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Clinging to History: The Supreme Court (Mis)Interprets Federal Rule of Evidence 801(d)(1)(B) as Containing a Temporal Requirement

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CASENOTE

CLINGING TO HISTORY: THE SUPREME COURT (MIS)INTERPRETS FEDERAL RULE OF EVIDENCE 801(d)(1)(B) AS CONTAINING A TEMPORAL REQUIREMENT

I. INTRODUCTION

The adoption of the Federal Rules of Evidence (the Rules) resulted in a more liberal standard for the admission and use of various forms of evidence.¹ For example, the Rules altered the definition of "relevant evidence" increasing the scope of evidence that can be presented to a jury.² Also, the Rules permit prior inconsistent statements to be admitted as substantive evidence rather than for impeachment purposes only.³ The Ad-

1. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) (abolishing the Frye rule for the admission of expert testimony).

2. In this note, the Advisory Committee compares the relevancy standard under the Federal Rules to the earlier common law standard. FED. R. EVID. 401 advisory committee's note.

3. FED. R. EVID. 801(d)(1)(A). The Advisory Committee stated that "[p]rior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. FED. R. EVID. 801(d)(1)(A) advisory committee's note. The Advisory Committee cites the California Law Revision Commission for the rationale underlying this rule. Under California's evidentiary provisions, Rule 801(d)(1)(A) "admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent." *Id.* These dangers are eliminated because "[t]he declarant is in court and may be examined and cross-examined with regard to his statements and their subject matter." *Id.* In addition, "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation." *Id.* McCormick reasons:

The reasons for the change of face . . . may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is

visory Committee enunciated these changes, and other changes resulting from the adoption of the Rules, in their notes accompanying the Rules.⁴

Despite the Committee's best efforts, not all of the Rules' intended effects were set out in the notes. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵ the Supreme Court interpreted the Rules as superseding the conventional common law doctrine, the *Frye* standard for admissibility of expert testimony,⁶ in a manner not noted by the Advisory Committee.⁷ Recently, the Court faced a similar situation in *Tome v. United States*.⁸

In *Tome*, the United States argued that the adoption of Federal Rule of Evidence 801(d)(1)(B)⁹ abolished the pre-motive rule¹⁰ for the admissibility of prior consistent statements offered to rebut certain types of impeachment. This significant alteration in the common law was not noted by the Committee,¹¹ and the Court refused to accept the argument. Instead,

on the stand to explain it if he can, has in high degree the safeguards of examined testimony.

CHARLES I. MCCORMICK, MCCORMICK ON EVIDENCE § 251 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK].

4. In the note accompanying Federal Rule of Evidence 401, the Advisory Committee describes the Rule's standard for relevancy as having a "tendency to make the existence' of the fact to be proved 'more probable or less probable,'" and as one not "unworkable" or "unrealistic." FED. R. EVID. 401 advisory committee's note. The Supreme Court has determined that "[t]he Rule's basic standard of relevance . . . is a liberal one." *Daubert*, 113 S. Ct. at 2794; see *supra* note 3.

5. 113 S. Ct. 2786 (1993).

6. *Id.* at 2793.

7. Nowhere in the notes accompanying Rules 702 or 703 does the Committee state that the *Frye* rule is superseded by the Federal Rules. FED. R. EVID. 702, 703 advisory committee's notes.

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

9. Rule 801(d)(1)(B) says that a statement is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . ." FED. R. EVID. 801(d)(1)(B).

10. The pre-motive rule requires that "if 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 the consistent statement was made *before* the source . . . originated." MCCORMICK, *supra* note 3, § 47. This Rule is also referred to as the temporal requirement and the two terms will be used interchangeably throughout this piece.

11. Brief for the United States at *17-18, 1994 WL 262340, *Tome v. United States*, 115 S. Ct. 696 (1995) (No. 93-6892).

the Court stated that timing is the only factor affecting the rebuttal value of prior consistent statements.¹² Consequently, in federal court the admissibility of an earlier consistent statement under Rule 801(d)(1)(B) still depends on whether the prior consistent statement was made before or after the motive to fabricate arose.

This casenote examines the Court's reasoning in *Tome* as well as the background against which this decision should be interpreted. Part II traces the historical development of the pre-motive requirement through an examination of case law and treatises written before the adoption of the Federal Rules of Evidence. Part III considers how the lower federal courts have handled the issue following the 1975 adoption of the Rules. Part IV interprets the analysis employed by the majority, concurrence, and dissent in *Tome*. Each opinion will be examined in comparison with previous Supreme Court opinions concerning the Federal Rules of Evidence. Part IV will also illustrate the misguided nature of the interpretive method used by the justices when viewed in light of these earlier decisions and approaches to the use of prior consistent statements. Finally, Part V predicts the probable effects of the *Tome* decision on child abuse prosecutions because prior consistent statements are often used in such cases.

II. COMMON LAW DEVELOPMENT OF THE TEMPORAL REQUIREMENT

A. *Origin and Development*¹³

At one time, courts admitted any prior statement consistent with testimony.¹⁴ This rule changed two hundred years ago when courts began to exclude any prior consistent statement

12. *Tome*, 115 S. Ct. at 705.

13. For a general history of the admissibility of prior consistent statements, see Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231, 234-45 [hereinafter *Hobgoblin*].

14. *Lutterell v. Reynell*, 86 Eng. Rep. 887, (1670) (holding that "[t]hough a hearsay was not to be allowed as a direct evidence, yet it might be made use of . . . to prove that [the witness] was confident to himself, whereby his testimony was corroborated.").

proffered to rebut a charge of recent falsification that was not made before the motive to lie arose. This temporal requirement, also referred to as the pre-motive rule, originated in *The King v. Parker*.¹⁵ In that case, the King's Bench refused to rehear the robbery conviction of two men obtained on the allegedly perjured testimony of the defendant, even though evidence of prior consistent statements had been presented.¹⁶ This shift in admissibility occurred as a result of a growing judicial animosity toward hearsay statements in general.¹⁷

During the 1800s, state courts began to embrace the temporal requirement, illustrating a growing disdain for the use of prior consistent statements that did not precede the witness' supposed motive to falsify.¹⁸ In *Clever v. Hillberry*,¹⁹ the Pennsylvania Supreme Court reasoned that "consonant declarations may be given in contradiction of evidence tending to show that the testimony at the bar is a fabrication of a recent date, and to show that the same statement was made before its ultimate effect on the question trying could have been foreseen. . . ."²⁰ However, the same court would not admit statements made after the tainting motive appeared.²¹ Similarly, the Supreme Court of Colorado held that the only exception to the general rule prohibiting prior consistent statements was in those instances "where a design to misrepresent is charged upon the witness in consequence of his relation to the party or

15. 99 Eng. Rep. 634 (1783).

16. *Id.* at 636. In a footnote, the justices quoted a treatise on contract law which stated the rule as follows:

In an ordinary case [prior consistent statements] would be at least superfluous . . . until there is some particular reason for impeaching them as false; which reason may be repelled by circumstances, showing that the motive upon which it is supposed to have been founded could not have had existence at the time when the previous relation was made, and which therefore repel the supposition of the fact related being an afterthought or falsification.

Id. at 635 n.(f).

17. See *Hobgoblin*, *supra* note 13, at 235-36.

18. See, e.g., *Connor v. People*, 33 P. 159, 162 (Colo. 1893).

19. 9 A. 647 (Pa. 1887).

20. *Id.* at 651 (quoting *McKee v. Jones*, 6 Pa. 425 (1847)); see also *In re Hesdra's Will*, 23 N.E. 555, 558 (N.Y. 1890) (noting the exception to the general rule against admission of prior consistent statements where such statements are made before the motive to falsify existed) (citation omitted).

21. *Clever*, 9 A. at 651.

the cause, in which case it seems it may be proper to show that he made a similar statement before that relation existed."²²

Federal courts also embraced the pre-motive requirement. In *Ellicott v. Pearl*,²³ Justice Story stated that when the witness' "testimony is assailed as a fabrication of a recent date, or a complaint recently made; . . . in order to repel such imputation, proof of the antecedent declaration of the party may be admitted."²⁴ However, rather than allowing pre-motive declarations full admissibility, both state and federal courts routinely accepted such testimony only to bolster the credibility of the principal witness.²⁵

Some courts during this period, however, refused to adopt the pre-motive rule. Most notably, the Supreme Court of North Carolina held that when the credibility of a witness is attacked, any earlier consistent declaration is admissible to repel the attack.²⁶ Other courts allowed for the admission of earlier testimony to rebut evidence of prior inconsistent statements brought out on cross-examination.²⁷ These cases also precluded the use of such statements for any purpose other than rehabilitation. This approach was based on the rationale that the statement was not offered for its truth, but only to demonstrate that the witness had made earlier consistent statements.²⁸

The aversion toward post-motive statements continued into the twentieth century in state courts across the country.²⁹ Some courts modified the general rule and admitted prior consistent statements to rebut any type of impeachment.³⁰ However, despite this liberalization of the general rule, state courts essentially remained united in their opposition to earlier consis-

22. *Connor*, 33 P. at 162 (quoting *Robb v. Hackley*, 23 Wend. 50 (1840)).

23. 35 U.S. 412 (1836).

24. *Id.* at 439.

25. *Id.*

26. *State v. Twitty*, 9 N.C. (2 Hawks) 449 (1823). The same court later allowed a witness to testify to his own earlier consonant statements, regardless of when they were made. *State v. George*, 30 N.C. (8 Ired.) 324, 328 (1848).

27. *See, e.g., Henderson v. Jones*, 10 Serg. & Rawle 322, 323-24 (Pa. 1823).

28. *See In re Hesdra's Will*, 23 N.E. at 558 (citation omitted).

29. *See, e.g., People v. Singer*, 89 N.E.2d 710, 711-12 (N.Y. 1949).

30. *See State v. Rose*, 111 S.E.2d 311, 314 (N.C. 1959); *Minton v. La Follette Coal, Iron & Ry.*, 101 S.W. 178, 181 (Tenn. 1907) (allowing witness testimony to establish credibility of plaintiff).

tent declarations that did not meet the temporal requirement.³¹ Federal courts, on the other hand, were not as uniform in their application of the pre-motive rule. Several circuits retained the temporal requirement for admissibility,³² while other circuits refused to endorse this bright-line exclusionary rule.³³

B. *Justifications for the Pre-motive Rule*

Some courts justify the pre-motive rule by holding that any statement that was not made before the motive to lie arose is not relevant to the issue of credibility because the same reason for falsifying trial testimony existed at the time of the earlier remarks.³⁴ Thus, the prior consistent statement is no more reliable than the one given at trial.³⁵ Other courts emphasize that the witness could validate a story by repetition or even create evidence if the pre-motive rule is not applied.³⁶

Courts rejecting the pre-motive rule have worked within the same parameters as those that support the rule. These courts speak of the general unreliability of prior consistent statements except for when the testimony of the witness is assailed as a recent fabrication.³⁷ However, their rationale changes when the issue of timing is considered. According to the Court of Appeals for the Eighth Circuit, the limitation is an "unnecessary refinement" because of the "relevancy" of such statements notwith-

31. See *Butler v. Parrocha*, 43 S.E.2d 1, 6 (Va. 1947); *State v. Murley*, 212 P.2d 801, 804-05 (Wash. 1949)

32. See *Grunethal v. Long Island R.R.*, 388 F.2d 480, 483 (2d Cir.), *rev'd*, 393 U.S. 156 (1968) (reversed on other grounds); *United States v. Leggett*, 312 F.2d 566, 572 (4th Cir. 1962).

33. See *United States v. Bays*, 448 F.2d 977 (5th Cir. 1971), *cert. denied*, 405 U.S. 957 (1972); *Hangar v. United States*, 398 F.2d 91, 104-05 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969); *Copes v. United States* 345 F.2d 723, 726 & n.8 (D.C. Cir. 1964).

34. See, *e.g.*, *Clever v. Hillberry*, 9 A. 647, 651 (Pa. 1887).

35. See *id.*

36. See *Leggett*, 312 F.2d at 572 ("[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.")

37. *Hangar v. United States*, 398 F.2d 91, 104 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969).

standing the time they were made.³⁸ The D.C. Circuit Court agreed, stressing that there should be no "special emphasis on the time [the statement] was made" because certain indicia of reliability were present at the time of testimony regarding the earlier declaration.³⁹ These reliability factors included the fact that "[t]he jury . . . had before it the accuser, the circumstances in which [the statement] was made, and the spontaneous denial of the accusation by the accused. Finally, the declarant was available and subjected to extensive cross-examination as to her testimony and to all prior statements. . . ."⁴⁰

Many commentators have supported the imposition of a temporal requirement. These academics promoted the rule and its justification in a manner similar to that of the supporting courts.⁴¹ For example, according to McCormick, "if 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 the consistent statement was made *before* the source . . . originated."⁴² As Wigmore also explains:

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.⁴³

Other writers, however, have criticized the application of the pre-motive rule and even the exclusion of prior consistent statements in general. According to Edmund Morgan, a former Royall Professor at Harvard Law School, the dangers that justify the exclusion of hearsay testimony (the statement was not

38. *Id.* (internal quotations omitted).

39. *Copes v. United States*, 345 F.2d 723, 726 (D.C. Cir. 1964).

40. *Id.*

41. *See, e.g.*, GEORGE W. BRADNER, RULES OF EVIDENCE AS PRESCRIBED BY THE COMMON LAW FOR THE TRIAL OF ACTIONS AND PROCEEDINGS § 12 (Chicago, Callaghan and Co. eds., 2d ed. 1898); WILLIAM P. RICHARDSON, THE LAW OF EVIDENCE § 530 (Jerome Prince ed., 8th ed. 1955).

42. MCCORMICK, *supra* note 3, § 47.

43. 4 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1128 (Chadbourn rev. 1972).

made in court, not under oath, not in the presence of the jury and not subject to immediate cross-examination) are not present when a witness is available to testify and does so.⁴⁴ Thus, there is no valid reason to keep such evidence from the jury.⁴⁵ Jack Weinstein, a professor of Law at Columbia University, agrees, calling the classification of many out-of-court statements as hearsay a "practical absurdity" since the declarant is testifying and subject to cross-examination.⁴⁶ Even Wigmore changes his position on the timing requirement when dealing with impeachment by a prior inconsistent statement. He states that the timing requirement is an unjust burden because a consonant statement is relevant to the credibility of the witness no matter when it was uttered.⁴⁷ Consequently, prior to the adoption of the Federal Rules, no consensus existed among courts or commentators regarding the appropriateness of the pre-motive rule.

III. FEDERAL RULE 801(d)(1)(B): GROWING UNEASINESS WITH THE PRE-MOTIVE RULE

A. *Initial Acceptance of the Pre-motive Rule*

In 1965, Chief Justice Warren organized a committee charged with drafting rules of evidence for use in the federal courts.⁴⁸ The final product, after Supreme Court and legislative approval, was the Federal Rules of Evidence. The Rules specifically address the admissibility of prior consistent statements.⁴⁹ Federal Rule 801(d)(1)(B) states that so long as the declarant testifies and is subject to cross-examination, any earlier statement by

44. Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948) [hereinafter *Hearsay Dangers*].

45. *Id.* Morgan is arguing for the admissibility of all prior statements regardless of purpose and without the requirement of any allegations of falsification. *Id.* at 192-96.

46. Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 333 (1961); see also JOHN M. MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 62 (1947) (allowing prior consistent statements to be used to defend a witness accused of a recent fabrication).

47. WIGMORE, *supra* note 43, § 1126 (discussing the timing requirement with respect to the utterance of prior consistent statements after impeachment with prior inconsistent statements).

