SUPREME COURT OF THE UNITED STATES

No. 93–6892

MATTHEW WAYNE TOME, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January 10, 1995]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join its opinion except for Part II–B. That Part, which is devoted entirely to a discussion of the Advisory Committee's Notes pertinent to Rule 801(d)(1)(B), gives effect to those Notes not only because they are "a respected source of scholarly commentary," *ante*, at 9–10, but also because they display the "purpose," *ante*, at 10, or "inten[t]," *ante*, at 11, of the draftsmen.

I have previously acquiesced in, see, *e.g.*, *Beech Aircraft Corp.* v. *Rainey*, 488 U. S. 153 (1988), and indeed myself engaged in, see *United States* v. *Owens*, 484 U. S. 554, 562 (1988), similar use of the Advisory Committee Notes. More mature consideration has persuaded me that is wrong. Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive—concerning the meaning of the Rules. But they bear no special authoritativeness as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution. It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change. See 28 U. S. C. §§2072, 2074 (1988 ed. and Supp. IV). In my view even the adopting Justices' thoughts,

unpromulgated as Rules, have no authoritative (as opposed to persuasive) effect, any more than their thoughts regarding an opinion (reflected in exchanges of memoranda before the opinion issues) authoritatively demonstrate the meaning of that opinion. And the same for the thoughts of congressional draftsmen who prepare statutory amendments to the Rules. Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters. The Notes are, to be sure, submitted to us and to the Members of Congress as the thoughts of the body initiating the recommendations, see §2073(d); but there is no certainty that either we or they read those thoughts, nor is there any procedure by which we formally endorse or disclaim them. That being so, the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear.

In the present case, the merely persuasive force of the Advisory Committee Notes suffices. Indeed, in my view the case can be adequately resolved without resort to the Advisory Committee at all. It is well established that "`"the body of common law knowledge"'" must be "`"a source of guidance"'" in our interpretation of the Rules. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*., 509 U. S. __, __ (1993) (slip op., at 7) (quoting *United States* v. *Abel*, 469 U. S. 45, 52 (1984) (quoting Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908, 915 (1978))). Rule 801(d)(1)(B) uses language that tracks common-law cases and prescribes a result that makes no sense except on the assumption that that language indeed adopts the common-law rule. As the Court's opinion points out, only the premotive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks.