconsistent with earlier statement "and thus the product of recent fabrication or improper influence or motive"); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980) ("After one party opens the subject of prior inconsistent statements, the other party may wish to introduce prior consistent statements . . . ."); *cf.* United States v. Nelson, 735 F.2d 1070, 1071 (8th Cir. 1984) (If no charge of recent fabrication is made, but only a cross-examination which revealed that the witness had given differing explanations on prior occasions, prior consistent statements may be admissible to *rehabilitate* the witness.). In *Nelson*, the court seems to draw a distinction between prior consistent statements as rehabilitative evidence as opposed to substantive evidence under 801(d)(1)(B).

In United States v. Pierre, 781 F.2d 329 (2d Cir. 1986), a case involving impeachment by prior inconsistent statements without the attribution of a "recent motive to fabricate," the Second Circuit held that a prior consistent statement "may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition." *Id.* at 333. In *Pierre*, a DEA agent, testifying for the government, was permitted to read from his formal arrest report which he prepared three days after the defendant's arrest and which was consistent with his testimony, but which also contained a significant detail which was not present in his notes of the interview with the defendant, taken immediately after the arrest. The court found that the consistent statement had some rebutting force beyond the mere fact that the witness has repeated on a "prior occasion a [statement] consistent with his trial testimony." *Id.* at 334. Embracing the analysis of Judge Friendly's concurrence in *Rubin*, *Pierre* relied on three previous decisions by the court: United States v. Corry, 183 F.2d 155, 156-57 (2d Cir. 1950); Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 60-62 (2d Cir. 1972); and United States v. Rubin, 609 F.2d 51 (2d Cir. 1979) *aff'd on other grounds*, 449 U.S. 424 (1981). According to *Pierre*, in all three cases prior consistent statements have been admitted to rehabilitate the credibility of [a] witness "in the absence of a recent motive to fabricate." *Pierre*, 781 F.2d at 331.

In none of these three cases, however, did the court disregard the traditional predicates which it had consistently required for the admission of prior consistent statements. *Pierre*'s analysis suffers from revisionist review. Despite *Pierre*'s statement to the contrary, *Corry*, *Applebaum*, and *Rubin* are *not* "clear holdings that a prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition," absent a charge of recent fabrication. *Id.* at 333. *Rubin*, the only post-1975 decision which the court cites in support of its position, specifically refused to reverse or qualify the position it took in United States v. Quinto, 582 F.2d 224 (2d Cir. 1978) ("[T]he standards for use of [prior consistent statements] for rehabilitative purposes should be the same as those under 801(d)(1)(B)."). *Rubin*, 609 F.2d at 61. Writing for the court, Judge Mansfield stated: "[W]e consider it unnecessary to resolve that issue in this case for the reason that the admission of the [consistent

consistent statement, impeachment is merely a tool. Impeach-

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statements] must in any event be sustained on other grounds." *Id. See also* United States v. James, 609 F.2d 36, 50 n.20 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980).

Four particular consistent statements were specifically discussed in *Rubin*. The first was admitted without objection at trial and the defendant "[was] precluded from raising the issue on appeal." *Rubin*, 609 F.2d at 61. The second was initially introduced by Rubin's counsel, which constituted "waive[r]" or "mitigat[ion] or eliminat[ion] [of] any prejudice," and also was waived since it was not the subject of any legitimate objection at trial. *Id.* The third and fourth statements, although not properly subject to objection, should not have been admitted but "the error [was] harmless." *Id.* at 64.

Corry and *Applebaum* are similarly misinterpreted by *Pierre*. As this article discusses, *supra* notes 80-81 and *infra* note 116, in both cases the court permitted the admission of the prior consistent statements because the statements were made before the suggested motive to fabricate arose. *See* United States v. Scholle, 553 F.2d 1109, 1121-22 (8th Cir. 1977).

In United States v. Harris, 761 F.2d 394 (7th Cir. 1985) and in United States v. Juarez, 549 F.2d 1113 (7th Cir. 1977), the Seventh Circuit suggested mere impeachment by a prior inconsistent statement is a sufficient predicate to trigger rehabilitation by a prior consistent statement.

> Thus, [the consistent statement] was offered merely to show that [the witness] had not made only inconsistent statements prior to his testimony at trial, and therefore those [sic] statement were not . . . subject to . . . 801(d)(1)(B) . . . . This use of prior consistent statements for rehabilitation is particularly appropriate where, as here, those statements are part of a report or interview containing inconsistent statements which have been used to impeach the credibility of the witness.

Harris, 761 F.2d at 399-400. Remarkably, *Harris* was decided less than three weeks after Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985), and although he wrote neither unanimous opinion, Judge Posner sat on each panel. In *Christmas* the court upheld the ruling of the trial court excluding a police officer's prior consistent statement, holding that such impeachment alone does not constitute a charge of "recent fabrication" which is required for the introduction of prior consistent statements:

> In effect, what the defendant is asking us to rule is that any isolated impeachment in cross-examination gives rise to an implied charge of recent fabrication. We decline this invitation. Impeachment on cross-examination is designed to attack the credibility of the witness, and often it can be construed as a charge that the witness is a liar as well as a charge that the witness is making up a new story. Indeed, in some circumstances the charges are equivalent . . . . This is particularly true where the "charging" party maintains that he never intended to show recent fabrication; rather he had intended to demonstrate that Sanders had consistently equivocated on her version of the events and hence could not be believed.

Id. at 1288.

In virtually all their other decisions, the Court of Appeals for the Second, Seventh, and Eighth Circuits have noticeably failed to suggest that there is a distinction between the "rehabilitative" and "substantive" purposes of prior consistent statements. Consequently, for the admission of these statements, the triggering mechanism has consistently been the traditional time-line and motive predicates. There have been a variety of other cases, however, in which impeachment by a prior inconsistent statement, without regard to a time-line predicate, has ostensibly triggered the admission of a prior consistent statement. A close reading of these cases demonstrates that the courts have discussed and ostensibly required the witness to have been charged with a motive to fabricate, before the consistent statement, regardless of whether it preceded this motive,

ment by prior inconsistent statements, for example, is a cross-examiner's means to develop the theory as to why and when the witness has been induced or influenced to lie. Only when the cross-examiner develops both the motive to lie and the timing of the fabrication can the admissibility of the consistent statement be evaluated.

Consequently, the relationship of the consistent statement to the inconsistent statement—whether the consistent statement was made before or made after the inconsistent statement—is wholly irrelevant to the question of admissibility. What is dispositive is whether the consistent statement precedes the motive to falsify, regardless of whether an inconsistent statement is involved.[116] If the prior consistent statement occurs before the mo-

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could be admitted. *See* United States v. Andrade, 788 F.2d 521 (8th Cir.), *cert. denied*, 107 S. Ct. 462 (1986) (charge of collaboration); United States v. Brantley, 733 F.2d 1429 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985) (plea bargain); United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983) (plea bargain); United States v. Cifarelli, 589 F.2d 180 (5th Cir. 1979) (cooperation with government); United States v. Herring, 582 F.2d 535 (10th Cir. 1978) (informant). Three other cases remain somewhat puzzling as far as the court's reasoning on this issue is concerned. In United States v. Rinn, 586 F.2d 113, 119-20 (9th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979), and United States v. Par-Pla, 549 F.2d 660, 663 (9th Cir.), *cert. denied*, 431 U.S. 972 (1977), the Ninth Circuit permitted the admission of the contents of a police report where the sole question on cross-examination was whether a specific detail was mentioned in the report. In United States v. Mock, 640 F.2d 629, 632 (5th Cir. Unit B 1981), while the Fifth Circuit permitted the admission of prior consistent testimony from the defendant's first trial following his impeachment, noting that "[the] existence of a motive to lie at Mock's previous trial would not make the prior statement inadmissible," there was no suggestion that this or any motive to fabricate existed nor that the impeachment was simply by prior inconsistent statement.

116. Consider United States v. Scholle, 553 F.2d 1109 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977), where the United States Court of Appeals for the Eighth Circuit rejected the proposition that to be admissible a prior consistent statement must have been made prior to the impeaching inconsistent statement. Noting that the requirement that a prior consistent statement precede the inconsistent statement "seems an unnecessary refinement," *Scholle* properly recognized that where a witness acknowledges a prior inconsistent statement, a prior consistent account must precede the alleged motive to fabricate, not the inconsistent declaration. *Id.* at 1122.