48. Edward W. Cleary, *Introduction to FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS III* (West 1993). The project took more than five years. *Id.*

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

that witness is admissible if "consistent with the declarant's testimony and . . . offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . ."⁵⁰

Despite its linguistic consistency with many prior common law decisions dealing with the same issue,⁵¹ this Rule expanded the use of prior consistent testimony. Rather than limit statements admissible under 801(d)(1)(B) to rehabilitation, the Advisory Committee specifically stated that they were admissible for substantive purposes.⁵² The Committee did not, however, state in the Rule or the accompanying notes whether the Rules codified the temporal requirement.⁵³

The Advisory Committee's lack of clarity as to the existence of a timing element in Rule 801(d)(1)(B) prompted questions about whether the pre-motive rule survived the creation of the Federal Rules of Evidence. Initially, many federal courts of appeals continued to require antecedent consistent statements, admitting only statements made before the alleged contamination.⁵⁴ Some courts reasoned that the common law pre-motive rule was implicit in the language of Rule 801(d)(1)(B) since that language was very similar to the language used in many decisions made prior to the adoption of the Rules.⁵⁵ In support of this position, the courts noted that, unlike other changes spelled out in the Advisory Committee's notes, the Committee did not point out any alteration in the prior common law regarding the interpretation of Rule 801(d)(1)(B).⁵⁶ Other courts simply followed the reasoning of the former common law decisions with no reference to the relationship between the language of the new rule and those cases.⁵⁷

50. *Id.*

51. See FED. R. EVID. 801 advisory committee's note and cases cited therein.

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

53. See FED. R. EVID. 801(d)(1)(B) advisory committee's note.

54. See, e.g., *United States v. Guevara*, 598 F.2d 1094, 1100 (7th Cir. 1979); *United States v. Quinto*, 582 F.2d 224, 232-33 (2d Cir. 1978); *United States v. Williams*, 573 F.2d 284, 289 (5th Cir. 1978).

55. See *Quinto*, 582 F.2d at 232-33.

56. See *id.*

57. See, e.g., *United States v. Harris*, 761 F.2d 394, 399 (7th Cir. 1985) (stating that prior consistent statements are "of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same 'for the simple reason that mere repetition does not imply veracity.'" (quoting

B. *A Shift Towards a More Flexible Standard*

The rationale underlying the pre-motive rule came under increased criticism in subsequent cases. Appellate courts began to question the bright-line distinction between what should and should not be admissible to "rebut an express or implied charge of recent fabrication or improper influence or motive."⁵⁸ Specifically, the courts began to examine the effects of the Rules' "liberal relevancy" definition on the admissibility of prior consistent statements.⁵⁹ Since relevancy under the Rules is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence,"⁶⁰ these courts reasoned that any earlier consonant statement, regardless of the time uttered, would have some rebuttal value.⁶¹ According to the United States Court of Appeals for the Third Circuit, "the case law indicates that the existence of a motive to fabricate when the [prior consistent] statement is made is a matter of relevance."⁶² The court further held that such a statement "is relevant under Rule 401 [because] Rule 801(d)(1)(B) does not impose the requirement that the statement must have been made before the motion [sic] to fabricate."⁶³ Thus, the courts of appeals disagreed on the admissibility of any post-motive statement. This disparity between the circuits finally caught the attention of the Supreme Court in 1994 when it granted certiorari in *Tome v. United States*.⁶⁴

United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir. 1979) (quoting 4 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 801(d)(1)(B)[01] at 801-117-18 (1981)).

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

59. See, e.g., United States v. Tome, 3 F.3d 342, 344 (10th Cir. 1993); United States v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992); United States v. Miller, 874 F.2d 1255, 1272 (9th Cir. 1989).

60. FED. R. EVID. 401.

61. *Tome*, 3 F.3d at 344. "[T]he relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." *Id.* at 350.

62. United States v. Casoni, 950 F.2d 893, 904 (3d Cir. 1992).

63. *Id.*

64. 114 S. Ct. 1048 (1994) (mem.).

IV. THE *TOME* OPINIONA. *Facts and Procedural History*

Matthew W. Tome, the defendant, and Beverly Padilla were the divorced parents of A.T., born in 1985. Following their legal separation in 1988, Tome was granted primary physical custody of his daughter while Padilla retained joint custody rights and saw her daughter on weekends and every other two weeks during the summer.⁶⁵

In August of 1989, Padilla petitioned the court to gain primary custody of A.T., but the court denied her petition. However, the court awarded her custody during the summer of 1990 and scheduled a follow-up hearing on the matter for August 24, 1990.⁶⁶ Padilla and A.T. did not attend this hearing. Rather, Padilla notified Colorado authorities of A.T.'s allegations of sexual abuse by her father on August 27th. In August 1991, authorities arrested Tome on charges of "knowingly engaging in sexual acts with his daughter, an Indian child under the age of twelve. . . ."⁶⁷

At trial, the prosecution called A.T., then six and one-half years old, as its first witness.⁶⁸ She testified that her father had sexual contact with her at various times when he had custody of her. The defense cross-examined A.T. over two days with a one day recess in between.⁶⁹ On the first day, A.T. testified with responses that were "immediate and ranged from single word responses to complete and relatively detailed sentences."⁷⁰ However, on the second day the testimony was strained. Some of A.T.'s answers came "as much as 40-55 seconds" after the question, and even then her responses were

65. *Id.* at 344.

66. *Id.*

67. *Id.* at 344-45. Mr. Tome was charged pursuant to 18 U.S.C. § 2241 with "engag[ing] in a sexual act with another person who has not attained the age of 12 years" which is punishable by up to life imprisonment or fines. This section applies to all "[o]ffenses committed within Indian country." 18 U.S.C. § 1153 (1988 & Supp. V 1993).

68. 3 F.3d at 345.

69. *Id.*

70. *Id.*

often "imprecise or unclear."⁷¹ Throughout this process, the defense repeatedly questioned A.T. regarding her feelings for her mother, her desire to reside with her mother, and her beliefs about the possible effects the trial would have on her mother's custodial rights.⁷²

Following this examination, the government proffered testimony from several witnesses concerning statements made to them by A.T. regarding the alleged abuse.⁷³ These statements were offered under Federal Rule 801(d)(1)(B) because, the prosecution argued, the defense's questioning of A.T. amounted to a charge that "she had fabricated the allegations of abuse in order to live with her mother in Colorado."⁷⁴ The defense objected to this evidence, but the trial court concluded that the evidence was admissible.⁷⁵

On appeal, Tome argued that the trial court erred in permitting the testimony as to A.T.'s prior consistent statements because, *inter alia*, the statements were made "after A.T.'s alleged motive to fabricate a story of abuse arose."⁷⁶ After analyzing the conflicting case law, the Tenth Circuit refused to adopt the pre-motive rule.⁷⁷ The court reasoned that "the pre-motive rule is a function of the relevancy rules, not the hearsay rules."⁷⁸ Therefore, the court concluded:

A per se rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie.⁷⁹

The appellate court held that "the district court properly admitted evidence of A.T.'s prior consistent statements under Rule

71. Tome v. United States, 115 S. Ct. 696, 699 (1995).

72. Tome, 3 F.3d at 345.

73. Id. at 345-46.

74. Id. at 346.

75. Id. at 346-47.

76. Id. at 349.

77. Id.

78. Id. at 350.

79. Id.

801(d)(1)(B)" because the district court had looked at the circumstances surrounding the out-of-court statements, the implication of a motive by the defense on cross-examination, and the lack of evidence about the defense's theory of fabrication.⁸⁰ Consequently, the conviction based on this evidence was upheld.⁸¹

This decision by the Court of Appeals for the Tenth Circuit solidified the rift between the circuits over the proper application of Rule 801(d)(1)(B). The decision increased the number of circuits that have refused to adopt the pre-motive rule to six⁸² in contrast to the six that have adopted it.⁸³ One year later, the Supreme Court granted certiorari to resolve this dispute.⁸⁴

The Supreme Court faced a difficult issue in *Tome* because neither Rule 801 nor the Advisory Committee's notes following the Rule say that the admissibility of prior consistent statements is contingent on the time the statement was made.⁸⁵ Because of this omission, the justices were left to choose the best basis for reading the Rule without any direct guidance from the authors. Although their methods of analysis were remarkably similar, the majority and dissent reached opposite conclusions regarding the requirements for admissibility under Rule 801(d)(1)(B).

80. *Id.* at 351.

81. *Id.* at 353.

82. The following circuits allow prior consistent statements that post-date the motive to fabricate: *Tome*, 3 F.2d at 351; *United States v. Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992); *United States v. Lawson*, 872 F. 2d 179, 183 (6th Cir. 1989); *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989); *United States v. Anderson*, 782 F.2d 908, 915-16 (11th Cir. 1986); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. Unit B 1981).

