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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 KENNEDY delivered the opinion of the Court, except as to Part IIB.

Various federal Courts of Appeals are divided over the evidence question presented by this case. At issue is the interpretation of a provision in the Federal Rules of Evidence bearing upon the admissibility of statements, made by a declarant who testifies as a witness, that are consistent with the testimony and are offered to rebut a charge of a "recent fabrication or improper influence or motive." Fed. Rule Evid. 801(d)(1)(B). The question is whether out-of-court consistent statements made after the alleged fabrication, or after the alleged improper influence or motive arose, are admissible under the Rule.

Petitioner Tome was charged in a one-count indictment with the felony of sexual abuse of a child, his own daughter, aged four at the time of the alleged crime. The case having arisen on the Navajo Indian Reservation, Tome was tried by a jury in the United States District Court for the District of New Mexico, where he was found guilty of violating 18 U. S. C. §§1153, 2241(c), and 2245(2)(A) and (B).

Tome and the child's mother had been divorced in 1988. A tribal court awarded joint custody of the

daughter, A. T., to both parents, but Tome had primary physical custody. In 1989 the mother was unsuccessful in petitioning the tribal court for primary custody of A. T., but was awarded custody for the summer of 1990. Neither parent attended a further custody hearing in August 1990. On August 27, 1990, the mother contacted Colorado authorities with allegations that Tome had committed sexual abuse against A. T.

The prosecution's theory was that Tome committed sexual assaults upon the child while she was in his custody and that the crime was disclosed when the child was spending vacation time with her mother. The defense argued that the allegations were concocted so the child would not be returned to her father. At trial A. T., then six and one half years old, was the Government's first witness. For the most part, her direct testimony consisted of one- and two-word answers to a series of leading questions. Cross-examination took place over two trial days. The defense asked A. T. 348 questions. On the first day A. T. answered all the questions posed to her on general, background subjects.

The next day there was no testimony, and the prosecutor met with A. T. When cross-examination of A. T. resumed, she was questioned about those conversations but was reluctant to discuss them. Defense counsel then began questioning her about the allegations of abuse, and it appears she was reluctant at many points to answer. As the trial judge noted, however, some of the defense questions were imprecise or unclear. The judge expressed his concerns with the examination of A. T., observing there were lapses of as much as 40–55 seconds between some questions and the answers and that on the second day of examination the witness seemed to be losing concentration. The trial judge stated, “We have a very difficult situation here.”

After A. T. testified, the Government produced six witnesses who testified about a total of seven statements made by A. T. describing the alleged sexual assaults: A. T.'s babysitter recited A. T.'s statement to her on August 22, 1990, that she did not want to return to her father because he “gets drunk and he thinks I'm his wife”; the babysitter related further details given by A. T. on August 27, 1990, while A. T.'s mother stood outside the room and listened after the mother had been unsuccessful in

questioning A. T. herself; the mother recounted what she had heard A. T. tell the babysitter; a social worker recounted details A. T. told her on August 29, 1990 about the assaults; and three pediatricians, Drs. Kuper, Reich and Spiegel, related A. T.'s statements to them describing how and where she had been touched by Tome. All but A. T.'s statement to Dr. Spiegel implicated Tome. (The physicians also testified that their clinical examinations of the child indicated that she had been subjected to vaginal penetrations. That part of the testimony is not at issue here.)

A. T.'s out-of-court statements, recounted by the six witnesses, were offered by the Government under Rule 801(d)(1)(B). The trial court admitted all of the statements over defense counsel's objection, accepting the Government's argument that they rebutted the implicit charge that A. T.'s testimony was motivated by a desire to live with her mother. The court also admitted A. T.'s August 22d statement to her babysitter under Rule 803(24), and the statements to Dr. Kuper (and apparently also to Dr. Reich) under Rule 803(4) (statements for purposes of medical diagnosis). The Government offered the testimony of the social worker under both Rules 801(d)(1)(B) and 803(24), but the record does not indicate whether the court ruled on the latter ground. No objection was made to Dr. Spiegel's testimony. Following trial, Tome was convicted and sentenced to 12 years imprisonment.