In *Scholle*, Kaufman, a co-conspirator who had been previously convicted for his involvement in the drug conspiracy, testified for the government as to Scholle's involvement in the conspiracy. On cross-examination, Kaufman was impeached with his own trial testimony in which he denied Scholle's involvement and was charged with fabrication induced by the improper motive of "obtaining preferential treatment with respect to the sentence he was currently serving." *Id.* at 1121. Kaufman was sentenced on November 4, 1985. Four days before he began serving his sentence, Kaufman implicated Scholle before a grand jury. Kaufman's grand jury testimony was consistent with his in-court presentation and was introduced by the government on redirect examination to rehabilitate his credibility. The time-line analysis was preserved because the consistent statements preceded Kaufman's incarceration and his correspondence with the gov-

tive to lie, it is relevant to refute the cross-examiner's contention that the live account was falsified as a result of that motive. The statement therefore is admissible without regard to any prior inconsistent account.

Arguably, if a witness is impeached with an inconsistent statement, the admission of a consistent declaration depends upon whether the witness admitted or denied making the inconsistent statement *and* whether the consistent statement helps explain the inconsistency.[117] Very few federal courts have ever

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ernment requesting reconsideration of his sentence. *See also supra* notes 69-70.

By citing 801(d)(1)(B) as the basis for admissibility of the prior statement, *Scholle* apparently holds the prior statement admissible for its truth as substantive evidence, although it specifically fails to mention any substantive purpose for admission. Somewhat ambiguously, the court also relies on Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), *cert. denied,* 393 U.S. 1119 (1969) and Affronti v. United States, 145 F.2d 3 (8th Cir. 1944), two pre-Rule cases. Recently, however, the court seemed to suggest a distinction between admissibility pursuant to 801(d)(1)(B) and the more traditional rehabilitative purposes under the common law. *See* United States v. Andrade, 788 F.2d 521, 532-33 (8th Cir.), *cert. denied,* 107 S. Ct. 462 (1986); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980).

117. If a witness denies having made a prior inconsistent statement and seeks to produce a consistent statement to support that denial, the time-line analysis must be satisfied before it is admitted. In such situations, the witness may disclaim that any inconsistent statement was made, or claim that the inconsistent statement was edited to include or omit the relevant details. Only if the witness denies the alleged inconsistent statement and claims that it presented a less than complete, more than complete or wholly falsified version of what he had said should the time-line analysis be disregarded. The selective reporting or substitution of a statement violates the rule of completeness and deprives the factfinder from hearing the full and complete version of the episode in question. Moreover, as Professor Graham explains, "[p]roof of such a prior consistent statement contradicts the extrinsic proof of the inconsistent statement offered by the cross-examiner." Graham, *supra* note 6, at 599.

Relying on Wigmore's widely quoted observation that "where the issue as to whether impeaching statements were made is involved, contrary statements of the witness should be admitted," Professor Graham contends that a prior consistent statement should be admissible not only when the witness insists that it was made in lieu of the denied inconsistent statement, but also in other contexts "depend[ing] upon certain relevant factors including the relationship, if any, between the circumstances surrounding the alleged assertions, the length of time that has elapsed between them, and finally, the order of occurrence." *Id.* at 600. This statement requires re-examination.

United States v. Corry, 183 F.2d 155 (2d Cir. 1950), is cited by Professor Graham with approval because the court permitted the admission of a prior consistent statement which was made two days before the alleged inconsistent statement. Professor Graham, however, fails to fully discuss Judge Hand's rather carefully sculpted opinion. First, it is not altogether clear that the witnesses denied making the inconsistent statements, although some statements imply that it may have been an issue. More significantly, however, the court painstakingly points out that the consistent statements were made prior to the witness' arrests and therefore "before any of them had an apparent motive to implicate Corry." *Id.* at 156. Judge Hand relies on Conrad v. Griffey, 52 U.S. (11 How.) 480 (1850), for his assertion that "statements by a witness in accordance with his testi-

permitted the admission of a prior consistent statement made after the motive to fabricate merely because it provided an explanation for the inconsistent statement. Indeed, since the promulgation of the federal rules, no circuit has embraced this analysis. If, of course, the consistent statement supports an explanation for the prior inconsistent account but also antedates the cross-examiner's challenged motive to lie, it is admissible be-

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mony at the trial are admissible after impeachment *if made before there is inducement to make these statements because of pressure or personal interest.*" *Corry*, 183 F.2d at 157 (emphasis added). In effect, Judge Hand holds the statements admissible not because they were made two days before the inconsistent statements, but because they were made before the challenged motive to lie arose. Judge Hand also refers to Judge Cooley's decision in Stewart v. People, 23 Mich. 63 (1871) upon which Professor Graham also relies. In *Stewart*, the government witnesses testified that the defendant had admitted that he had been in Chicago during the relevant period and unequivocally denied making statements inconsistent with this account. While the consistent statements certainly supported the witness' denial, they were made *before* he was arrested and promised consideration for his cooperation and testimony.

Graham argues that Felice v. Long Island R.R., 426 F.2d 192 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970), where the court properly held inadmissible a consistent statement made two months after an allegedly incomplete inconsistent statement, provides a notable example of a trial court's proper use of its discretion. Here the court found the "corroborative value too slight" because of the two-month hiatus, as contrasted with other consistent statements made only a few days before the inconsistent declarations. Graham, *supra* note 6, at 600. The issue, however, was not the length of time, as Professor Graham suggests, but the timing of the charge, as the court itself recognized. *Felice*, 426 F.2d at 198. Relying on Tompkins v. Erie R.R., 90 F.2d 603 (1937), *rev'd on other grounds*, 304 U.S. 64 (1938) and United States v. Sherman, 171 F.2d 619 (1948), *cert. denied*, 337 U.S. 931 (1949), Judge Friendly pointed out that "the exception allowing use of prior consistent statements to rebut a charge of recent contrivance requires that they be prior to the contrivance." *Id.* at 198. Remarkably, the statement at issue was not only made two months after the inconsistent statement, but six weeks after the case was filed. Significantly, other admissible consistent declarations were made before the motive to fabricate arose.

This analysis was applied in Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56 (2d Cir. 1972), when the court noted that Felice's consistent statements not only came after the inconsistent account, but "were made after he began to contemplate the institution of suit [which] provided a strong basis for the inference that a motive to fabricate had developed and that he was trying to make a self-serving record for use at trial." *Id.* at 62.

In *Tompkins* the witness did not deny making the prior inconsistent statement, but rather admitted that his statements in the account were false. On re-direct examination, he was permitted to testify to consistent statements which he had made prior to the inconsistent statement. Rather than embracing the position advocated by Professor Graham, the court noted that:

> [T]he cross-examination had been so broad as to render the redirect competent. He was asked on cross-examination whether he had always had the [same] impression . . . and whether that had *always* been his claim. To explain his answer that it had, it was proper to allow him to say that he had told the doctors so immediately after the accident.

Tompkins, 90 F.2d at 606 (emphasis added).

cause the two required predicates have been satisfied—a motive to lie occurring after the consistent account.[118] To this extent,

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118. Professor Graham refers to Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969) as an example of a decision in which a prior consistent statement was held admissible to explain a preceeding acknowledged inconsistent statement. Remarkably, *Hanger* has not been cited in support of this theory by any federal court. Rather, it has been frequently cited and quoted with approval for the position that the prior consistent statement need not precede the inconsistent statement to become admissible under the Rule. *See Scholle*, 553 F.2d at 1121, discussed *supra* note 116.

In *Hanger*, Riley, the government's witness, testified to participating in a bank robbery with the defendants. On cross-examination, Riley was impeached with three prior inconsistent statements he gave after his arrest in which he exculpated the defendants. The cross-examiner also suggested that Riley was motivated to testify falsely against the defendants "to help [him] in getting out of this bank robbery and this scrape [he had gotten himself] into." *Hanger*, 398 F2d. at 102. Riley pointed out that he had already been sentenced to ten years. Although he admitted making the inconsistent statements, Riley explained that he had been concerned about being "no rat or no fink" and that the state prison's open cell policy made him fear for his safety. *Id.* at 103. Over objection, the court permitted the government to introduce a statement by Riley which was inconsistent with his courtroom testimony, but which was made after his three inconsistent accounts. The defense contended that the consistent statement was inadmissible because it followed the inconsistent statements and because Riley's "motive . . . to shift responsibility for the crime to other after reflection [was at its greatest]." *Id.* at 104. In its holding that the evidence was properly received, the court rejected the position that to be admissible, prior consistent statements must be made prior to the inconsistent statements.

This position was reaffirmed by the Eighth Circuit in *Scholle*. As the *Hanger* court intimated, however, Riley's motivations while talking to a psychiatrist in the course of his treatment and before sentencing were born of different reasons from that of his courtroom testimony presented several years later. Significantly, the last of Riley's inconsistent statements was made to another treating physician in the same psychiatric facility approximately seven weeks before his consistent account. To this extent, the consistent statement was "prior to the claimed fabrication [and was] received to refute the impeaching evidence or repel the imputation." *Hanger*, 398 F.2d at 104.