83. The following circuits have held that Rule 801(d)(1)(B) embodies a pre-motive rule: *United States v. White*, 11 F.3d 1446, 1450 (8th Cir. 1993); *United States v. Lewis*, 954 F.2d 1386, 1391 (7th Cir. 1992); *United States v. Casoni*, 950 F.2d 893, 904 (3d Cir. 1991); *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988); *United States v. Brennan*, 798 F. 2d 581, 587 (2d Cir. 1986); *United States v. Henderson*, 717 F.2d 135, 138 (4th Cir.), *cert. denied*, 465 U.S. 1009 (1984).

84. *Tome v. United States*, 114 S. Ct. 1048 (1994) (mem.).

85. *See* FED. R. EVID. 801(d)(1)(B) advisory committee's note.

B. *The Majority Opinion*⁸⁶

1. Flawed Beginnings

The Court opened its opinion with a brief discussion about the pre-Federal Rules common law approach to the admissibility of earlier consistent statements.⁸⁷ According to Justice Kennedy, the majority of courts required that any prior consistent statement be made before the alleged motive arose in order to be admissible.⁸⁸ Based on this context, the Court presented the issue as “whether Rule 801(d)(1)(B) embodies this temporal requirement.”⁸⁹

Although the Court’s statement of the issue seems fair on its face, it implies that the Rules must be interpreted with the prior common law evidentiary principles in mind rather than within their own context like most statutes. This premise contravenes the purpose of codifying a standard set of rules. Normally, when legislators or committees draft a system of rules, the drafters look to prior rules to incorporate the strengths of those rules while eliminating their weaknesses.⁹⁰ The language of the rules presents the drafters’ version of the best and worst of the old law *but not necessarily* the majority view in that former realm. Thus, the Court’s view of the issue in this case contradicts the intent and purpose of drafting a standard set of guidelines and affects the remaining analysis of Rule 801(d)(1)(B).

Following a questionable beginning in the *Tome* opinion, the majority proceeded with a three-pronged approach to interpreting the Rule. First, the majority looked at the structure and language of the Rule itself.⁹¹ Next, the majority examined the legislative history as evidenced in the Advisory Committee’s

86. Justice Kennedy delivered the majority opinion in which Justices Stevens, Souter and Ginsburg joined in full. Justice Scalia joined in part and in the judgment. *Tome v. United States*, 115 S. Ct. 696, 698 (1995).

87. *Id.* at 699.

88. *Id.* at 700.

89. *Id.*

90. The Advisory Committee took this approach in creating the Federal Rules of Evidence.

91. 115 S. Ct. at 700-02.

notes to support its reading of the Rule.⁹² Finally, the majority dispensed with the Government's theory that the temporal requirement is a function of the rules of relevancy.⁹³ While this method falls in line with the Court's analysis of other Federal Rules of Evidence and has served the Court well in those decisions,⁹⁴ the choice to use this interpretive process proves inadequate in the *Tome* decision. An examination of the majority's three primary arguments illustrates the shortcomings of this method.

2. Structure and Language of Rule 801(d)(1)(B)

Initially, the majority's analysis noted the Advisory Committee's decision to expand the definition of prior consistent statements as "nonhearsay . . . if they are offered to rebut a charge of 'recent fabrication or improper influence or motive.'"⁹⁵ This treatment is uncommon because "[t]he Rules do not accord this weighty, nonhearsay status to all prior consistent statements."⁹⁶ The court gave substantial weight to the Advisory Committee's decision, dubbing it "instructive [because] the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense."⁹⁷ However, the majority carried this argument too far. They asserted that if no temporal requirement exists, "there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well."⁹⁸ Careful examination of this proposition reveals several weaknesses.

First, this proposition assumes that timing is the key factor affecting the reliability of any prior consistent statement. However, as the dissent noted, the witness may have other motivations that override the reasons for changing his/her story.⁹⁹ In fact, the existence of a motive to lie at the time of the earlier

92. *Id.* at 702-04.

93. *Id.* at 704-05.

94. *See, e.g.,* *United States v. Abel*, 469 U.S. 45 (1984) (interpreting Federal Rule of Evidence 608(b)).

95. *Tome*, 115 S. Ct. at 701 (quoting FED. R. EVID. 801(d)(1)(B)).

96. *Id.*

97. *Id.*

98. *Id.* at 702.

99. *Id.* at 703 (Breyer, J., dissenting).

remarks may not even be the best indicia of reliability. Sometimes other factors, like alternative reasons to tell the truth¹⁰⁰ or the circumstances surrounding the earlier statement,¹⁰¹ indicate that the witness probably told the truth, although a motive did exist to fabricate a story.

The Court also ignores other possible reasons for selecting this particular subset of out-of-court statements for preferential treatment. For example, prior consistent statements admitted under Rule 801(d)(1)(B) could be given special treatment because they are reliable due to the presence of the witness and the opposition's right to cross-examine the witness.¹⁰² Also, juries often find limiting instructions difficult to follow. The difficulty lies in distinguishing the purposes for admission of evidence and the complex nature of limiting the use of evidence.¹⁰³ Thus, it is reasonable to believe that the Advisory

100. *Id.* Justice Breyer notes that the witness may have overriding motives to tell the truth.

A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that only the truth will save his child's life. . . . In these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation. . . .

Id.

101. *See* United States v. Miller, 874 F.2d 1255, 1275 (9th Cir. 1989) (stating that the existing motive to fabricate, the desire for revenge for breaking off a relationship, while "not negligible, . . . it is not nearly as strong as the very powerful motive that criminal defendants may feel to give exculpatory testimony."); United States v. Sampol, 636 F.2d 621, 670-74 (D.C. Cir. 1980) (noting that witnesses can have both the motive to lie and to tell the truth at the same point in time); *see also* Brief for the United States at *23, 1994 WL 262340, *Tome v. United States*, 115 S. Ct. 696 (1995) (No. 93-6892). In that brief, the United States argues that A.T. had little motive to lie because

it is doubtful that . . . [her] dislike [for her father] would have caused her to repeat a fabrication during the course of a doctor's examination or an interview by a case worker investigating the abuse . . . [since] there is no reason to believe that A.T. thought that either the pediatrician or the case worker could influence the custody decision.

Id.

102. Morgan states that "[w]hen the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements" because "[t]he adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable. . . ." Morgan, *Hearsay Dangers*, *supra* note 44, at 192.

103. Justice Breyer makes this point in the dissent. *Tome*, 115 S. Ct. at 707-08 (Breyer, J., dissenting). McCormick agrees, stating that "[s]uch a limiting instruction

Committee had other reasons for treating prior consistent statements differently than other out-of-court statements.¹⁰⁴

Next, the Court attempted to rebut the United States' argument that "an out-of-court consistent statement, whenever it was made, tends to bolster the testimony of a witness and so tends also to rebut an express or implied charge" of fabrication.¹⁰⁵ The majority discounts the United States' argument because it implies that adoption of the government's position would permit the admissibility of a large number of prior consistent statements.¹⁰⁶ However, the United States did not contend that all prior statements consistent with trial testimony should be admitted.¹⁰⁷ Rather, the government argued that prior consistent statements made in a context that "suggest[s] that they were not the product of the discrediting motive" should be allowed.¹⁰⁸ This argument is not so readily dismissed because only some prior consistent statements will meet the Rule's rebuttal requirement when taken in context. Also, Rule 403, which gives a trial judge discretion to keep highly prejudicial or unreliable statements away from the jury, can further limit the admissibility of earlier consonant state-

may not always be effective. . . ." MCCORMICK, *supra* note 3, § 59. Weinstein and Berger follow suit because "as a practical matter, the jury in all probability would misunderstand or ignore a limiting instruction anyway, so there is no good reason for giving one." JACK B. WEINSTEIN & MARGARET A. BERGER, 4 WEINSTEIN'S EVIDENCE, ¶ 801(d)(1)(B)[01], at 801-188 (1994); *see also* Comment, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1092-93 (1969) (questioning the effectiveness of limiting instructions). For an interesting look at the effects of curative instructions, which are analogous to limiting instructions, see Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

104. Cf. FED. R. EVID. 105 advisory committee's note (citing *Bruton v. United States*, 389 U.S. 818 (1968), in which the Court held that the use of a limiting instruction did not give sufficient protection to a defendant).

