

**FEDERAL PUBLIC DEFENDER**

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Advisory Committee on Evidence Rules  
Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, D.C. 20544

Re: Proposed Amendment to Federal Rule of Evidence 801(d)(1)(B)

Dear Committee Members:

On behalf of the Federal Public Defenders, I respectfully submit the following comments for consideration by the Advisory Committee on Evidence Rules. We do not believe that an amendment to Federal Rule of Evidence 801(d)(1)(B) is warranted, and, in fact, it could be more harmful than beneficial.

As outlined in the memorandum prepared by Professor Daniel J. Capra, the current rule excludes from the definition of hearsay a prior statement that is “consistent with the declarant’s testimony and is offered to rebut an express or implied charge of recent fabrication or improper motive.” Fed. R. Evid. 801(d)(1)(B). The Supreme Court held in Tome v. United States, 513 U.S. 150 (1995), that a prior consistent statement is admissible as substantive evidence only if it was made *before* the charged fabrication or improper influence or motive arose. A review of the case law reveals that the majority of the circuits permit introduction of consistent statements made after the improper motive arose but only for purposes of evaluating credibility.

Judge Bullock and others have criticized the current rule because it is confusing to the jury (and law students). The potential for confusion exists with respect to most limiting instructions on evidence offered solely for impeachment. For example, a jury is instructed to consider a prior conviction only for impeachment but it is highly likely that this instruction is ignored at least as often as it is followed.

Judge Bullock proposes an amendment that would eliminate the distinction between the types of consistent statements, allowing all of them to be admitted as substantive evidence. We think that such an amendment is not necessary and would actually be counterproductive. For the reasons outlined in Tome, the proposed amendment would allow a party to build an appearance of truthfulness. In Tome, the Court was concerned that the government had presented a parade of sympathetic witnesses to repeat the complainant’s statements even though the statements did not rebut the claim that her motive for alleging abuse by her father was to live in comfort with her

mother.

The Sixth Amendment generally requires cross-examination in the presence of the accused and the trier of fact precisely because such confrontation may expose the errors in the witness's testimony. See Crawford v. Washington, 541 U.S. 36, 61 (2004) (Sixth Amendment requires reliability to be tested in the "crucible of cross-examination"). Allowing substantive consideration of all prior consistent statements may create an incentive to craft the perfect statement out of court as a substitute for the imperfect live testimony. This undermines the essence of confrontation.

A good lawyer prepares her witness by going over the testimony. The repetition does not, however, make the statement more true. In fact, if a party tries to introduce multiple out-of-court consistent statements, the court's repeated limiting instructions will not confuse the jury but may drive the appropriate point home that the fact that the witness has said the same story many times does not make it truer. At some point, the court will exclude such statements as cumulative.

An alternative remedy would be to consider all prior consistent statements only for impeachment or to preclude them entirely. Neither remedy is satisfactory. A statement made prior to the motive to lie is more probative because it is not subject to manipulation by the parties and less subject to manipulation by the witness. While it may be cumulative because the jury hears the statement live from the witness stand, these pre-prevarication statements have a ring of truth that others do not.

Daniel Broderick, former the Federal Public Defender for the Eastern District of California put it this way:

To me the limitation on prior consistent statements is a necessary application of 403's limitation on cumulative evidence. The witness has testified and been cross examined. If the weakness of the witness's testimony flows from continuous bias then prior consistent statements add nothing to the trial. On the other hand, if the weakness of the direct testimony relates to some event occurring before trial (a deal or offer from the government), then the current rule makes sense in that the jury should be able to consider what the witness said before this event in evaluating the witness's credibility and in determining what actually happened. But absent some intervening event (that creates a motive to lie), the fact the witness has previously told someone else the same thing they are telling the jury does not make any material fact more or less probable. It simply bolsters that statement in the exact same manner that argument bolsters the statement. And the jury is quite likely to give too much weight to repeated testimony.

Judge Kozinski opines that prior statements are helpful in assessing credibility only if the jury thinks they are true. This is not always the case. For example, a suspect's statements at the time of detention, or lack thereof, often are admitted for credibility. Assume that two individuals are detained at a checkpoint and drugs are found hidden in the vehicle. The driver is prosecuted but the

passenger is not. At trial, the passenger testifies for the defendant that they were drinking at a bar and some guy asked them to drive a car across the bridge because he was more intoxicated than they were but they had no idea there were drugs in the car. If the passenger did not give this story when detained, the prosecutor will surely cross-examine him about this. On the other hand, if the prosecutor cross-examines him suggesting that he has made this up to help his friend, it would be relevant to credibility that the passenger told the same story to the arresting agent in a separate interrogation room. This statement would not meet the requirements of Fed. R. Evid. 801(d)(1)(B) because the passenger had a motive to exculpate the two of them even when interrogated but it bears on his credibility that he told this story from the beginning. The jury could disbelieve both statements but the existence of the first statement assists in an evaluation of whether the trial testimony is true.

Finally, the fact that appellate courts have deemed the erroneous admission of certain consistent statements without a limiting instruction to be harmless does not gauge the importance of the rule at trial. The trial judge tries to make the right ruling on the evidence regardless of whether an appellate court will deem an error subject to reversal. Judge Bullock's proposal to allow all such statements into evidence for the truth would change the dynamics at the trial.

Accordingly, Federal Public Defenders do not think that the proposed amendment is warranted, and we respectfully oppose its adoption. Thank you for the opportunity to comment on this important matter.

Yours very truly,



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Co-Chair, Legislative Committee