Hanger relies in large part on Copes v. United States, 345 F.2d 723 (D.C. Cir. 1964). In *Copes* the court similarly held that the relationship between the inconsistent and consistent statements was inconsequential. *Id.* at 726. What was dispositive in *Copes*, as in *Hanger*, was the time-line analysis and the discussion of the imputed motive to fabricate. Jo Ann Copeland testified for the government that Mrs. Copes attempted an abortion which resulted in an extended hospitalization. On cross-examination, Copeland was impeached with several inconsistent statements which attributed other causes for her condition, as well as with a prior consistent statement, made at the hospital which inculpated the defendant. The cross-examiner further suggested that she was induced to fabricate her consistent account by three motives: a desire to protect her husband, a wish to receive medical treatment, and a hope to extricate herself from further police involvement.

The court, in its discussion approving the admissibility of the prior consistent account, first noted that the contents of and circumstances under which the statement was made were introduced by the defendant. More extensively, however, the court discussed the time-line analysis in noting that the consistent account effectively refuted the motive which was "put in issue by the defense." *Id.* at 725. Mrs. Copeland testified that while

the prior consistent statement should be considered no differ-

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she was in the hospital, she gave what turned out to be her consistent account because she believed that she was dying and "did not want to die with a lie on her soul." *Id.* at 724. A physician and detective who were present when Mrs. Copeland provided her account were also permitted to testify as to what was said and under what circumstances the account was given. This testimony squarely refuted the cross-examiner's imputation of a motive which prompted Mrs. Copeland to fabricate. "Their testimony could be construed by the jury, if credited, as an indication that her accusation of the defendant and her testimony at the trial were not mere recent fabrication." *Id.* at 725. *See* Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956).

Professor Graham mentions Hewitt v. Corey, 150 Mass. 445, 23 N.E. 223 (1890), to illustrate the relevance of admitting a prior consistent statement which occurs after an admitted inconsistent statement. But upon careful examination, the court in *Corey* permitted the consistent statement, not because it offered an explanation for the inconsistent account, but because, as was true in both *Hanger* and *Copes,* it preceded and thereby refuted the alleged motive to lie.

Mrs. Annie Hewitt sued the Sheriff for conversion of her horse when the Sheriff attached it as the property of her husband. The husband testified that the horse belonged to his wife, but was impeached with a personal property mortgage form in which he had included the horse. Without objection, he explained that the horse had been included in the document and that he brought this error to the attention of the mortgagee when he learned of the mistake. Over objection, the mortgagee was permitted to corroborate this account. By permitting the prior consistent statement, the court discussed the theory of cross-examination and noted that the consistent statement effectively rebutted the cross-examiner's charge that the husband consciously lied during the trial to protect his wife's interests:

> His explanation, if believed, went to show that he did not *consciously* do anything which amounted to an assertion of title in himself. His statement to the mortgagee, *made before the present controversy arose,* would have a legitimate tendency to confirm his explanation . . . . Clearly distinguishable from this is a case where it appears that the witness has at other times made statements inconsistent with his testimony, and where it is plain that he must have been false at one time or the other.

Id. at 446, 23 N.E. at 223 (emphasis added).

Professor Graham refers to People v. Bias, 170 Cal. App. 2d 502, 339 P.2d 204 (1959), as an example of where a prior consistent statement which precedes an acknowledged inconsistent statement is admissible to support the witness' explanation for the inconsistent statement. After testifying that the defendant ordered her to perform oral sex, the witness, Mary Ellen, was impeached with her prior testimony at a preliminary hearing where she testified that the defendant had said nothing to her. She explained that she "did not want to say it before" and both she and a police officer were permitted to testify that she had told the officer on the day after the incident what the defendant had siad. *Id.* at 311, 339 P.2d at 210. Professor Graham correctly suggests that the court permitted the introduction of the consistent statement "in answer to an express or implied charge that the trial testimony was recently fabricated." Graham, *supra* note 6, at 596. However, the court went on to state that "proving a statement at the preliminary examination contrary to that made at the trial, is in effect a charge of recent fabrication." *Bias,* 170 Cal. App. 2d at 512, 339 P.2d at 211. The position that impeachment by a prior inconsistent statement automatically opens the door for prior consistent statements has been widely rejected by all the circuits and also disaprroved by Professor Graham. Significantly, the court did not address the concern which Professor Graham discusses—that if the consistent statement supports the witness' explanation for the inconsistency it should be admitted. To this extent, his argument is similar to that which

ently than any other statement which conforms to the traditional time-line analysis.

At first blush, the position that a prior consistent statement should be admissible to corroborate an explanation for an admitted inconsistent statement appears tenable. Consider *People v. Gentry*,[119] a prosecution for child abuse, and Professor Graham's analysis of this case.[120] Turner, a witness who was in the house with the defendant and the victim on the night of the incident, testified that during the early morning hours he heard footsteps and then slapping sounds followed immediately by the sounds of a child crying. On cross-examination, Turner was impeached with a statement he had given that same night in which he omitted these details. Turner conceded that he was intoxicated at the time of the first statement, but made a second statement the following morning when he recovered which was consistent with his courtroom testimony. Over objection, this statement was admitted into evidence as a prior consistent statement, corroborative of Turner's explanation for the inconsistent account.

The theory underlying the admissibility of a prior consistent statement is that the statement "may support the witness' denial of the alleged self-contradiction, or it may be offered to support the witness' explanation."[121] Professor Graham, who advocates the admissibility of consistent statements under this theory, properly recognizes that if relevant, the prior consistent account becomes so only when it refutes the cross-examiner's express charge or "intended inference."[122] If, however, the cross-examiner impeaches with an inconsistent statement in a general attack on credibility without charging the witness with a specific motive to lie, Professor Graham would permit the admission of a consistent statement which either explains the admitted inconsistency or supports the witness' denial of making the inconsis-

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he advanced in his discussion of People v. Gentry. Graham, *supra* note 6, at 589. However, just as Turner's "consistent" statement did not make it any more likely that his drunken state caused his inconsistent statement, Mary Ellen's "consistent" report to the police officer the day after the incident did not make it any more likely that her inconsistent testimony at the hearing resulted from embarrassment. *See* Thomas v. Ganezer, 137 Conn. 415, 78 A.2d 539 (1951) (discussed *supra* note 88).

119. 270 Cal. App. 2d 462, 76 Cal. Rptr. 336 (1969).

120. *See* Graham, *supra* note 6, at 589-591.

121. *Id.* at 590.

122. *Id.*

tent statement.[123] By rejecting the time-line analysis, however, Professor Graham's proposal would make it relatively easy for any witness to deny or explain the making of an inconsistent statement by offering a litany of self-serving declarations which could be admitted for their truth through a parade of witnesses. Any consistent statement made after the alleged failure to speak always suffers from the risk that it was made simply to counteract the impeaching evidence. This is especially true when it is the witness who volunteers the excuse for his admitted silence or inconsistency.[124] If the cross-examiner, however, introduces the factual basis which ultimately underlies the witness' explanation, the witness should be permitted to present a consistent account that rebuts the cross-examiner's intended inference. Although Professor Graham is correct when he states that "the order of occurrence of the statements does not destroy the explanatory cogency of the prior consistent statement as a matter of logical relevancy,"[125] it is not the order of statements which is dispositive. What is determinative is the time-line analysis which requires that the consistent statement preceed the motive to lie. Only then is relevancy insured without having to pay the additional expenses of Rule 403 considerations.[126]

In *Gentry,* Turner's second statement was admitted to rehabilitate his explanation that his inconsistent statement was the product of his alcoholic stupor.[127] Arguably, the consistent account is corroborative of the explanation because it was offered "at the earliest opportunity, after Turner had recovered his senses."[128] This analysis is strained. Just because Turner's second account provides details omitted in the first story does not make it more or less likely that Turner was intoxicated when he first answered questions and sober when he gave another rendition. This is the only relevant consideration regarding the admissibility of the second statement. Evidence which corroborates Turner's explanation that he was drunk when first questioned,[129]

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123. *Id.* at 592-604.

124. *See* 4 J. WIGMORE, *supra* note 2, § 1126 at 258-67. *See also supra* notes 117-118 and accompanying text.

125. Graham, *supra* note 6, at 596.

126. *See supra* note 98.

127. *See supra* notes 119-121 and accompanying text.

128. People v. Gentry, 270 Cal. App. 2d 462, 474, 76 Cal. Rptr. 336, 344 (1969). *See also* Graham, *supra* note 6, at 590.

129. This assumes, of course, that Rule 403 considerations are not implicated. *See supra* note 98.

that have long militated against the introduction of consistent accounts, might include the following evidence: testimony from the first interrogating detective describing Turner's demeanor and physical characteristics during the questioning session, including such characteristics as Turner's speech, gait, eyes, the smell of his breath, condition of his clothing and his sense of balance; the detective's opinion as to whether Turner was drunk or suffering the effects of alcohol; and witnesses who saw Turner drinking during the relevant time frame. Had the cross-examiner, however, charged that Turner's in-court account was concocted by him or fed to him[130] sometime after the episode,[131] because he was drunk during the relevant period, the prior consistent account would serve to effectively refute the cross-examiner's contention.