105. 115 S. Ct. at 702.

106. In the language of Justice Kennedy, "[t]he theory would be that, in a broad sense, any prior statement by a witness concerning the disputed issues at trial would have some relevance in assessing the accuracy or truthfulness of the witness's in-court testimony on the same subject." *Id.* (emphasis added).

107. Brief for the United States at *44-46, 1994 WL 262340, *Tome v. United States*, 115 S. Ct. 696 (1995) (No. 93-6892).

108. *Id.* at *46.

ments.¹⁰⁹ Thus, the majority overstated their concerns and did not support their interpretation of Rule 801(d)(1)(B).

Finally, the majority supported its initial conclusion with a comparison of the Rule's language to the language used in earlier common law cases upholding the pre-motive rule.¹¹⁰ As the Court noted, "the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common law cases adopting the pre-motive requirement."¹¹¹ Thus, the majority concludes, "its use of wording which follows the language of the common law cases, suggests that it was intended to carry over the common law pre-motive rule."¹¹²

This statement is flawed in two ways. First, despite the majority's implication to the contrary, not all cases with this language support the pre-motive rule. In fact, some common law cases have substantially similar language to that in Rule 801(d)(1)(B) but *specifically reject* the pre-motive rule.¹¹³ In *Hangar v. United States*, the United States Court of Appeals for the Eighth Circuit employed language similar to that used in the Rule but held that prior consistent statements were admissible even if "made after . . . the motive . . . to fabricate was greatest. . . ."¹¹⁴ Thus, the Advisory Committee's use of specific language does not necessarily imply that the Rule incorporates the temporal requirement. This language implies only that the drafters used words often employed by earlier courts.

Second, the Committee might have chosen such familiar language for other reasons. For example, the Rule uses "fabrication or improper influence or motive" which the majority believes

109. FED. R. EVID 403 ("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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.").

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

111. *Id.*; see *United States v. Zito*, 467 F.2d 1401, 1403 (2d Cir. 1972) (holding that "prior consistent statements can only be introduced after a charge [of] . . . recent fabrication and where the "statements were made before any motive to fabricate developed"); see also *Hanger v. United States*, 398 F.2d 91, 104 (8th Cir. 1968).

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

113. See, e.g., *Hangar*, 398 F.2d at 104; *Copes v. United States*, 345 F.2d 723, 726 (D.C. Cir. 1964).

114. *Hangar*, 398 F.2d at 104.

indicates adoption of the temporal requirement.¹¹⁵ However, the Committee could have chosen the Rule's language so that courts and attorneys would realize what types of impeachment would warrant the Rule's application. In the Rule, the Advisory Committee stated that prior consistent statements are admissible "if offered to rebut" such charges.¹¹⁶ This usage implies that what follows is a prerequisite to admissibility. The Committee then continued with the language "an express or implied charge . . . of recent fabrication or improper influence or motive," to establish what must be shown for prior consonant statements to be admissible.¹¹⁷ Thus, the Committee could have been using the familiar language to specify the prerequisites for admissibility rather than indicating a timing requirement.

Notwithstanding the flaws in the three main text-based arguments made by the Court, the two most persuasive structural arguments against the majority's interpretation lie in two standard canons of construction: 1) *expressio unis est exclusio alterius* (*exclusio alterius*) or "the expression of one thing is the exclusion of another,"¹¹⁸ and 2) the plain meaning doctrine. The Supreme Court previously endorsed the maxim *exclusio alterius*.¹¹⁹ In *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*,¹²⁰ the Court stated that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."¹²¹ Thus, should a statute list requirements for admissibility so that anything not set out is assumed to be omitted? With respect to prior consistent statements, the Rule specifies all that is necessary for their admissibility, so that the declarant must testify and be available for cross-examination regarding the earlier remarks,

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

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

117. *Id.*

118. BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

119. *See, e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying the maxim *expressio unis est exclusio alterius* in the interpretation of the Endangered Species Act). However, the Court has become increasingly wary of congressional silence as evidence of legislative intent. *See William J. Eskridge, Jr., The New Textualism*, 37 UCLA L. REV. 621, 640 (1990).

120. 414 U.S. 453 (1974).

121. *Id.* at 458 (quoting *Botany Worsted Mills v. United States* 278 U.S. 282, 289 (1929)).

the statement must be "consistent," the statement must be challenged as a recent fabrication or the product of an improper motive, and the statement must be offered to "rebut" the alleged improper motive.¹²² The Rule contains no explicit timing requirement. Also, as noted by the majority, the Advisory Committee's notes do not even mention the pre-motive rule.¹²³ Though the Court has found such omissions persuasive in earlier cases, the majority gave no such deference in this case.¹²⁴

The second maxim ignored by the Court, the plain meaning doctrine, also supports the argument that Rule 801(d)(1)(B) does not contain a temporal requirement. The plain meaning doctrine simply states that "a legislature says in a statute what it means and means in a statute what it says there."¹²⁵ In other words, the "plain language" of the statute controls.¹²⁶ Instead of applying this maxim, the Court read a temporal requirement into the word "rebut." The court reasoned that a prior statement does not "rebut" a charge if the same motive to lie existed at the time of the earlier remarks.¹²⁷ However, this interpretation contravenes the Rule's plain meaning because the Rule does not state that the evidence "must rebut," only that it be "offered to rebut" the charges of contamination.¹²⁸ The Court's failure to recognize the plain meaning doctrine coupled with its omission of the *exclusio alterius* maxim weakens this first portion of the majority's argument.

3. Use of the Advisory Committee's Notes

The Court then proceeded to discuss the legislative history of Rule 801, as documented in both the Advisory Committee's

122. FED. R. EVID. 801.

123. See FED. R. EVID. 801 advisory committee's note.

124. See *Daubert*, 113 S. Ct. at 2794 (noting that "[t]he drafting history [of Rule 702] makes no mention of Frye. . .").

125. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

126. See *United States v. Huddleston*, 485 U.S. 681, 687 (1988) (rejecting "petitioner's position, for it is inconsistent with . . . the plain language of Rule 404(b)").

127. *Tome v. United States*, 115 S. Ct. 696, 700-02 (1995).

128. See Transcript of Oral Argument at *19-20, 1994 WL 665263, *Tome v. United States*, 115 S. Ct. 696 (1995) (No. 93-6892). This strained reading of the Rule is noted by the dissent. *Tome*, 115 S. Ct. at 706-10.

notes and works by the Rules' drafters. Though this method contravenes the plain meaning doctrine of statutory interpretation, the Court's examination of these sources is consistent with its past decisions interpreting the Rules.¹²⁹ Also, an examination of the Rules' legislative history has often lent support to the Court's interpretation of the Rules.¹³⁰ However, in this case, the method proves ineffective because, despite the majority's contentions otherwise, the legislative history of Rule 801 does not indicate conclusively that the pre-motive rule exists under the Federal Rules.

The majority pointed to the notes accompanying Rule 801 for additional support. More specifically, the majority cited the Committee's failure to state that the Rule "abandoned the pre-motive requirement" as support for the argument that a temporal requirement is found in Rule 801(d)(1)(B).¹³¹ This conclusion is an implicit application of the aforementioned *exclusio alterius* maxim which the Court ignored in its analysis of the structure of Rule 801(d)(1)(b).¹³² Though the majority did not specifically endorse this maxim, their conclusion that the Committee intended no change because of the absence of any specific indication that change occurred,¹³³ is simply a variation of the *exclusio alterius* canon. The majority's application of this maxim here detracts significantly from the drafters' intent argument because the majority did not apply this maxim consistently throughout the analysis.

Next, the majority interpreted the Committee's heavy reliance on two academics, Charles McCormick and John H. Wigmore, as support for its position. This may be because "[t]hroughout their discussion of the Rules, the Advisory Committee Notes rely on McCormick and Wigmore as authority for the common

129. See, e.g., *Huddleston*, 485 U.S. at 687-88 (the Court first looks at the language and structure of Rule 404(b), and then at the legislative history behind the Rule); *United States v. Owens*, 484 U.S. 554, 562 (1988) (the Court reviews the language, structure and legislative history of Rule 801(d)(1)(C)).