On appeal, the Court of Appeals for the Tenth Circuit affirmed, adopting the Government's argument that all of A. T.'s out-of-court statements were admissible under Rule 801(d)(1)(B) even though they had been made after A. T.'s alleged motive to fabricate arose. The court reasoned that "the pre-motive requirement is a function of the relevancy rules, not the hearsay rules" and that as a "function of relevance, the pre-motive rule is clearly too

broad . . . because it is simply not true that an individual with a motive to lie always will do so." 3 F. 3d 342, 350 (CA10 1993). "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." *Ibid.* The court recognized that some Circuits require that the consistent statements, to be admissible under the Rule, must be made before the motive or influence arose, see, *e.g.*, *United States* v. *Guevara*, 598 F. 2d 1094, 1100 (CA7 1979); *United States* v. *Quinto*, 582 F. 2d 224, 234 (CA2 1978), but cited the Ninth Circuit's decision in *United States* v. *Miller*, 874 F. 2d 1255, 1272 (1989), in support of its balancing approach. Applying this balancing test to A. T.'s first statement to her babysitter, the Court of Appeals determined that although A. T. might have had "some motive to lie, we do not believe that it is a particularly strong one." 3 F. 3d, at 351. The court held that the district judge had not abused his discretion in admitting A. T.'s out-of-court statements. It did not analyze the probative quality of A. T.'s six other out-of-court statements, nor did it reach the admissibility of the statements under any other rule of evidence.

We granted certiorari, 510 U. S. ___ (1994), and now reverse.

The prevailing common-law rule for more than a century before adoption of the Federal Rules of Evidence was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards. As Justice Story explained: "[W]here the testimony is assailed as a

fabrication of a recent date . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted." *Ellicott* v. *Pearl*, 35 U. S. 412, 439 (1836) (emphasis supplied). *See also* *People* v. *Singer*, 300 N. Y. 120, 124–125, 89 N. E. 2d 710, 712 (1949).

McCormick and Wigmore stated the rule in a more categorical manner: "[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated." E. Cleary, McCormick on Evidence §49, p. 105 (2d ed. 1972) (hereafter McCormick). See also 4 J. Wigmore, Evidence §1128, p. 268 (J. Chadbourn rev. 1972) (hereafter Wigmore) ("A consistent statement, at a *time prior* to the existence of a fact said to indicate bias . . . will effectively explain away the force of the impeaching evidence" (emphasis in original))." The question is whether Rule 801(d)(1)(B) embodies this temporal requirement. We hold that it does.

Rule 801 provides:

> "(d) Statements which are not hearsay.—A statement is not hearsay if—
>
> "(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .
>
> "(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

Rule 801 defines prior consistent statements as nonhearsay only if they are offered to rebut a charge of "recent fabrication or improper influence or motive." Fed. Rule Evid. 801(d)(1)(B). Noting the "troublesome" logic of treating a witness prior consis-

tent statements as hearsay at all (because the declarant is present in court and subject to cross-examination), the Advisory Committee decided to treat those consistent statements, once the preconditions of the Rule were satisfied, as nonhearsay and admissible as substantive evidence, not just to rebut an attack on the witness's credibility. See Advisory Committee Notes on Fed. Rule Evid. 801(d)(1), 28 U. S. C. App., p. 773. A consistent statement meeting the requirements of the Rule is thus placed in the same category as a declarant's inconsistent statement made under oath in another proceeding, or prior identification testimony, or admissions by a party opponent. See Fed. Rule Evid. 801.

The Rules do not accord this weighty, nonhearsay status to all prior consistent statements. To the contrary, admissibility under the Rules is confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive," the same phrase used by the Advisory Committee in its description of the "traditiona[l]" common law of evidence, which was the background against which the Rules were drafted. See Advisory Committee Notes, *supra,* at 773. Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. In the present context, the question is whether A. T.'s out-of-court statements rebutted the alleged link between her desire to be with her mother and her testimony, not whether they suggested that A. T.'s in-court testimony was true. The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.

This limitation is instructive, not only to establish the preconditions of admissibility but also to reinforce the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate arose.

That is to say, the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense. Impeachment by charging that the testimony is a recent fabrication or results from an improper influence or motive is, as a general matter, capable of direct and forceful refutation through introduction of out-of-court consistent statements that predate the alleged fabrication, influence or motive. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. By contrast, prior consistent statements carry little rebuttal force when most other types of impeachment are involved. McCormick §49, p. 105 ("When the attack takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements. The defense does not meet the assault." (footnote omitted)); see also 4 Wigmore §1131, p. 293 ("The broad rule obtains in a few courts that consistent statements may be admitted *after* impeachment of any sort—in particular after any impeachment by *cross-examination*. But there is no reason for such a loose rule" (footnote omitted)).

There may arise instances when out-of-court statements that postdate the alleged fabrication have some probative force in rebutting a charge of fabrication or improper influence or motive, but those statements refute the charged fabrication in a less direct and forceful way. Evidence that a witness made consistent statements after the alleged motive to fabricate arose may suggest in some degree that the in-court testimony is truthful, and thus suggest in some degree that that testimony did not result from some improper influence; but if the drafters of Rule 801(d)(1)(B) intended to countenance rebuttal along that indirect inferential chain, the purpose of confining the types of impeachment that open the

door to rebuttal by introducing consistent statements becomes unclear. If consistent statements are admissible without reference to the time frame we find imbedded in the Rule, there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well. Whatever objections can be leveled against limiting the Rule to this designated form of impeachment and confining the rebuttal to those statements made before the fabrication or improper influence or motive arose, it is clear to us that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement.