Professor Graham's approach to relevancy in this context would open the floodgates for an onslaught of consistent statement witnesses, many of whom would have an unyielding interest in the outcome of the proceeding. Consider the following development had Gentry confessed to abusing the child on the same night Turner was first interviewed, but claimed he had been threatened or coerced by the police or even maintained his innocence continuously—positions commonly advanced by defendants in both suppression hearings and at trial. Under the Graham theory, anyone to whom Gentry had offered this explanation or to whom he had professed his innocence would be permitted to testify. In a similar vein, Turner or any "star" government witness' second account could well beget additional recountings. Under this theory of admissibility and pursuant to 801(d)(1)(B), consistent statements offered to a variety of detectives and other investigators, polygraphers, physicians, prosecutors, and those made during official proceedings, such as grand juries or preliminary hearings or examinations, all come in as substantive evidence.[132]

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130. *See* United States v. Crosby, 713 F.2d 1066 (5th Cir.), *cert. denied,* 464 U.S. 1001 (1983), discussed *supra* notes 96-101 and accompanying text.

131. *See* United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986), discussed *supra* notes 92-93 and accompanying text.

132. The admission of prior statements in this context presents a theory of admissibility not contemplated by 801(d)(1)(B). Rather than offering his consistent account to rebut the charge of recent fabrication or motive to lie, the witness himself raises the question of his motives in an effort to explain away his contrary position. Without fidelity to the time-line predicates, however, the relevancy of this type of evidence is outweighed by a variety of Rule 403 considerations. *See supra* note 98.

E. The Rule of Completeness

Once the prior consistent statement is admitted, another inquiry, which many courts have refused to undertake, is essential. The question which now plagues courts and must be resolved is how much of the prior consistent statement, once the requisite predicates are established, may be admitted. Because 801(d)(1)(B) has made such consistent statements substantive evidence, the resolution of this question may often spell the difference between whether a directed verdict is granted or whether the case can be given to the jury.[133] The prior consistent statement is relevant only to refute the charge that the in-court testimony is the result of an improper motive because it was made when the challenged motive did not exist. The consistent statement may corroborate an extensive description or recitation of a single episode or a complete scenario, or may simply provide corroboration for an inconsistent or omitted detail. To remain relevant, however, only those statements or portions of the consistent declaration which specifically address the challenged zone of inquiry—the inconsistent, or omitted details or the concocted account—should be admissible.[134] Consider the following scenario in our hypothetical prosecution of Greenpockets for bank robbery.[135] On direct examination, Weasel provides a description of the perpetrators and a variety of additional circumstantial evidence that makes it more likely than not that Greenpockets was one of the robbers. He cannot identify Greenpockets, however, and has no recollection of any conversation with him. His testimony alone, even if taken in the light most favorable to the government, will not withstand a directed motion for acquittal at the conclusion of the government's case.[136] On cross-examination, Weasel is quizzed about an inconsistent statement from which he had omitted certain aspects of Green-

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133. The jury in some circumstances will receive a case which otherwise would be preliminarily dismissed. Because prior consistent statements are admissible as substantive evidence or for the truth of the matters asserted in the statements, the consistent statement could well provide a crucial and necessary element in the case of the plaintiff or prosecution, without which its preliminary burden of proof would not be satisfied. If a plaintiff fails to meet its preliminary burden of proof, a motion for a directed verdict or for judgment notwithstanding the verdict properly lies. *See* FED. R. CIV. P. 50. If the government fails to sustain its initial burden of proof, the case will not proceed to the jury because a motion for judgment of acquittal will lie. *See* FED. R. CRIM. P. 29.

134. *See* United States v. Blankinship, 784 F.2d 317, 320 (8th Cir. 1986).

135. *See supra* text following note 70.

136. *See supra* note 133.

pockets' description and on his deal with the government, cut after he made the consistent account. On re-direct examination, should the prosecutor be permitted to present the detective and through him introduce Weasel's entire written statement, only a part of which includes Greenpockets' admission to Weasel that he masterminded and participated in the robbery?[137] If so, an out-of-court declaration, taken under conditions of questionable reliability and without any guarantees of trustworthiness, may provide a crucial, substantive, and sufficient missing link in the theory of prosecution resulting in a conviction when the declaration was originally admitted only to rehabilitate a witness' prior statement that cannot itself be admitted as substantive evidence.[138]

Many courts have permitted the admission of either the entire consistent statement or significant portions of the declaration which were extraneous to the specific area of impeachment, which provides the predicates for admissibility.[139] To a large ex-

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137. Although the prosecutor could seek to "refresh" Weasel's recollection of his conversation with Greenpockets with the written statement given to the Detective, *see* FED. R. EVID. 612, the circumstances are such that the statement is not admissible as "past recollection recorded." *See* FED. R. EVID. 803(5). Similarly, even if the prosecutor impeaches Weasel with his statement to the detective, *see* FED. R. EVID. 607, the inconsistent statement is not admissible for substantive purposes. *See* FED. R. EVID. 801(d)(1)(A), *supra* note 5.

138. The same type of tortured logic may operate in the trial of a civil case. Consider the following scenario. In a contributory negligence jurisdiction, where the plaintiff must prove that he was not contributorily negligent, Suzanne Spectacles is called to testify for the plaintiff's estate in a hit and run collision case. Plaintiff was killed. Spectacles testified that while proceeding north at about midnight, she looked out of her open passenger window moments before the collision and saw a Chevrolet driving west and a Cadillac traveling south, both bound to meet at the intersection. She further testifies that the intersection has a four-way stop sign and that the defendant was the driver of the Cadillac. Spectacles has no specific recollection whether the Chevrolet had its lights on, an issue which has been raised by the defense. On cross-examination Spectacles is impeached with an inconsistent statement given several days after the incident in which she stated that she did not recognize and could not identify the driver of the Cadillac and that the Chevrolet's lights were not on. This prior inconsistent statement is, of course, not admissible as substantive evidence. In another account of the incident, offered two weeks after the "inconsistent account," Spectacles stated that she recognized the defendant as the driver of the Cadillac and that the Chevrolet's lights were, in fact, on. Assuming that it is otherwise admissible because the time-line predicates have been met, Spectacle's second 'consistent' statement may be received as substantive evidence for the truth of its contents. Consequently, the plaintiff has now been able to introduce evidence that the Chevrolet's lights were on and therefore, establish the remaining element in the plaintiff's case. The prior consistent statement has enabled the plaintiff to withstand a motion for a non-suit on the question of contributory negligence and the case can to go to the jury for a verdict on liability.

139. United States v. Andrade, 788 F.2d 521, 531-33 (8th Cir.), *cert. denied*, 107 S.

tent, these courts have relied on a tortured reading of the "rule of completeness"[140] to justify the admission of consistent ac-

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Ct. 462 (1986); United States v. Blankinship, 784 F.2d 317, 319-20 (8th Cir. 1986); United States v. DeCoito, 764 F.2d 690, 694-95 (9th Cir. 1985); United States v. Rinn, 586 F.2d 113, 119-20 (9th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979); United States v. Lombardi, 550 F.2d 827, 828-29 (2d Cir. 1977); United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir. 1977); *cf.* United States v. Brantley, 733 F.2d 1429, 1437-38 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985). *Contra* United States v. Mock, 640 F.2d 629, 632 (5th Cir. Unit B 1981); United States v. Dennis, 625 F.2d 782, 794-97 (8th Cir. 1980).

140. The rule of completeness permits the admission of an entire conversation or document or of omitted portions of a communication when parts of it have been proven by the other party and "fairness" requires such. This evidence, however, must be related to the same subject matter and otherwise be admissible. Federal Rule of Evidence 106 seems to address this common law theory by requiring the immediate introduction of part or all of a writing when another part is introduced. The rule provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." FED. R. EVID. 106. Federal Rule Civil Procedure 32(a)(4) contains almost the identical language governing the admissibility of depositions. Federal Rule of Evidence 611(a) gives the trial court wide discretion over the scope of direct and redirect examination. *See* United States v. Taylor, 599 F.2d 832, 839 (8th Cir. 1979).