130. *Huddleston*, 485 U.S. at 688 (stating that the petitioner's argument is "simply inconsistent with the legislative history behind Rule 404(b)"); see also *Owens*, 484 U.S. at 562-63 (looking at the legislative history for the reasons to support the carving of prior identifications out of the hearsay rule).

131. *Tome*, 115 S. Ct. at 703.

132. See *supra* part IV.B.2.

133. *Tome*, 115 S. Ct. at 703.

law approach."¹³⁴ The majority then stated that "[i]n light of the categorical manner in which those authors state the pre-motive requirement, it is difficult to imagine that the drafters . . . would have remained silent if they intended to modify the pre-motive requirement."¹³⁵

Though this reasoning seems persuasive, the majority undermined its argument by refusing to look to McCormick or Wigmore elsewhere in the opinion to determine whether the pre-motive requirement is an element of the hearsay or relevance rules.¹³⁶ Again, this inconsistent application of a method of interpretation detracts from the Court's position. Furthermore, had the majority relied on McCormick earlier in determining how to classify the pre-motive rule, they would have found no support. Rather, McCormick's definition lends credence to the dissent's statement that the Rule is "not hearsay, but relevance,"¹³⁷ because McCormick states that, once contamination has been charged, "the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source . . . originated."¹³⁸ Thus, the majority's use of McCormick seems self-serving as the Court cites him only when he supports its argument.

The majority looked to McCormick's hornbook on evidence, and its editor, Edward Cleary, who was the Reporter of the Advisory Committee.¹³⁹ The Court stressed the fact that Professor Cleary did not indicate a repudiation of the temporal requirement in McCormick's hornbook when referring to the Federal Rules of Evidence.¹⁴⁰ However, this reliance on Professor Cleary's omission fails for the same reasons mentioned earlier. First, the majority implicitly endorses the *exclusio alterius* maxim by contending that had there been any change in the temporal requirement Professor Cleary would have reported this fact

134. *Id.*

135. *Id.* This statement also implicitly endorses the *exclusio alterius* maxim which, as stated in part IV.B.3 *supra*, contradicts the majority's earlier refusal to use the maxim.

136. *See id.* at 701, 704.

137. *Id.* at 706 (Breyer, J., dissenting).

138. MCCORMICK, *supra* note 3, § 47 (emphasis added).

139. *Tome v. United States*, 115 S. Ct. 696, 703 (1995).

140. *Id.*

in the hornbook.¹⁴¹ Second, the majority's refusal to acknowledge that Professor Cleary defines the Rule using the term "relevancy" again seems self-serving.¹⁴²

Finally, the majority found support for the pre-motive rule in the "Committee's stated 'unwillingness to countenance the general use of prior prepared statements as substantive evidence,'" and in its specific rejection of Uniform Rule of Evidence 63(1).¹⁴³ The Court argued that should Rule 801(d)(1)(B) be read as to contain no temporal requirement, "the distinction between rejected Uniform Rule 63(1) and Rule 801(d)(1)(B) would all but disappear."¹⁴⁴ However, the distinction between the two could be retained by adopting the rule set out by the Tenth Circuit.

First, as the court of appeals indicated, its holding did not "overlook or devalue the veracity concerns which underlie the rule [because] 'the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant "probative force bearing on credibility apart from mere repetition.'"¹⁴⁵ Thus, not every statement will come in under this test because the trial judge will only accept those statements that have a probative value apart from repetition.

Second, the majority does not give enough credit to the exclusionary value of the requirement that "recent fabrication or improper influence or motive" must be shown.¹⁴⁶ Despite the Court's implication to the contrary, "not every attempt to impeach a witness's credibility constitutes a charge of fabrication."¹⁴⁷ In other words, statements offered under Rule

141. *See id.*

142. *See id.*; *see also* MCCORMICK, *supra* note 3, § 47.

143. *Tome*, 115 S. Ct. at 703; *see also* FED. R. EVID. 801(d)(1) advisory committee note. Uniform Rule of Evidence 63(1) allows admission of any out-of-court statement by a declarant who is present at trial and available for cross-examination. UNIF. R. EVID. 63(1) (1953).

144. *Tome*, 115 S. Ct. at 703.

145. *United States v. Tome*, 3 F.3d 342, 350 (10th Cir. 1993) (quoting *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989) (quoting *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986))).

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

147. *Gaines v. Walker*, 986 F.2d 1438, 1444 (D.C. Cir. 1993); *see also* *United States v. Cherry*, 938 F.2d 748, 755 (7th Cir. 1991).

801(d)(1)(B) are often kept out due to the lack of an "assertion [that the witness] . . . has recently changed her testimony from what it was before because of some recent influence or motivation."¹⁴⁸ Although this determination is within the discretion of the trial court,¹⁴⁹ appellate courts have overturned trial judges' rulings when there was clearly no accusation of contamination or falsification.¹⁵⁰

4. Hearsay, Not Relevancy

The government's final argument for rejecting the pre-motive rule was based on Article IV of the Rules. More specifically, the argument was based on Rule 401, which sets the standard for what evidence is relevant.¹⁵¹ Rule 401 liberalized the relevancy requirement for admissibility, a change noted by the Supreme Court in past decisions.¹⁵² The government took the position that this liberalization affected the common law temporal requirement by making some prior statements relevant, and thus admissible, even though the declarations were made after the alleged motive arose.¹⁵³ The Court rejected the government's assertion first by failing to recognize that the timing element is truly a function of the relevancy rules and

148. *Byrd v. Lionville Mfg. Co.*, 1988 WL 97662 (E.D. Pa. 1988); *see also Mecca v. Gibraltar Corp.*, 746 F. Supp. 338, 347 (S.D.N.Y. 1990) (excluding statements "[b]ecause there had been no charge of recent fabrication."); *United States v. International Business Machines Corp.*, 87 F.R.D 411, 421 n.10 (S.D.N.Y. 1980) (referring to a ruling by the trial court excluding a document offered "after cross-examination as a prior consistent statement to rebut an alleged charge of recent fabrication or improper influence or motive, it was again excluded when the court determined that there was no such charge, express or implied, in the record").

149. *United States v. Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992) ("The trial court must determine . . . whether there has been a charge of recent fabrication, improper influence or motive. . .").

150. *See Felice v. Long Island R.R.*, 426 F.2d 192, 198 (1970) (holding that a "statement made two months after the injury has no sufficient logical tendency to show that statements made within a week were incomplete").

151. FED. R. EVID. 401; Brief for the United States at *28-31, 1994 WL 262340, *Tome v. United States*, 115 S. Ct. 696 (1995) (No. 93-6892).

152. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2793-94 (1993) (rejecting the strict common law relevancy standards in the realm of expert testimony).

153. Brief for the United States at *28-31, 1994 WL 262340, *Tome v. United States*, 115 S. Ct. 696 (1995) (No. 93-6892).

then, by mischaracterizing the effects of not having a temporal requirement.¹⁵⁴

First, the Court does not address whether the pre-motive rule is merely a manifestation of the strict common law relevancy requirement. Instead, the majority marginalized the debate by claiming that the United States' position contradicted the "Rules' general proscription of hearsay testimony. . . ."¹⁵⁵ Although the majority correctly stated that there is a general disdain for hearsay testimony, it failed to consider the Rules' exceptions for certain out-of-court statements.¹⁵⁶ The United States contended that the relevancy provisions also affect the acceptable out-of-court statements because once the criteria for admissibility set out in Rule 801(d)(1)(B) are met, the evidence must remain relevant to be admissible.¹⁵⁷ The government's position is the more logical reading of the Federal Rules as a whole because *every* piece of evidence must be relevant to be admissible.¹⁵⁸ Also, any out-of-court statement must meet one of the provisions in Rule 801, Rule 803, or Rule 804 to be admissible.¹⁵⁹ The *sole* test for acceptable evidence is not as the majority implied.

Next, the majority overstated the effects that a rejection of the temporal requirement would have on trial work.¹⁶⁰ The Court expressed its concern that, without the pre-motive rule, Rule 801(d)(1)(B) "involves considerable judicial discretion; . . . reduces predictability; and . . . enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted."¹⁶¹ However, these factors do not justify the Court's rejection of the Tenth Circuit's balancing test because each factor also applies to Rule 801(d)(1)(B) with a temporal requirement.¹⁶²

154. See *Tome*, 115 S. Ct. at 704.

155. *Id.*

156. See FED. R. EVID. 801, 803, 804.

157. Brief for the United States at *28-31, 1994 WL 262340, *Tome v. United States*, 115 S. Ct. 696 (1995) (No. 93-6892).