The underlying theory of the Government's position is 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 that the testimony has been the product of an improper influence. Congress could have adopted that rule with ease, providing, for instance, that "a witness' prior consistent statements are admissible whenever relevant to assess the witness's truthfulness or accuracy." The 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. The narrow Rule enacted by Congress, however, cannot be understood to incorporate the Government's theory.

Our analysis is strengthened by the observation that the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common law cases that describe the premotive requirement. "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." E. O. 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, 245. See, *e.g.*, *Ellicott* v. *Pearl*, 35 U. S. 412, 439 (1836); *Hanger* v. *United States*, 398 F. 2d 91, 104 (CA8 1968); *People* v. *Singer,* 300 N. Y. 120, 89 N. E. 2d 710 (1949).

The language of the Rule, in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in 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.

Our conclusion that Rule 801(d)(1)(B) embodies the common-law premotive requirement is confirmed by an examination of the Advisory Committee Notes to the Federal Rules of Evidence. We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules. See, *e. g.*, *Huddleston* v. *United States*, 485 U. S. 681, 688 (1988); *United States* v. *Owens*, 484 U. S. 554, 562 (1988). Where, as with Rule 801(d)(1)(B), "Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." *Beech Aircraft Corp.* v. *Rainey*, 488 U. S. 153, at 165–166, n. 9 (1988). The Notes are also a respected source of scholarly commentary. Professor Cleary was a distinguished commentator on the law of evidence, and he and members of the Committee consulted and considered the views, criticisms, and suggestions of the academic community in preparing the Notes.

The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary. Where the Rules did depart from their common-law antecedents, in general the Committee said so. See, *e.g.*, Notes on

Rule 804(b)(4), 28 U. S. C. App., p. 790 ("The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility"); 804(b)(2), *id.,* at 789 ("The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits"); 804(b)(3), *ibid.* ("The exception discards the common law limitation and expands to the full logical limit."). The Notes give no indication, however, that Rule 801(d)(1)(B) abandoned the premotive requirement. The entire discussion of Rule 801(d)(1)(B) is limited to the following comment:

> "Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should
> not be received generally." Notes on Rule 801(d)(1)(B); *id.,* at 773.

Throughout their discussion of the Rules, the Advisory Committee Notes rely on Wigmore and McCormick as authority for the common-law approach. In light of the categorical manner in which those authors state the premotive requirement, see *supra*, at ___, it is difficult to imagine that the drafters, who noted the new substantive use of prior consistent statements, would have remained silent if they intended to modify the premotive requirement. As we observed with respect to another provision of the Rules, "[w]ith this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]." *United States* v. *Abel*,

469 U. S. 45, 50 (1984). Here, we do not think the drafters of the Rule intended to scuttle the whole premotive requirement and rationale without so much as a whisper of explanation.

Observing that Edward Cleary was the Reporter of the Advisory Committee that drafted the Rules, the Court has relied upon his writings as persuasive authority on the meaning of the Rules. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. ___ (1993); *Abel*, *supra*, at 51–52. Cleary also was responsible for the 1972 revision of McCormick's treatise, which included an examination of the changes introduced by the proposed federal rules to the common-law practice of impeachment and rehabilitation. The discussion, which occurs only three paragraphs after the treatise's categorical description of the common-law premotive rule, also lacks any indication that the proposed rules were abandoning that temporal limitation. See McCormick §50, p. 107.

Our conclusion is bolstered by the Advisory Committee's stated "unwillingness to countenance the general use of prior prepared statements as substantive evidence." See Notes on Rule 801(d)(1), 28 U. S. C. App., p. 773. Rule 801(d), which "enumerates three situations in which the statement is excepted from the category of hearsay," *ibid*., was expressly contrasted by the Committee with Uniform Rule of Evidence 63(1) (1953), "which allows *any* out-of-court statement of a declarant who is present at the trial and available for cross-examination." Notes on Rule 801(d)(1), *supra,* at 773 (emphasis added). When a witness presents important testimony damaging to a party, the party will often counter with at least an implicit charge that the witness has been under some influence or motive to fabricate. If Rule 801 were read so that the charge opened the floodgates to any prior consistent statement that satisfied Rule 403, as the Tenth Circuit concluded, the

distinction between rejected Uniform Rule 63(1) and Rule 801(d)(1)(B) would all but disappear.

