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

Re: Comment on the Proposed Amendment to Evidence Rule 801(d)(1)(B)

Dear Committee Members:

I write to comment upon the proposed amendment to Federal Rule of Evidence 801(d)(1)(B). I find the rationale for the proposed change compelling. Treating similarly situated prior consistent statements uniformly enhances clear and logical operation of the Evidence Rules. I have significant concerns about the current draft of the proposed amendment, however, because I believe it has the potential to deliver a mixed message to judges and litigants about the future of the Supreme Court's decision in *Tome v. United States*. Should the Committee decide to amend Rule 801(d)(1)(B), I believe that an amendment that deals squarely with *Tome* is preferable to one that may perpetuate ambiguity in the area of prior consistent statements.

A. A Laudable Goal: Consistent and Rational Operation of Evidence Rules

Extending the Rule 801(d)(1)(B) hearsay exemption to all prior consistent statements that serve to rehabilitate a testifying witness is in keeping with the policies behind the Rule. A review of the Advisory Committee Notes to the original hearsay exemption for prior consistent statements offered to rebut an express or implied charge of recent fabrication or improper influence or motive reveals three primary justifications for allowing substantive use of such statements. First, the hearsay exemption does not give the fact-finder access to out of court statements it would not otherwise receive. Under the Rule, prior consistent statements may be considered for their truth only when they are already admissible for their non-hearsay rehabilitative purpose. Thus, the hearsay exemption merely allows for greater use of out of court statements already received by the fact-finder. Second, and relatedly, the statements at issue must be "consistent" with trial testimony already given in court subject to cross-

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examination in order to rehabilitate. Allowing substantive use of out of court statements that merely echo the preferred trial testimony decreases the core hearsay risk – the use of unreliable and un-cross-examined out of court statements to build a case. Third, such prior consistent statements may only be offered for a rehabilitative purpose if the opponent of those statements first opens the door with an impeaching attack on the testifying witness that makes prior consistencies relevant to repair. Therefore, the party opponent may control access to prior consistent statements through careful consideration of impeachment strategies.

Logically extending these policy considerations reveals that the existing Rule is under-inclusive. Current Rule 801(d)(1)(B) only permits substantive use of prior consistent statements that rebut one type of impeaching attack – an attack of recent fabrication or improper motive. Of course, other types of impeachment may make prior consistent statements relevant to repair, most notably attacks on memory or suggestions of a prior inconsistency. Importantly, the three primary justifications for allowing substantive use of prior consistent statements under Rule 801(d)(1)(B) apply equally to prior consistent statements offered to rehabilitate these attacks on memory and consistency. The fact-finder will necessarily have access to these prior consistent statements for their non-hearsay rehabilitative value. The value in such statements arises out of their consistency with trial testimony already given by the declarant subject to in court cross-examination. Finally, prior consistent statements only become permissible *after* the opponent has opened the door by challenging memory or consistency. Based upon the stated rationale for permitting the hearsay exemption in existing Rule 801(d)(1)(B), there is no reason to limit the hearsay exemption to one type of rehabilitative prior consistent statement alone.

The struggle of courts, litigators and commentators to justify and maintain differential treatment of similarly situated prior consistent statements has led to significant confusion and inefficiency. In seeking a rational and uniform approach to the admissibility of prior consistent statements, the proposed amendment to Rule 801(d)(1)(B) promotes an important and laudable objective. Of course, the entire purpose of Evidence Rules is to encourage a trial process driven by logic, reason and fairness. Rules that draw illogical or even arbitrary distinctions create confusion among judges, litigants and jurors. The proposal to amend Rule 801(d)(1)(B) nicely aligns with a model of clear and consistent rule-making and, as suggested by its proposed Advisory Committee Note, merely "extends the argument made in the original Advisory Committee Note to its logical conclusion."