158. See FED. R. EVID. 402.

159. See FED. R. EVID. 801, 803, 804.

160. *Tome v. United States*, 115 S. Ct. 696, 704-05 (1995).

161. *Id.*

162. 115 S. Ct. at 704-05 (rejecting the Tenth Circuit's balancing test). For an

With regard to the majority's first concern, judicial discretion, the existence of the pre-motive rule under the Federal Rules does not eliminate the power of the trial judge to determine whether the witness has been accused of changing her testimony.¹⁶³ The Court's concern about predictability is also overrated because, under the current system, there is no way of knowing what improper motive the opposition will allege. Although trial counsel may believe that a motive arose on January 1, 1990, the trial court may find a pre-existing motive and exclude statements which counsel had heretofore believed to be admissible. In essence, no less predictability exists under the proposed new rule because no litigant can predict which motive the opposition will plead. Finally, lack of forewarning should not concern the Court because each side is on notice that any statement might be proffered in rebuttal and, consequently, each side will be prepared to argue about each statement's admissibility.

C. Justice Scalia's Concurrence

1. Justice Scalia's Rationale for the Temporal Requirement: A Hypocritical Precedent

Justice Scalia opened his concurrence by criticizing the Court for examining the legislative history of the Rule.¹⁶⁴ During the course of his tenure, Scalia has steadily taken this position and the Supreme Court has recently become more receptive to his position.¹⁶⁵ Though his criticism may be worthy of review, Justice Scalia's own rationale in support of the temporal rule falls victim to the same attack set forth against the majority opinion.

articulation of the balancing test, see *United States v. Tome*, 3 F.3d 342, 350 (10th Cir. 1993) (quoting *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989) (quoting *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986))).

163. See *supra* notes 147-50 and accompanying text.

164. *Tome*, 115 S. Ct. at 706 (examining the Advisory Committee's notes for guidance).

165. See, e.g., *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994) ("We did not resort to legislative history to cloud a statutory text that is clear."). For a discussion of this development and the changes in interpretive approaches by the Court, see generally Eskridge, *supra* note 119, at 621.

Justice Scalia opened his analysis of Federal Rule 801(d)(1)(B) by stating that “[i]t is well established that ‘the body of common law knowledge’ must be ‘a source of guidance’” in our interpretation of the rules.¹⁶⁶ However, Justice Scalia quotes the exact type of source that he claims the Court should not examine. He cites a law review article by Edward Cleary, the Reporter of the Advisory Committee, on how to interpret the Federal Rules of Evidence.¹⁶⁷ Thus, his argument is weakened due to his inconsistent application of his own interpretive maxium.

2. Justice Scalia’s Endorsement of the Majority’s Points

Justice Scalia follows his opening premise by pointing out two other reasons why reading Rule 801(d)(1)(B) with a temporal requirement is logical. First, he states that the Rule “uses language that tracks common law cases. . . .”¹⁶⁸ However, not all common law cases using language similar to that in Rule 801(d)(1)(B) endorse the temporal requirement.¹⁶⁹ Other reasons also exist for choosing specific language, such as indicating which forms of impeachment trigger the application of Rule 801(d)(1)(B).¹⁷⁰

Next, Justice Scalia states that “only the pre-motive-statement limitation makes it rational to admit a prior corroborating statement” in response to a charge of contamination or falsification and not for other forms of impeachment.¹⁷¹ This assertion is flawed in two significant ways. First, Justice Scalia assumes that timing is the primary factor when determining the reliability of a prior consistent statement. This assumption is not valid.¹⁷² Second, other reasons exist for granting these specific statements specialized treatment, such as the witness’ presence

166. *Tome*, 115 S. Ct. at 706 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794 (1993) (quoting *United States v. Abel*, 469 U.S. 45, 52 (1984) (quoting Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978))).

167. *Id.*

168. *Tome*, 115 S. Ct. at 706.

169. See *supra* notes 110-14 and accompanying text.

170. See *supra* notes 117-19 and accompanying text.

171. *Tome*, 115 S. Ct. at 706.

172. See *supra* notes 101-03 and accompanying text.

in court and availability for cross-examination.¹⁷³ Consequently, even if one disregards the crack in the foundation of Justice Scalia's argument, the remaining points do not support his position.

D. *The Dissent*¹⁷⁴

1. Relevancy, Not Hearsay

The dissent opened by questioning the majority's contention that the issue is one of hearsay rather than relevancy.¹⁷⁵ To do so, they pointed to McCormick's definition of the pre-motive rule, which speaks in terms of a post-motive statement's "[ir]relevancy."¹⁷⁶ Justice Stephen Breyer then dismantled the Court's claim that the temporal requirement is the only justification for giving a prior consistent statement special treatment as nonhearsay.¹⁷⁷

The decision to treat prior consistent statements differently when offered to rebut a charge of improper motive is also predicted on a hearsay-based concern. This concern involves the jurors' ability to "distinguish between the rehabilitative and substantive use of the kind of statements listed in Rule 801(d)(1)(B)."¹⁷⁸ However, the reason for this distinction does not support a pre-motive requirement because the timing of a statement has no bearing on a jury's difficulty with limiting instructions.¹⁷⁹ Thus, the dissent came to the more reasonable conclusion that the selective treatment given to certain statements under Rule 801(d)(1)(B) is not based on a temporal requirement. Furthermore, because Rule 801(d)(1)(B) addresses a hearsay issue founded on concerns unrelated to the pre-motive rule, the dissent concluded that any temporal requirement

173. See *supra* notes 104-06 and accompanying text.

174. Justice Breyer authored the dissent in which Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas joined. 115 S. Ct. at 706-10.

175. *Id.* at 706-07.

176. *Id.* at 707; see MCCORMICK, *supra* note 3, § 47.

177. 115 S. Ct. at 707-08.

178. *Id.* at 707; see also *supra* note 103.

179. 115 S. Ct. at 707-08.

must come from the relevancy provisions of the Federal Rules.¹⁸⁰

Justice Breyer then looked at Rule 801(d)(1)(B) to determine the prerequisites to admissibility imposed on prior consistent statements. Over and above the requirements of Rule 801(d)(1) that the witness testify at trial and be subject to cross-examination,¹⁸¹ the dissent concluded that a statement may be properly admitted under Rule 801(d)(1)(B) if it is 1) "consistent with the declarant's testimony," and 2) offered to rebut a charge of fabrication or improper influence.¹⁸² However, this still leaves the question of whether the relevancy standard under the Federal Rules allows some post-motive statements to be admitted.¹⁸³

2. The Abolishment of the Temporal Requirement by the Liberal Concept of Relevancy under the Federal Rules of Evidence

The dissent proceeded to look at Rule 401 to determine its effect on the admissibility of statements under Rule 801(d)(1)(B). The dissent cited five reasons in support of its conclusion that the relevancy provisions do not bar all post-motive statements: 1) some post-motive statements are relevant to the issue of credibility and truth; 2) the common law pre-motive rule was not uniformly endorsed; 3) Rule 401 liberalized the standard for relevancy; 4) Rule 403 authorizes judges to exclude some post-motive statements; and 5) the drafters probably would not have relied on such an indirect method with which to include the pre-motive rule.¹⁸⁴ Each of these reasons is discussed individually below.

First, statements can be relevant in a number of situations despite a motive to falsify. For example, "[a] post-motive statement is relevant to rebut . . . when the speaker made the prior statement while affected by a far more powerful motive to tell

180. *Id.* at 708.

181. *Id.*; *see also* FED. R. EVID. 801(d)(1).

182. 115 S. Ct. at 708.

183. *Id.*

184. *Id.* at 708-09.

the truth."¹⁸⁵ Spontaneous statements by the witness, analogous to the excited utterances exception to hearsay testimony in Rule 803(2),¹⁸⁶ are also more likely truthful and, accordingly, may be relevant.¹⁸⁷ Thus, the majority's claim that no post-motive statement can be relevant is simply not true.