These rules address two sometimes antagonistic common law concerns: first, that the admission of a portion of a writing or statement may pervert its meaning by distorting the context in which it was made, and second, that requiring the admission of the entire writing or statement will confuse the specific inquiry and burden the jury with evidence irrelevant to the controversy. *See* C. MCCORMICK, *supra* note 35, at 145. Although, as stated by the Advisory Committee's Note, "[f]or practical reasons, [Rule 106] is limited to writings and recorded statements and does not apply to conversations." *Id.* at 145 n.7. "The rule does not in any way circumscribe the right of the adversary to develop the matter or cross-examination or as part of his own case." *Id.* at 146 n.8. McCormick notes that Rule 106 should not be read to limit the power of the court under Rule 611 nor "affect the application of the rules in the text to writings, recorded statements, or conversations." *Id.* at 145 n.7. Rule 611, however, "does not include the authority to require the proponent to include an omitted part of a conversation that is otherwise inadmissible." *Id.*

The application of this theory to prior consistent statements was recognized in Affronti v. United States, 145 F.2d 3 (8th Cir. 1944): "[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." *Id.* at 7. In *Affronti*, the court approved only those portions of the report "as related to matters about which the [witness] had been cross-examined." *Id. See also*, United States v. Mock, 640 F.2d 629, 632 (5th Cir. Unit B 1981); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979), *aff'd on other grounds*, 449 U.S. 424 (1981). Customarily, the issue of "how much" of the consistent statement should be admitted arises though the impeachment includes evidence of a prior inconsistent statement or whether a charge of recent fabrication develops in other ways. If the cross-examiner impeaches with a prior inconsistent statement, the rule of completeness may be involved in two respects. First, the proponent may claim that portions of the inconsistent statement which were not used on cross-examination are, in fact, consistent, and "fairness" requires that these consistent portions be admitted so that the jury may

counts that are wholly irrelevant to the impeaching inquiry.

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appreciate the the declaration's full context. Second, a statement to other witnesses at or near the time of the inconsistent account, but which is consistent with the courtroom presentation, should be admitted to "complete" the picture of the statement's full context which was distorted by the impeachment.

Trial courts have not strictly applied the rule of completeness, nor limited the extent of the prior consistent statement to those portions of the same or other statements that "in fairness" are required by the context *and* that specifically refute the charge of recent fabrication. Loose readings of Rule 106 and tortured understanding of the rule of completeness have enabled parties to introduce "any other part or any other writing" to be considered contemporaneously with the document or statement at issue. *See* United States v. Pierre, 781 F.2d 329, 332 (2d Cir. 1986). An example of the potential dangers which could result from such a permissible reading is illustrated in *Mock*. Following a "rigorous cross-examination," the defendant attempted to introduce the entire transcript of his testimony from a former trial. The court properly permitted only those portions from the transcript which were the subject matters of the cross-examination. *Mock*, 640 F.2d at 632.

Despite its adherence to this traditional analysis in *Dennis*, the Eighth Circuit in United States v. Blankinship, 784 F.2d 317 (8th Cir. 1986), has recently abandoned the traditional theory of completeness and devised a rather unique theory of admissibility. In that case the court permitted the admission of prior statements in their entirety when only portions contained consistencies which refuted the impeachment. *Blankinship* concerned a prosecution for assault on a postal employee. The defendant presented a theory of self-defense which relied substantially on the impeachment of the letter carrier with his prior statement to postal inspectors given after the incident. Although the witness denied making one of the inconsistencies, the court approved the admission of the "entire statement [as] necessary to show the seriousness of the claimed inconsistencies." *Id.* at 320. *See also* United States v. Andrade, 788 F.2d 521 (8th Cir.), *cert. denied*, 107 S. Ct. 462 (1986). United States v. Brantley, 733 F.2d 1429 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985), presents another illustration of the rule's misapplication. Frank Senior, who had initially been charged as a participant in the conspiracy to import and distribute marijuana, testified for the government pursuant to a plea bargain agreement. After his arrest but prior to his deal with the government, Senior and his lawyer, "presumably in the hopes of striking a better plea bargain with the government and obtaining a less severe sentence from the trial judge," prepared a thirty-one page statement detailing the smuggling operation. *Id.* at 1437-38. Counsel for one of the defendants suggested that the statement, which Senior stated was a "full disclosure" of the conspiracy, failed to include the ultimate destinations of the ships upon which the drugs had been loaded. Although Senior conceded that this information had been omitted, the statement, in fact, did mention that the loads were bound for the United States. The trial court admitted not only those portions of the statement that contained the details about destination, but the entire thirty-one pages "to show that Senior's direct testimony was not a fabrication." *Id.* at 1438. In approving this decision, the Eleventh Circuit failed not only to apply the time-line analysis, as had been its consistent practice, but erred in treating the issue as one implicating the rule of completeness and 801(d)(1)(B).

The two passages from the statement which supplied the information (which the defense implied was missing) constituted direct proof that the prior account was not "inconsistent." In effect, the admission of those two passages was an application of neither the principles governing prior consistent statements nor the rule of completeness. It was simply direct evidence that what was alleged to be missing was, in fact, present. In affirming the "broad discretion regarding the admission of prior consistent statements," the Eleventh Circuit widened the latitude afforded to trial courts: "Although a trial court has discretion to exclude those parts of prior consistent statements that do not relate

Trial courts should carefully review and where appropriate, redact the consistent statements before ruling on admissibility and if the required predicates have been satisfied, permit only those portions of the consistent statements that refute the cross-examiner's charge to be admitted.

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specifically to matters on which the defendant has been impeached, it is not required to do so." *Id.* (citation omitted).

Brantley, which rejected the time-line analysis, relied on United States v. Lombardi, 550 F.2d 827 (2d Cir. 1977), a decision that ironically applied this time-line analysis. In *Lombardi*, Yuin, the government's key witness, was impeached with portions of his prior testimony before the grand jury and at another trial where he admittedly failed to implicate the defendant's nephew in any of the drug transactions. The court permitted the prosecutor to read other portions of the testimony which had nothing to do with the nephew but which were consistent with Yuin's direct testimony against Lombardi. The Second Circuit upheld the admission, however, only because the time-line predicates were satisfied and because the consistent statement, although it did not address the evidence developed in the impeachment by omission, squarely refuted the basic charge of recent fabrication levied by the cross-examiner. *Id.* at 828-29.

Two decisions of the United States Court of Appeals for the Seventh Circuit further illustrate the need to require trial courts to apply a strict interpretation of the rule of completeness as it applies to prior consistent statements. In United States v. Juarez, 549 F.2d 1113 (7th Cir. 1977), a Drug Enforcement Task Force officer who testified for the government, conceded that his reports were "generalizations" which might be "inaccurate" in certain respects. *Id.* at 1114. The trial court admitted the entire report as relevant to the issue of the credibility of the witness. Despite recognizing that neither Rule 801(d)(1)(B) nor Rule 106 were "literally applicable," the court held that the trial court did not abuse its discretion by balancing the relevancy considerations of Rule 402 with the prejudicial concerns of Rule 403 since:

> [t]he witnesses' answers concerning the reports were necessarily fragmentary and might well have misled the jury as to the witnesses' credibility in the absence of an opportunity to see the reports themselves . . . . The admission of the reports was not error, although we do not mean to encourage the admission of reports such as these, and district judges should exercise their discretion to admit them only when necessary in their judgment to remove confusion, false impressions, or other barriers to the ascertainment of truth.

Id. at 1114. More than limited encouragement came, however, in United States v. Harris, 761 F.2d 394 (7th Cir. 1985), where the court seemed to rule that as long as the statements are admitted outside of 801(d)(1)(B) for rehabilitative purposes:

> This use . . . for rehabilitation is particularly appropriate where . . . those statements are part of a report or interview containing inconsistent statements which have been used to impeach the credibility of the witness . . . . [U]sed in this matter [they] are relevant to whether the impeaching statements really were inconsistent within the context of the interview, and if so, to what extent . . . . [t]his rehabilitative use of prior consistent statements is also in accord with the principle of completeness promoted by Rule 106.

Id. at 400 (citations omitted).

The Ninth Circuit has further diluted the substance of 801(d)(1)(B) by ruling that where a declarant is asked whether he had made a particular statement in a conversation, he has "opened the door to admission of the full conversation . . . ." United States v. Parr-Pla, 549 F.2d 660, 663 (9th Cir.), *cert. denied*, 431 U.S. 972 (1977). *See also* United States v. Stuart, 718 F.2d 931 (9th Cir. 1983); United States v. Rinn, 586 F.2d 113, 119-20 (9th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).

IV. Judicial Treatment of Rule 801(d)(1)(B)

Since the enactment of 801(d)(1)(B), there has been wide ranging debate as to whether the new acceptance of prior consistent statements as "substantive" evidence has altered the conditions which trigger their admissibility or whether the Rule even permits the admission of prior consistent declarations failing to meet the requirements of 801(d)(1)(B) for the lesser "rehabilitative purposes."[141] Drafting problems within 801(d)(1)(B) have left the courts without direction and with unfettered discretion regarding the rehabilitative purpose of prior consistent statements.[142] Courts have uniformly recognized that the enactment of the Rule did not remove the traditional rehabilitative use of prior consistent statements regardless of whether they are admissible for substantive purposes.[143] Various courts, although accepting the time-line analysis from common law for substantive use, have reserved decision as to whether the time-line analysis required under 801(d)(1)(B) necessarily governs the rehabilitative application of this type of evidence.[144] An increasing number of these courts have argued that the distinction between the

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141. *See* United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983) ("[W]e have indicated our desire for a more relaxed standard of admissibility under Rule 801(d)(1)(B) . . . ."); United States v. Williams, 573 F.2d 284, 289 n.3 (5th Cir. 1978) ("[T]his Circuit has held that a prior statement can be used to rebut a charge of improper motive even though the statement was made after the alleged motive arose."); United States v. Parodi, 703 F.2d 768, 784-85 (4th Cir. 1983) ("We recognize that there is a split in the authorities on this question whether Rule 801(d)(1)(B) conditions admissibility of prior consistent statements corroborative of an allegedly impeached witness' testimony on the absence of a motive to fabricate at the time the prior statements were made.").