B. The Mixed Messages Inherent in the Proposed Amendment

In seeking to justify singling out prior consistent statements offered to rebut a charge of recent fabrication or improper motive for a hearsay exemption, the Supreme Court, in *Tome v. United States*, found a "pre-motive" requirement implicit in Rule 801(d)(1)(B). The Court held

that, consistent with common law rehabilitation practices, all prior consistent statements offered for their truth under Rule 801(d)(1)(B) must have been made *before* the charged motive to fabricate arose. According to the Court, such pre-motive prior consistent statements provide particularly compelling and reliable rebuttal of an impeaching attack. For this reason, the Court discerned a pre-motive requirement implicitly embedded within the Rule and found that this requirement justified a hearsay exemption for only one type of prior consistent statement. Notwithstanding the temporal requirement imposed by *Tome*, the Court acknowledged that it would be theoretically possible for a post-motive statement to repair an impeaching attack, but found that Rule 801(d)(1)(B) would not allow substantive use of such post-motive prior consistent statements.

Subsection (i) of the proposed amendment to Rule 801(d)(1)(B) seeks to maintain and isolate the category of prior consistent statements authorized for substantive use under the original Rule. By preserving the familiar language of the Rule, subsection (i) of the proposed amendment suggests that practice under the current Rule, as defined by the Supreme Court in *Tome*, will continue under the proposed amendment. Subsection (i), therefore, signals that prior consistent statements that repair allegations of improper motive or recent fabrication may only be used substantively if they preceded the development of the charged motive. Because all prior consistent statements admitted to rehabilitate share the same justifications for substantive use described above, subsection (ii) of the proposed amendment seeks to bring all rehabilitative prior consistent statements within the scope of the hearsay exemption. Subsection (ii) seeks to accomplish this by allowing any prior consistent statement "that otherwise rehabilitates the declarant's credibility as a witness" to be admitted for its truth.

As noted above, even the Supreme Court in *Tome* acknowledged that a post-motive statement could rehabilitate in some albeit rare circumstances. Should a trial court find that a post-motive prior consistent statement rehabilitates an impeached trial witness, however, the proposed amendment to Rule 801(d)(1)(B) presents a confusing Hobson's choice for the trial judge. Subsection (i) and *Tome* send a clear signal that the post-motive statement is inadmissible for its truth. Following long-standing precedent, therefore, a trial judge should not permit substantive use of the statement. Under subsection (ii), however, any prior consistent statement that serves to rehabilitate would be substantively admissible. In other words, subsection (ii) blesses what subsection (i) has long been interpreted to prohibit. By incorporating both concepts into the Rule, I believe that the current draft of the proposed amendment sends an improper mixed message that threatens to further confuse and complicate the field of prior consistent statements. Although post-motive rehabilitative prior consistent statements may be rare, the goal of the proposed amendment is to clarify and rationalize the Rule. Rather than proceeding with an amendment that risks continued

confusion, any amendment should tackle the *Tome* issue directly and give judges and litigants clear guidance as to the effect of the amendment on the *Tome* requirement.

C. How to Solve a Problem Like Tome

There are a few alternatives for dealing with the *Tome* issue.

1. Leave Well Enough Alone

The path of least resistance would be to reject any amendment to Rule 801(d)(1)(B) and to leave the Rule and practice under it alone. There are certain to be many voices in favor of this approach. Indeed, there is something to be said for the safety of the familiar. Courts and litigants have many years of experience with the current Rule and the *Tome* pre-motive analysis.[1] The obvious drawback of this option is that it maintains the mysterious disparate treatment of different types of prior consistent statements under the Evidence Rules and the need for complicated jury instructions of questionable utility.

2. A Middle Ground: Keep Tome and Expand Substantive Use of Other Prior Consistent Statements

Another option would be to amend the Rule to extend a hearsay exemption only to prior consistent statements that rehabilitate a witness in ways other than a *Tome* challenge to motivation, while maintaining the *Tome* pre-motive standard for all prior consistent statements that repair attacks of recent fabrication or improper influence or motivation. This could be done by adding language to subsection (ii) of the proposed amendment that clarifies its application only to prior consistent statements *not* within the category defined by subsection (i).[2] Under such an amendment, a post-motive prior consistent statement would remain inadmissible for its truth. Prior consistent statements that repair an attack on memory or consistency, however, could be used for their truth along with pre-motive prior consistent rehabilitative statements.