That Rule 801(d)(1)(B) permits prior consistent statements to be used for substantive purposes after the statements are admitted to rebut the existence of an improper influence or motive makes it all the more important to observe the preconditions for admitting the evidence in the first place. The position taken by the Rules reflects a compromise between the views expressed by the "bulk of the case law . . . against allowing prior statements of witnesses to be used generally as substantive evidence" and the views of the majority of "writers . . . [who] ha[d] taken the opposite position." *Ibid*. That compromise was one that the Committee candidly admitted was a "judgment . . . more of experience than of logic." *Ibid.*

"A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 521 (1989) (applying that presumption in interpreting Federal Rule of Evidence 609). Nothing in the Advisory Committee's Notes suggests that it intended to alter the common-law premotive requirement.

The Government's final argument in favor of affirmance is that the common-law premotive rule advocated by petitioner is inconsistent with the Federal Rules' liberal approach to relevancy and with strong academic criticism, beginning in the 1940's, directed at the exclusion of out-of-court statements made by a declarant who is present in court and subject to cross-examination. This argument misconceives the design of the Rules' hearsay provisions.

Hearsay evidence is often relevant. "The only way in which the probative force of hearsay differs from the probative force of other testimony is in the

absence of oath, demeanor, and cross-examination as aids in determining credibility." Advisory Committee's Introduction to Article VIII, 28 U. S. C. App., p. 771. That does not resolve the matter, however. Relevance is not the sole criterion of admissibility. Otherwise, it would be difficult to account for the Rules' general proscription of hearsay testimony (absent a specific exception), see Fed. Rule Evid. 802, let alone the traditional analysis of hearsay that the Rules, for the most part, reflect. *Ibid.* ("The approach to hearsay in these rules is that of the common law. . . . The traditional hearsay exceptions are drawn upon for the exceptions . . ."). That certain out-of-court statements may be relevant does not dispose of the question whether they are admissible.

The Government's reliance on academic commentators critical of excluding out-of-court statements by a witness, see Brief for United States 40, is subject to like criticism. To be sure, certain commentators in the years preceding the adoption of the Rules had been critical of the common-law approach to hearsay, particularly its categorical exclusion of out-of-court statements offered for substantive purposes. See, *e.g.*, Weinstein, The Probative Force of Hearsay, 46 Iowa L. Rev. 331, 344–345 (1961) (gathering sources). General criticism was directed to the exclusion of a declarant's out-of-court statements where the declarant testified at trial. See, *e.g.*, Weinstein, *supra*, at 333 ("treating the out of court statement of the witness himself as hearsay" is a "practical absurdity in many instances"); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 192–196 (1948). As an alternative, they suggested moving away from the categorical exclusion of hearsay and toward a case-by-case balancing of the probative value of particular statements against their likely prejudicial effect. See Weinstein, *supra*, at 338; Ladd, The Relationship of

the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn. L. Rev. 506 (1934). The Advisory Committee, however, was explicit in rejecting this balancing approach to hearsay:

> "The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of preparation for trial." Advisory Committee's Introduction, *supra,* at 771 (emphasis added).

Given the Advisory Committee's rejection of both the general balancing approach to hearsay, and of Uniform Rule 63(1), see *supra*, ___, the Government's reliance on the views of those who advocated these positions is misplaced.

The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee noted and sought to avoid: It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted. See Advisory Committee's Introduction, *supra,* at 771.

The case before us illustrates some of the important considerations supporting the Rule as we interpret it, especially in criminal cases. If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak

charge that A. T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A. T.'s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A. T. had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.

We are aware that in some cases it may be difficult to ascertain when a particular fabrication, influence, or motive arose. Yet, as the Government concedes, a majority of common-law courts were performing this task for well over a century, see Brief for United States 39, and the Government has presented us with no evidence that those courts, or the judicial circuits that adhere to the rule today, have been unable to make the determination. Even under the Government's hypothesis, moreover, the thing to be rebutted must be identified, so the date of its origin cannot be that much more difficult to ascertain. By contrast, as the Advisory Committee commented, see *supra*, at ___, the Government's approach, which would require the trial court to weigh all of the circumstances surrounding a statement that suggest its probativeness against the court's assessment of the strength of the alleged motive, would entail more of a burden, with no guidance to attorneys in preparing a case or to appellate courts in reviewing a judgment.

Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the

prosecution's only eye witness. But "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States* v. *Salerno*, 505 U. S. ___, ___ (1992) (slip op., at 4). When a party seeks to introduce out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available, there is no need to distort the requirements of Rule 801(d)(1)(B). If its requirements are met, Rule 803(24) exists for that eventuality. We intimate no view, however, concerning the admissibility of any of A. T.'s out-of-court statements under that section, or any other evidentiary principle. These matters, and others, are for the Court of Appeals to decide in the first instance.

Our holding is confined to the requirements for admission under Rule 801(d)(1)(B). The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive. These conditions of admissibility were not established here.

The judgment of the Court of Appeals for the Tenth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.