142. *See* United States v. Parodi, 703 F.2d 768 (4th Cir. 1983) where in discussing the requirement of time-line predicates, the court noted: "If the drafters of the Rule intended any other conditions for admissibility, it must be assumed they would have added them. They did not. A number of circuits, though, have read such a condition into the Rule." *Id.* at 784. Compare United States v. Check, 582 F.2d 668 (2d Cir. 1978), where the Second Circuit noted that "prior [consistent] statements [which] could not satisfy the standards set forth in Fed. R. Evid. 801(d)(1)(B) . . . were not admissible even for the more limited purpose of bolstering the witness's credibility." *Id.* at 681 n.40.

143. *See* United States v. DePeri, 778 F.2d 963, 977 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 1518 (1986); United States v. Andrews, 765 F.2d 1391 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 815 (1986); United States v. Sutton, 732 F.2d 1483, 1501-02 (10th Cir. 1984); United States v. Wiggins, 530 F.2d 1018, 1022 (D.C. Cir. 1976). In fact, no circuit court has suggested that the Rule eviscerated the purely rehabilitative purposes of prior consistent statements.

144. *See* United States v. James, 609 F.2d 36, 50 n.20 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980) ("We need not decide whether Fed. R. Evid. 801(d)(1)(B) should be construed to limit the use of prior consistent statements for the purpose of rehabilitation to those circumstances in which such statements also may be used as direct evidence.").

"substantive" effect of 801(d)(1)(B) and the traditional "rehabilitative" purposes of prior consistent statements requires that the time-line analysis serve as a predicate only when 801(d)(1)(B) is invoked for substantive purposes. In effect, these courts have suggested that 801(d)(1)(B) requires a strict time-line analysis for the admission of prior consistent declarations only because it addresses substantive use. Consequently, these courts argue that where rehabilitative use is proposed, no time-line analysis is required.[145] This position is untenable for several reasons.

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145. *See* United States v. Pierre, 781 F.2d 329, 331 (2d Cir. 1986); United States v. Harris, 761 F.2d 394, 399-400 (7th Cir. 1985); United States v. Parodi, 703 F.2d 768, 784-87 (4th Cir. 1983). In *Harris*, Judge Bauer, writing for the court, stated that "[i]t is now settled" that the time-line analysis "need not be met" so long as the evidence is offered "solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements." *Harris*, 761 F.2d at 399. The basis for his conclusion is questionable. He relies on his own opinion in United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir. 1977), where the prior consistent statements were admitted to correct the inference created on cross-examination that the witness' written report differed from his courtroom account. In *Juarez*, Judge Bauer expressly noted that 801(d)(1)(B) was not applicable and admonished trial judges to "exercise their discretion to admit [such reports] only when necessary in their judgment to remove confusion, false impressions, or other barriers to the ascertainment of truth." *Id.* at 1114. In virtually all of its decisions in which prior consistent statements have been at issue, the Seventh Circuit has reaffirmed the requirement of the time-line predicate for the application of 801(d)(1)(B) without reference to a rehabilitative purpose that falls outside the time-line requirements. Finally, in United States v. Guevara, 598 F.2d 1094 (7th Cir. 1979), Judge Bauer, again writing for the court, affirmed the decision of the trial court to exclude a prior consistent statement pursuant to 801(d)(1)(B) for failure to satisfy the time-line predicates without examining admissibility for purely rehabilitative purposes. *Id.* at 1100.

In *Pierre*, the Second Circuit recently recognized a rehabilitative purpose for consistent statements which do not conform to time-line predicates that would permit their admission where such statements have "some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." *Pierre*, 781 F.2d at 331. The Court identified these statements as those used "to establish a pattern of consistency . . . to diminish the likelihood that the witness had made the inconsistent statement attributed to him," and those "offered to clarify or amplify the meaning of the impeaching inconsistent statement . . . under the doctrine of completeness." *Id.* (citations omitted). In *Pierre*, a government agent was impeached by an omission in notes of an interview with the defendant. Over objection on re-direct, the agent was permitted to refer to his formal report which he prepared on the basis of his notes three days after the interview and which contained the "omission." The court did not consider whether the existence of a motive for the agent to fabricate would tend to diminish the rebutting force of the prior statement (the report), placing it in the category of "mere repetition." *Pierre*, 781 F.2d at 334.

In *Parodi*, the Fourth Circuit rejected the time-line analysis for both rehabilitative as well as substantive purposes under 801(d)(1)(B). Relying on Judge Friendly's concurring opinion in United States v. Rubin, 609 F.2d 51, 68-69 (2d Cir. 1979) (Friendly, J., concurring), *aff'd*, 449 U.S. 424 (1981), which discussed the impropriety of applying the time-line to only rehabilitative evidence, and on its decisions in United States v. Weil, 561 F.2d 1109, 110-11 (4th Cir. 1977) and United States v. Dominguez, 604 F.2d 304, 411

First, this perspective borders on the tautological by assuming that because prior consistent statements are now admissible for substantive purposes, their use for exclusively rehabilitative purposes should not be restricted to the same time-line predicates required at common law. Prior consistent statements are relevant on a single rationale, regardless of whether they are admitted as substantive or rehabilitative evidence. For precisely the same reasons common law courts were prompted to delineate an exception to the general rule precluding admissibility of prior consistent statements for rehabilitative purposes that allows their admissibility under the Federal Rules for substantive purposes.[146] A prior consistent statement is relevant and therefore admissible only when made *before* the alleged motive to lie arose. Only then does it logically refute the cross-examiner's contention that the now consistent courtroom presentation was fabricated *as a result* of that motive.[147] The expansion of the consequences of admission has not altered this basic rationale.[148]

Second, in their efforts to enlarge the scope of circumstances in which prior consistent statements are admissible, various courts have misconstrued the language and misunderstood the analysis of the pre-rule decisions upon which they purport to rely.[149] These decisions rely on distinctions without differences in pre-rule decisions. The debate has been misdirected primarily because the inquiry is misfocused.[150] When the issue is reformulated and confined to the arena of relevancy as balanced by Rule

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(4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980), both of which held that time-line predicates are not required under 801(d)(1)(B), the court concluded that because the draftsmen omitted any direct reference to the time-line predicates in the Rule, neither the rehabilitative nor substantive purposes of admissibility would be served by reading them into the Rule. In United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984), however, the Fourth Circuit held that the time-line analysis was required for admissibility under the rule as "fully consistent" with *Parodi*. *Id.* at 138 & n.1.

146. *See supra* notes 22, 24-26 and accompanying text.

147. *See* Graham, *supra* note 6, at 583.

148. [T]he standards for determining whether prior consistent statements can now be admitted as substantive evidence are precisely the same as the traditional standards and . . . continue to be the standards used under the new rules of evidence for determining which varieties of prior consistent statements can be admitted for the more limited purpose of rehabilitation.

United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978).

149. *See supra* notes 83-111 and accompanying text.

150. A clear example are the repeated references to United States v. Scholle, 553 F.2d 1109 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977), which is widely miscited as rejecting the time-line analysis. *See supra* note 116.

403 considerations,[151] the traditional and more restrictive time-line analysis should apply in full force to any prior consistent statement, regardless of whether it is proffered for substantive or rehabilitative purposes. Moreover, without the traditional safeguards and barometers of reliability which other forms of substantive evidence present,[152] prior consistent statements under 801(d)(1)(B), like prior inconsistent statements under 801(d)(1)(A),[153] should be admissible only for rehabilitative purposes unless given under oath.

The aggrandizement of prior consistent statements under 801(d)(1)(B) to the category of "substantive" evidence has created a definitional nightmare in which virtually every component within the Rule has been subject to misguided and inconsistent interpretation.[154] Divergent interpretations and applications of 801(d)(1)(B) exist not only between[155] but within[156] the federal circuit courts. State courts, looking to the federal rule and application for guidance, have found readily accessible evidentiary pegs to hang whatever decisional hats judges have found most convenient to wear.[157] While the gestational period of the Rule has provided little guidance, its infancy and adolescence has revealed disparate judicial treatment of what con-

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151. *See supra* note 98.