One potential conflict with such an amendment would occur with multiple impeaching attacks on a testifying witness. For example, an opponent could challenge a witness's

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[1] Some may prefer to maintain the current Rule out of fear that an amended Rule blessing expanded *use* of out of court statements could lead to increased *admission* of prior consistent statements. Indeed, surveyed district court judges opined that the amendment would increase admission of prior consistent statements. As described above, the hearsay exemption allows only statements otherwise disclosed to the jury for rehabilitation. While an amendment might encourage party attempts to use prior consistencies more often, trial judges would retain full control over the decision about rehabilitation (which triggers substantive use under the proposal).

[2] One could argue that the draft Rule already operates to maintain the *Tome* pre-motive limitation by admitting prior consistent statements that "otherwise" rehabilitate in the second subsection of the proposed Rule. Because draft subsection (ii) could also be read to allow any type of prior consistent statement that rehabilitates for its truth, regardless of the kind of impeaching attack used, it would be beneficial to clarify this point in Rule text.

motivations *and* memory. A post-motive prior consistent statement might be inadmissible substantively to repair the attack on the witness's motivations, but might still be admissible for its truth to rehabilitate the challenge to memory under subsection (ii). Nevertheless, because of the need for a distinct type of impeachment to trigger such admissibility, this result would not undermine *Tome* in the way that the proposed amendment could. In other words, post motive statements would not be substantively admissible to repair an attack on motivation, but could only be offered for their truth in the event of another triggering impeachment method. This option presents a middle ground that seeks to resolve the disparity between different breeds of prior consistent statements, while remaining true to the *Tome* precedent.

3. Reject Tome in Favor of a Straightforward and Uniform Approach to All PCS

Another possibility seems to present the cleanest and clearest resolution of the issue. An amendment to Rule 801(d)(1)(B) could eliminate proposed subsection (i) and any reference to specific types of prior consistent statements. An amended rule could simply provide for the substantive admissibility of all prior consistent statements that are otherwise admitted to "rehabilitate the declarant's credibility as a witness."[3] Consistent with current practice, this approach would leave to the trial judge the question of which prior consistent statements rehabilitate. The Rule simply would clarify that all prior consistent statements admitted for rehabilitation may be used substantively. Committee Notes to such an amendment could explain that a temporal pre-motive requirement is not dispositive of admissibility under the Rule. That said, the Notes could emphasize, consistent with *Tome*, that post-motive statements rarely repair an attack on motivation, but that they could be admitted under the Rule in a proper case should the trial judge find that they rehabilitate under the unique circumstances presented.

This option simultaneously offers significant potential merits and demerits. On the positive side, such an amendment would bring logic, simplicity and uniformity to the evaluation of prior consistent statements, eliminating the need for either detailed evaluation of chronologies or confusing limiting instructions to the jury about ignoring the substance of prior statements that merely repeat trial testimony they are encouraged to consider. On the negative side, such an amendment effectively overrules the hard and fast *Tome* pre-motive standard and alters longstanding practice in this area.

Before considering such an alternative, the Advisory Committee should explore a significant question: how critical is the *Tome* pre-motive requirement to fair operation of the hearsay exemption? First, the pre-motive requirement was implied to explain the substantive

[3] This option appears to have been the original proposal circulated to district court judges in connection with the survey conducted by the Federal Judicial Center.

use of only one type of prior consistent statement under existing Rule 801(d)(1)(B). Should that Rule be expanded to include all types of prior consistencies, the pre-motive requirement is no longer necessary to distinguish the admissible prior consistent statements from the inadmissible. At its core, the pre-motive requirement is aimed at determining which prior statements serve to rehabilitate an impeached trial witness. This question is regulated by Rules 401 and 402, rather than by any Article Eight provisions. The original Advisory Committee Notes to current Rule 801(d)(1)(B) don't seek to govern rehabilitation, but simply allow for substantive use of consistent statements deemed rehabilitative by the trial judge. The reason for the hearsay exemption appears to be the perceived harmlessness inherent in allowing substantive use of statements already published to the jury that are wholly consistent with trial testimony.