Next, the dissent challenged the Court's conclusion that courts uniformly endorsed the pre-motive rule prior to the adoption of the Federal Rules. First, the dissent pointed out that a minority of jurisdictions "recognized that postmotive statements could be relevant"¹⁸⁸ Also, the dissent noted that even in the jurisdictions that imposed the temporal requirement, no explanation was given as to why an absolute rule should exist.¹⁸⁹ The lack of explanation is noteworthy because it supports the theory that the rule was adhered to because of historical value rather than for its logic.

Third, the dissent cited *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, as an indication that the relevancy provisions of the Federal Rules are more liberal than the prior common law.¹⁹⁰ Specifically, the dissenting justices pointed out that "*Daubert* suggests that the liberalized relevancy provisions of the Federal Rules can supersede a pre-existing rule of relevance, at least where no compelling practical or logical support can be found for the pre-existing rule."¹⁹¹ Furthermore, since no strong reasons can be found to support the preservation of the temporal requirement, *Daubert* and Federal Rule 401 should be interpreted as abolishing it.¹⁹²

The dissent also reasoned that the existence of Federal Rule 403 lends support to the repudiation of a temporal requirement. Federal Rule 403 allows a judge to preclude "the barely relevant, the time wasting, and the prejudicial. . . ."¹⁹³ This flexi-

185. *Id.* at 708.

186. FED. R. EVID. 803(2).

187. *Tome*, 115 S. Ct. at 708; see also *United States v. Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989) (holding that a spontaneous statement was relevant when made after an alleged motive to lie existed).

188. *Id.*

189. *Id.*

190. 113 S. Ct. 2786 (1993).

191. *Tome*, 115 S. Ct. at 709.

192. *Id.*

193. *Id.*

ble provision partially supplants the common law pre-motive rule by codifying a judge's power to exclude those post-motive statements not sufficiently probative in light of the purpose offered.¹⁹⁴ Rule 403 would be considered with each determination of admissibility under a balancing test approach. In effect, this would add another safeguard against the possible admission of prepared statements.

Finally, the dissent pointed to the most obvious reason for the removal of the temporal requirement—Rule 801(d)(1)(B) and the accompanying Advisory Committee's note are silent about any timing requirement.¹⁹⁵ Although the drafters may have assumed that the rule would be applied without question, "this would have been a remarkably indirect (and therefore odd) way of doing so"¹⁹⁶ Thus, it is unlikely that the Committee would have preserved the temporal requirement in such a vague manner.

In sum, the dissent's more reasonable interpretation of Rule 801(d)(1)(B) leads to the more logical conclusion that the temporal requirement was eliminated for two main reasons. First, the Rule does not mention anything about limiting admissibility based on the timing of the prior consistent statements in relation to the motive to fabricate. The majority's refusal to give due deference to this omission by the Advisory Committee contradicts both the Court's own precedent and traditional rules of statutory construction. The dissent recognized the value of the Committee's silence on the temporal requirement by taking it as an indication that any strict rule on timing had been abandoned with the adoption of the Federal Rules.

Second, the Court failed to recognize the effects of the Rule's relevancy provisions on other portions of the Federal Rules. This failure was caused by the majority's mischaracterization of the pre-motive rule as hearsay-based when the concerns underlying its application are different from the rationale behind the general proscription of hearsay testimony. Had the majority correctly categorized the temporal requirement as did the dis-

194. FED. R. EVID. 403 advisory committee note.

195. *Tome*, 115 S. Ct. at 709; FED. R. EVID. 801 advisory committee note.

196. *Tome*, 115 S. Ct. at 709 (quoting Justice Breyer); *see also supra* notes 120-25 and accompanying text.

sent, the more reasonable conclusion that the temporal requirement was abolished would follow.

V. FORWARD FROM THE *TOME* DECISION: THE NEGATIVE EFFECTS ON CHILD MOLESTATION PROSECUTIONS

The Court's adherence to the antiquated pre-motive rule will affect cases which most often involve impeachment on the grounds of recent falsification. Such cases include many types of criminal cases, including child molestation cases like *Tome*. The effects of the temporal requirement are best illustrated by applying it to the facts of *Tome*.

The *Tome* Court's holding that only pre-motive statements are admissible under Federal Rule 801(d)(1)(B) will have a negative effect on child abuse prosecutions in two specific ways. First, the existence of an alleged motive for fabrication is more likely with child abuse cases, thus the chances of keeping prior consistent statements from being admitted are increased. Second, the addition of the temporal requirement to the difficulties inherent in any case with a child witness will discourage prosecutions for child abuse.

First, in most cases involving allegations of child molestation, defense counsel will accuse the child of fabricating the charges.¹⁹⁷ Most of the time, the alleged motive to fabricate will predate the prior consistent statements which will render the statements inadmissible.¹⁹⁸ This will enable the defense to prevent any corroborating statement from coming before the jury so long as counsel can allege a motive that arose before the statements were made. The *Tome* case provides an excellent illustration.

In *Tome*, the defendant and his former wife were in a legal battle over physical custody of their allegedly abused child, A.T. The abuse allegations arose during the custody dispute, implicating a possible motive for fabrication at the time the charges of abuse were first made. The possible motive was that A.T.

197. See, e.g., *United States v. Tome*, 3 F.3d 342, 349 (10th Cir. 1993); *United States v. Payne*, 944 F.2d 1458, 1471 n.12 (9th Cir. 1991).

198. See *Tome*, 3 F.3d at 349; *Payne*, 944 F.2d at 1471 n.12.

wanted to live with her mother. The defense could allege this motive on cross-examination and any prior consistent statements would be prohibited because the custody fight occurred long before the alleged incident of abuse. Ironically, in the case of a custody fight, a child might not be claiming abuse in order to live with the non-abusive parent. Rather, the child may want to live with the mother *due to the abuse*. In addition, allegations of fabrication that trigger the temporal requirement never have to be substantiated. Due to the lack of a substantiation requirement, the possibility of abuse is high.

Despite these concerns, the pre-motive rule prohibits these statements from ever being admissible under Rule 801(d)(1)(B) rather than allowing a court to do a common sense analysis to see whether the statements have a sufficient indicia of reliability to be admissible. Courts could, for example, determine whether the child testified at the original custody hearing regarding her preference with respect to living arrangements. Also, the court might analyze statements regarding custody preference made by the child to other relatives and friends prior to the allegations of abuse. Finally, the court might look to the circumstances surrounding the earlier statements and the strength of the motive to lie. In any situation, the trial court would have some flexibility in determining whether earlier consonant declarations by the child are admissible.

Second, the difficulty in satisfying the temporal requirement in child abuse cases places one more burden on a prosecutor who already faces a difficult situation due to the inherent challenges of basing a case around a child witness. Child witnesses present more difficult situations for the following reasons: 1) unlike adults, "the testimony of a child witness is perishable;"¹⁹⁹ 2) child witnesses often find testifying a frightening experience;²⁰⁰ and 3) even when the child remembers and successfully braves being on the stand, the child's testimony is

199. Dirk Lorenzen, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1068 (1988); see also *State v. Brotherton*, 384 N.W.2d 375, 377-78 (Iowa 1986) (reporting that the child accuser could not remember the alleged incident of sexual misconduct).

200. John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L.J. 801, 805 (1987).

almost always hindered by his limited linguistic ability.²⁰¹ When these problems occur, the prosecution often turns to Rule 801(d)(1)(B) to permit corroborating testimony. However, the availability of this approach is now severely limited. Consequently, a prosecutor presented with a young child alleging abuse will be more reluctant to seek criminal charges.

VI. CONCLUSION

The *Tome* Court's reading of Federal Rule of Evidence 801(d)(1)(B) is strained and counterintuitive. The majority overlooks the most obvious arguments against the existence of a temporal requirement while emphasizing the marginal ones. In the end, the majority's decision seems to be based more on the venerable history of the temporal requirement than on any logical foundation. Because of the Court's stasis, prosecutors will now face a predicament in certain criminal cases because a likely motive existed at any time a prior consistent statement was uttered. Unfortunately, after *Tome*, trial courts have no choice but to exclude all post-motive declarations in every case without regard to the reliability of the individual comment. This is an outcome that does not promote justice in our courts.

Christopher A. Jones

201. Lorenzen, *supra* note 199, at 1068.