152. *See* FED. R. EVID. 803, 804.

153. *See supra* note 5.

154. Inconsistent and disparate judicial treatment of the components of 801(d)(1)(B) include the following: who may offer the consistent statement, what type of impeachment may trigger rebuttal by the consistent statement, what are the factual prerequisites of the the impeachment, how much of the consistent account may be admissible, and whether the time-line predicates are required for admissibility.

155. *See supra* notes 141, 142, 145 and *infra* notes 173-77 and accompanying text.

156. *Compare* United States v. Parodi, 703 F.2d 768 (4th Cir. 1983) *with* United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984); and *compare* United States v. Smith, 746 F.2d 1183 (6th Cir. 1984) *with* United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983). *See supra* notes 141, 142 and 145.

157. *See* Williams v. State, 629 P.2d 54, 63 (Alaska 1981); State v. Martin, 135 Ariz. 552, 553-54, 663 P.2d 236, 237-38 (1983); People v. Small, 631 P.2d 148, 159 (Colo.) *cert. denied*, 454 U.S. 1101 (1981). State v. McKinney, 107 Idaho 180, 687 P.2d 570 (1984); People *ex rel.* Ashford v. Ziemann, 110 Ill. App. 3d 34, 38-39, 441 N.E.2d 1255, 1257-59 (1982), *aff'd*, 99 Ill. 2d. 353, 459 N.E.2d 940 (1984); State v. Fredette, 462 A.2d 17, 22-24 (Me. 1983); State v. Arndt, 285 N.W.2d 478, 480 (Minn. 1979); State v. Lovato, 91 N.M. 712, 713, 580 P.2d 138, 139 (Ct. App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978); State v. Sprawl, 3 Ohio App. 3d 406, 406-07, 445 N.E.2d 729, 731 (1982); State v. Roy, 140 Vt. 219, 226-27, 436 A.2d 1090, 1093-94 (1981).

stitutes a prior consistent statement[158] and of how to apply each component of the rule.[159]

Because of this uncertainty in construction, many of these applications have permitted the admission of evidence which is often unreliable,[160] at best only marginally relevant,[161] and frequently prejudicial[162] either by masking the evidence with the rehabilitative label[163] or by manipulating traditional relevancy concepts.[164] This overly flexible approach has desensitized the trial process to the types of considerations that prompted common law courts to reject these forms of proof even as rehabilitative evidence.[165]

The admissibility of prior consistent statements, without ensuring that the evidence responds directly to a challenged motive to falsify within a certain time frame, has eased the way for the entrance of self-serving declarations which are probative of little else than that the witness' motive to fabricate has not changed since his previously, consistently related fable. This approach has added to the confusion of the issues at trial by misdirecting the inquiry from an examination of first-hand sources to

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158. A "statement" is "(1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(d). Although defined in ostensibly an expansive manner, that which constitutes a statement is a subject upon which reasonable judges have widely differed. *Compare* Judge Meskill's opinion in United States v. Moskowitz, 581 F.2d 14, 21 (2d Cir. 1978), *cert. denied,* 439 U.S. 871 (1978), *with* Judge Friendly's concurrence, *id.* at 22, regarding a police artist's sketch. In United States v. Rohrer, 708 F.2d 429, 433 (9th Cir. 1983), the court admitted a diagram as a prior consistent statement. Tape recordings of a witness's conversations or his written statement which are proffered to rebut an attack on the truthfulness of the courtroom account were not *prior* consistent statements, but the actual statements. *Compare* United States v. Papia, 560 F.2d 827, 845 n.9 (7th Cir. 1977) (tape recordings are considered actual statements) *and* United States v. Hall, 739 F.2d 96, 100 (2d Cir. 1984) (inconsistent letter was admitted) *with* United States v. Brantley, 733 F.2d 1429, 1438 (11th Cir. 1984), *cert. denied,* 470 U.S. 1006 (1985) (diagram was prior consistent statement) *and* United States v. Albert, 595 F.2d 283, 289 (5th Cir.), *cert. denied,* 444 U.S. 963 (1979) (tape recording admissible as prior consistent statement).

159. *See supra* note 154.

160. *See e.g.,* United States v. Andrews, 765 F.2d 1491 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 815 (1986); United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied,* 465 U.S. 1009 (1984).

161. *See* United States v. Feldman, 711 F.2d 758 (7th Cir.), *cert. denied,* 464 U.S. 934 (1983) (discussed *supra* note 69).

162. *See* United States v. Brantley, 733 F.2d 1429 (11th Cir. 1984), *cert. denied,* 470 U.S. 1006 (1985) (discussed *supra* note 140).

163. *See* United States v. Harris, 761 F.2d 394 (7th Cir. 1985) (discussed *supra* notes 107-108).

164. *See* Graham, *supra* note 6, at 580-581.

165. *See supra* notes 27-33 and accompanying text.

an alternative inquiry into the consistent statement's attendant circumstances requiring the calling of additional witnesses, thus creating a trial within a trial on discreet and collateral matters.[166] This approach has also lessened the restrictions against the introduction of cumulative evidence even if the probative value becomes slighter as the trial date approaches, thus encouraging parties to accumulate consistent statements, thereby increasing the number of witnesses called by each side.[167] It has relaxed the restraints on the admission of evidence, traditionally excluded because of concerns regarding its reliability and trustworthiness by focusing the inquiry on an examination of the listener's credibility, thus minimizing the thrust of the impeachment.[168] In those cases where some prior declarations are admitted for substantive purposes, while others qualify only for the rehabilitative effect, this double charge may mislead and further confuse a jury as to the weight to be applied to the out-of-court declarations.[169] Because prior consistent statements are now substantive evidence, courts are more likely to allow a jury to hear the evidence because it is "substantive," while others will allow its introduction "merely" to rehabilitate the witness. A non-traditional approach to 801(d)(1)(B) permits a party whose witness has been impeached to present multiple consistent accountings of the truth of the in-court statement by parading a litany of witnesses to whom the declarant cleverly offered consistent accounts.[170] Moreover, 801(d)(1)(B) permits the admission

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166. *See* Graham, *supra* note 6, at 581 n.22:

> The introduction of a prior consistent statement on direct examination of a witness would often lead to cross-examination relating to circumstances surrounding the alleged making as well as possible the calling of witnesses to support or deny the making of the statement. In short, one might have a mini-trial on the issue of whether the prior consistent statement was made and the circumstances surrounding its making. The same problem, of course, may sometimes arise with respect to prior consistent statements admitted to rebut.

167. The court can always exclude the "needless presentation of cumulative evidence," pursuant to Rule 403. FED. R. EVID. 403, *supra* note 98. To the extent that additional witnesses are offering "substantive" evidence, the court may be less likely to exercise its discretion in favor of excluding the evidence.

168. *See* United States v. Coleman, 631 F.2d 908, 914 (D.C. Cir. 1980).

169. *See* United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985); United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir. 1977).

170. Among the traditional re-runs blessing the television networks during the Christmas season is the delightful story of "Miracle on 34th Street." It is the story of an elegant and elderly gent who "claims to be" Santa Claus—the one and only, true Santa Claus. On all of his identification cards, his name has been recorded as Kris Kringle and his residence as the North Pole. His next of kin are, of course, Rudolph and friends. He ends up working for both of the largest department stores in New York City at that

of a witness' unproven and unchallenged out-of-court declarations for their truthful content, while the witness' prior inconsistent statements, even when offered against the witness' interest, must be made under oath to have the same substantive impact.[171]

The great majority of the federal circuits have applied the traditional common law analysis to the admissibility of prior inconsistent statements under 801(d)(1)(B).[172] Although most of those decisions have been reluctant to pointedly embrace the traditional analysis in their discussion,[173] they employ these principles in their holdings. The courts seem to have accepted the common law's two primary touchstones governing prior consistent statements: (1) an impeachment alleging an intentional fabrication as a result of an improper motive, and (2) a requirement that the consistent declaration be made before the alleged motive arose. Several circuits have either failed to address or have specifically reserved judgment on whether these conditions

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time—Gimbels and Macys—where thousands of children, along with their parents, hear him tell them that he is Santa Claus. During his eventual civil commitment hearing, the Judge frames the seminal issue on the resolution of one question—whether or not the respondent, Kris Kringle, is the true Santa Claus. Were Mr. Kringle tried today in a United States District Court under the same circumstances, and assuming that the time-line predicates were met, should the thousands of children and their parents and all of the people to whom Kringle had reported himself to be Santa, be permitted to offer Kringle's statements to them as substantive evidence that the respondent is Santa Claus? Does the fact that Kringle told them he was Santa make it any more likely that he is? Rule 403 notwithstanding, 801(d)(1)(B) ensures the admissibility of this evidence for its truth and substantive nature.

171. *See* FED. R. EVID. 801(d)(1)(A), *supra* note 5.