Indeed, the pre-motive requirement may not only be less necessary under an amended rule, but also inadequate to curb improper use of prior consistent statements. In *Tome*, all of the young victim's out of court statements accusing her father of abuse were made *after* her parents' divorce required her to spend time alone in her father's care. Where the defense cross-examination implied that the victim's story of abuse was designed to influence the custody arrangement to allow her to stay with her mother, the victim's prior statements were all made after this alleged motive to fabricate arose. On these facts, the Supreme Court used the pre-motive requirement to exclude these powerful and damning hearsay statements by the victim.

Close consideration of *Tome* suggests that while the pre-motive requirement may have served its purpose on the facts of *Tome*, it may be inadequate to protect against improvident use of hearsay in other cases. Suppose the victim in *Tome* had made all of her powerful and damning accusations of abuse *before* her parents' divorce, perhaps precipitating it. Under the analysis in *Tome*, the prosecutor would have been permitted to use the victim's pre-motive consistent statements for their truth in response to defense counsel's questioning about the victim's desire to return to her mother. While satisfying the pre-motive requirement, such use of victim hearsay appears inconsistent with the purposes of Rule 801(d)(1)(B). Although the defense may have opened a door with its challenge to the little girl's motivations, the prior statements were anything but a mere repetition of her trial testimony. Her stilted responses to leading questions failed to paint a persuasive picture of abuse on the stand. To have allowed her detailed out of court accusations would implicate the core hearsay risk of substituting hearsay for trial testimony. Furthermore, allowing such statements appears at odds with the policy underlying Rule 801(d)(1)(B) that takes a "why not?" approach to substantive use of prior consistent statements because it assumes that the statements ***add nothing*** to trial testimony, but merely echo it in a way that repairs an opponent's impeaching attack. A pre-motive requirement may not effectively prevent admission of hearsay like that at issue in *Tome.*

Rather, a cautious and thoughtful evaluation of prior witness statements to gauge their genuine consistency with trial testimony holds far greater promise for protecting against misuse of Rule 801(d)(1)(B). An Advisory Committee Note emphasizing the importance of material consistency between the trial testimony and prior statements for proper operation of the hearsay exemption could be beneficial in promoting the intended use of Rule 801(d)(1)(B).[4]

D. Conclusion

Amending Rule 801(d)(1)(B) to include prior consistent statements used to rehabilitate impeaching attacks other than attacks on motivation is completely consistent with the stated reasons for the original hearsay exemption. Such an expansion of the hearsay exemption would logically treat all prior consistent statements used to rehabilitate testifying witnesses similarly. As such, the proposed amendment advances the development of clear and rational evidentiary policies that can be administered efficiently and uniformly. Arguably, the proposed amendment responds to ambiguity in the original Rule, which failed to include certain prior consistent statements or to articulate any basis for excluding them from coverage. If the Advisory Committee acts to correct this ambiguity, it seems crucial to design an amendment that does not suffer from similar ambiguities that will need to be litigated or eventually corrected by future rule-making. For that reason, the current design of the proposed amendment that blesses *Tome* in its first subsection, while potentially undermining it in the second, should not be adopted. An amendment that deals with the *Tome* issue directly (one way or the other) would be superior to the proposed draft. Moreover, an explicit clarification in the Advisory Committee Notes of the importance of consistency between trial testimony and prior statements seems critical to proper operation of the exemption.

Respectfully submitted,

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[4] Although the Supreme Court did not reach the issue of the victim's cross-examination in *Tome*, all of the Rule 801(d)(1) hearsay exemptions require that the declarant be "subject to cross-examination about a prior statement." *Tome* also presented a difficult problem of effective cross-examination of a very young trial witness. More active oversight of the existing cross-examination requirement in Rule 801(d)(1)(B) would also minimize hearsay risks associated with substantive use of prior consistent witness statements.