172. Breneman v. Kennecott Corp., 799 F.2d 470 (9th Cir. 1986); United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986); United States v. Pierre, 781 F.2d 329 (2d Cir. 1986); United States v. Doyle, 771 F.2d 250 (7th Cir. 1985); United States v. DeCoito, 764 F.2d 690 (9th Cir. 1985); United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984); United States v. LeBlanc, 612 F.2d 1012 (6th Cir.), *cert. denied*, 449 U.S. 849 (1980); United States v. Rios, 611 F.2d 1335 (10th Cir. 1979), *cert. denied*, 452 U.S. 918 (1981); United States v. Lanier, 578 F.2d 1246 (8th Cir.), *cert. denied*, 439 U.S. 856 (1978); United States v. Wiggins, 530 F.2d 1018 (D.C. Cir. 1976).

173. The Rule does not set forth the time-line predicates as an "express condition" for admissibility. *See* United States v. Parodi, 703 F.2d 768, 784-85 (4th Cir. 1983). Nevertheless, the traditional analysis has been invariably followed. *See e.g.*, United States v. Smith, 746 F.2d 1183, 1185 (6th Cir. 1984); United States v. Sutton, 732 F.2d 1483, 1493-94 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985); United States v. Duncan, 693 F.2d 971, 980 (9th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); United States v. Coleman, 631 F.2d 908, 913-14 (D.C. Cir. 1980) United States v. Provenzano, 620 F.2d 985, 1001 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); United States v. Dominguez, 604 F.2d 304, 310-17 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979); United States v. McGrath, 558 F.2d 1102, 1107 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

are required under 801(d)(1)(B),[174] but appear to have applied the two predicate requirements in reaching their decisions, at times performing semantic leaps of faith to preserve the integrity of the time-line analysis.[175] Only the United States Courts of Appeals for the Fifth[176] and Eleventh[177] Circuits have specifically rejected the traditional time-line analysis for the employment of 801(d)(1)(B) by holding prior consistent statements admissible even if they too, are products of the same motive to lie as is the courtroom account.

V. Conclusion

Since the advent of 801(d)(1)(B), the use of prior consistent statements at trial has not only suffered from inconsistent application within and among the circuits, but has truly become a hobgoblin for the trial lawyer. Theories of impeachment or

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174. *See* United States v. De Peri, 778 F.2d 963, 977 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1518; 106 S. Ct. 2277 (1986); United States v. Andrews, 765 F.2d 1491, 1501-02 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 815 (1986); United States v. Sutton, 732 F.2d 1483, 1493-94 (10th Cir. 1984), *cert. denied*, 469 U.S. 1157 (1985); United States v. Duncan, 693 F.2d 971 (9th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); United States v. Patterson, 644 F.2d 890, 899-900 (1st Cir. 1981); United States v. Scholle, 553 F.2d 1109, 1121-22 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977); United States v. Wiggins, 530 F.2d 1018, 1022 (D.C. Cir. 1976).

175. *See* United States v. Andrews 765 F.2d 1491, 1501-02 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 815 (1986) (although defendant alleges government agent had motive to implicate her, court finds motive to fabricate arose only after courtroom challenge); United States v. Parodi, 703 F.2d 768, 784 (4th Cir. 1983) (defendant's hope of lenient treatment is not same motive as negotiations for leniency); United States v. LeBlanc, 612 F.2d 1012, 1015-17 (6th Cir.), *cert. denied*, 449 U.S. 849 (1980) (although defendant alleges two motives to fabricate, court ignores one to preserve integrity of time-line).

176. United States v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B 1981); United States v. Mock, 640 F.2d 629, 632 (5th Cir. Unit B 1981); United States v. Cifarelli, 589 F.2d 180, 185 (5th Cir. 1979); United States v. Williams, 573 F.2d 284, 287-89 (5th Cir. 1978).

177. United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir. 1986) ("We have repeatedly rejected the assertion that a prior consistent statement is inadmissible merely because it was made after the declarant developed a motive to fabricate."). *See also* United States v. Brantley, 733 F.2d 1429, 1438 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985) (admitting a prior consistent statement which was ostensibly made when the motive arose). In United States v. Andrews, 765 F.2d 1491, 1501 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 815 (1986), the court refused to discuss the defendant's contention of identical motive so that admissibility would conform to the time-line analysis, rather than relying, as did *Anderson*, on United States v. Parry, 649 F.2d 292 (5th Cir. Unit B 1981). In *Andrews*, the prior statement was a tape recording, made by the government agent while observing through a window the defendant enter her house. The challenged motive which predated the tape was the desire to implicate the defendant. The Eleventh Circuit, however, identified the motive to fabricate as an interest in securing corroboration for his account, thereby arising only after the agent knew that his courtroom presentation would be challenged. *Andrews*, 765 F.2d at 1501-02.

cross-examination of witnesses, let alone those of the defense and prosecution, are often developed or constructed based on whether the other side will be permitted to call a supporting cast of receivers to recount the consistent offerings of a witness attacked or impeached.[178] Increasingly, these prior tellings address not only the point in contention, but other areas of the witness' testimony which have not been called into question. Less frequently, the consistent declarations may supply a missing element in a lawyer's presentation without which the case would suffer dismissal. For the most part, prior consistent statements have been admitted without regard to the underlying consideration that make the statements relevant—whether they specifically refute the charge of fabrication. Similarly, the imbalance created by the drafters of 801(d)(1)(B) as to the uses of prior consistent statements as substantive evidence, in contrast to the uses of prior inconsistent statements for impeachment or credibility purposes, should be righted.

A redrafting of two rules within the Federal Rules of Evidence will clarify the confusion associated with the introduction of prior consistent statements and ensure that such statements will be admitted only when relevant to specifically refute the challenged attack on a witness' in-court testimony. Moreover, the proposed redrafting will limit the use of prior inconsistent statements to rehabilitative evidence, unless presented with the identical safeguards now required for the non-hearsay admission of prior inconsistent statements.

The proposed redrafting of Rule 801(d)(1)(B) should read as follows:

> (d) *Statements which are not hearsay.* A statement is not hearsay if—
>
> (1) *Prior Statement by witness.* The declarant testified at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .
>
> (B) consistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition and is offered to rebut express or implied charges of in-

178. *See supra* note 170 and accompanying text.

> tentional fabrication at the time of trial as a result of a motive which did not exist at the time the consistent statement was made.

This proposed redrafting presents the same guarantees of reliability as are now required before an inconsistent statement may be admitted for substantive purposes and makes clear that the traditional time-line analysis is a necessary predicate for admissibility. The proposal specifically places the concept of "recent fabrication" in its traditional context and discards the superfluous label of "improper" when defining motive. Any motive which causes a witness to lie is "improper" such that rehabilitation by a consistent statement which meets the time-line predicates is admissible. Similarly, the term "influence" is also omitted since any influence that results in fabrication supplies witnesses with the motive to lie.

The proposed addition to Rule 613[179] should read as follows:

> (c) *Evidence of prior consistent statement of witness.* Evidence of a prior consistent statement by a witness is admissible for rehabilitative purposes if the witness testified at the trial or hearing and is subject to cross-examination concerning the statement and the statement is offered to rebut an expressed or implied charge of intentional fabrication at the time of trial as a result of a motive which did not exist at the time the consistent statement was made.

This proposed rule makes clear that the proper response to an attack on a witness' credibility, either through impeachment by inconsistent statement or otherwise, is rehabilitation which specifically addresses the theory of the attack. No longer should impeachment by inconsistent statement not given under oath automatically trigger the admission of a prior consistent statement which neither meets the thrust of the impeachment nor the conditions of the oath, but is nonetheless admissible for substantive purposes. Moreover, the proposed uniform application of the time-line analysis as a predicate to admissibility of prior consistent statements for both rehabilitative as well as substantive purposes will ensure the presence of the "high probative value," advocated by the Eighth Circuit in *United States v.*

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179. *See supra* note 4.

Dennis,[180] and the "rebutting force" recognized as essential by the Second Circuit in *United States v. Pierre*,[181] before the statement may be admitted.

If adopted, this proposal will restore the traditional relevancy standards to the doctrine of prior consistent statements. Trial lawyers will be compelled to more carefully develop and more precisely formulate and execute their respective cross and re-direct examinations to enable them to argue that the consistent declarations either rebut or fail to rebut the proffered challenge. Trial judges may then undertake the essential inquiry to determine admissibility: "What was the witness' motive and when did he have it." Only by answering this question may trial judges fashion and trial lawyers rely on rulings that pay little notice to the hobgoblins within cross-examination and rid the trial of foolish consistencies that pollute rather than purify the waters of inquiry.

180. 625 F.2d 782, 797 (8th Cir. 1980).
181. 781 F.2d 329, 331 (2d Cir. 1986) (discussed *supra* note 115).