The Admissability of Rehabilitative and Substantive Prior Consistent Statements and the Temporal Requirement

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THE ADMISSIBILITY OF REHABILITATIVE AND SUBSTANTIVE PRIOR CONSISTENT STATEMENTS AND THE TEMPORAL REQUIREMENT

If the testimony of a witness is impeached during a trial, the introduction of a prior consistent statement may aid in reestablishing the witness's credibility. Generally, a statement made outside of the courtroom constitutes hearsay and is deemed inadmissible. However, under Federal Rule of Evidence 801(d)(1)(B) ("Rule 801(d)(1)(B)"), a prior statement may be admitted if it 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." Therefore, if there is a charge that the witness fabricated his testimony, or had an improper influence or motive, then the witness's testimony is considered impeached and the prior statements are admissible to reha-

1 See Fed. R. Evid. 801(d)(1)(B). According to the rule, the prior consistent statement must "rebut an express or implied charge . . . of a recent fabrication or improper influence or motive." Id. Admitting this type of statement may afford a witness's original testimony greater credibility because it can demonstrate that his testimony has remained consistent. Id. The rule permitting this introduction is found within the hearsay exception of the Federal Rules of Evidence. See Fed. R. Evid. 801(d). This rule provides three exceptions for when a statement will not be considered hearsay. Id.; see also United States v. Harris, 761 F.2d 394, 398 (7th Cir. 1985) (consistent statements from interview admissible so fact-finder can determine whether impeaching and inconsistent statements from interview were taken out of context); United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982) (allowing statements to come before motive to lie, but still adhering to Rule 801(d)(1)(B)), cert. denied, 459 U.S. 1117 (1983); United States v. Quinto, 582 F.2d 224, 232 (2d Cir. 1978) (developing three prong test which encompassed requirements under Rule 801(d)(1)(B)).

2 See Fed. R. Evid. 801(c). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Id.; Harris, 761 F.2d at 398 (demonstrating requirements for hearsay); United States v. Herring, 582 F.2d 535, 536 (10th Cir. 1978) (giving trial court discretion to determine hearsay).

3 Fed. R. Evid. 801(d)(1)(B). The enactment of the Federal Rules of Evidence changed the admissibility standard for evidence. See Fed. R. Evid. 801 advisory committee's note. Originally, before the acceptance of the rule in 1975, prior consistent statements were only admissible to rehabilitate the credibility of a witness. See Yvette Olstein, Pierre and Brennan: The Rehabilitation of Prior Consistent Statements, 53 Brook. L. Rev. 515, 515 (1987). Substantive evidence, which is intended to prove the truth of the issue asserted, was not considered prior to the adoption of the rule. Id. But with both rehabilitative and substantive evidence presently accepted as prior consistent statements, the amount of statements under the hearsay exception is greatly increased. Id.
bilitate the witness or substantiate his testimony.  

However, Rule 801(d)(1)(B) does not expressly require that the prior consistent statement precede the motive to fabricate in order to be admissible. As a result, the circuit courts are divided on whether such a temporal requirement exists. In addition, the circuits which allow the admission of statements to postdate the motive to fabricate are split on whether these statements can be used for substantive and rehabilitative purposes.

4 See Fed. R. Evid. 801 advisory committee's note. Rule 801(d)(1)(B) was intended to make prior consistent statements admissible not only to rehabilitate the credibility of a witness but also as substantive evidence of the events asserted. Id. The advisory committee stated:

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 into evidence, no sound reason is apparent why it should not be received generally.

Id. This was a significant alteration to the hearsay rule because "[for nearly 200 years last past, the courts have enforced, except in certain very limited circumstances, a general prohibition against the use of prior consistent statements." See Quinto, 582 F.2d at 232. Primarily, prior consistent statements were previously always considered irrelevant. Id.


6 See, e.g., United States v. Vest, 842 F.2d 1319, 1320 (1st Cir.) (admitting statements made before motive to fabricate existed), cert. denied, 488 U.S. 912 (1988); United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983) (admitting prior consistent statements only if statement was made prior to time supposed motive to falsify arose), cert. denied, 465 U.S. 1009 (1984); United States v. Rohrer, 708 F.2d 429, 434 (9th Cir. 1983) (admitted prior consistent statements to rehabilitate only when made before witness had motive to fabricate); United States v. Quinto, 582 F.2d 224, 235 (2d Cir. 1978) (holding that admission of prior consistent statement must come before motive to lie if used as substantive evidence).

For circuits which have held that some form of prior consistent statements may postdate the fabrication motive, see United States v. Montague, 958 F.2d 1094, 1101 (D.C. Cir. 1992) (admitting prior consistent statements without mandating temporal requirement); United States v. Casoni, 950 F.2d 893, 903 (3rd Cir. 1991) (declaring that rehabilitative statements can postdate any fabrication motive); United States v. Andrade, 788 F.2d 521, 532 (8th Cir.) (admission or rejection of prior consistent statement which postdates motive to fabricate is addressed to sound discretion of trial court and will not be reversed on appeal except when there has been prejudicial abuse of discretion), cert. denied, 479 U.S. 963 (1986); United States v. Anderson, 782 F.2d 908, 915 (11th Cir. 1986) (asserting that motive is not relevant to admissibility of prior consistent statements); United States v. Harris, 761 F.2d 394, 398 (7th Cir. 1985) (admitting statements which postdate motive to fabricate); United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982) (timing of prior consistent statements may only affect materiality), cert. denied, 459 U.S. 1117 (1983); United States v. Parry, 649 F.2d 292, 296 (5th Cir. 1981) (considering temporal requirement insufficient); United States v. Rios, 611 F.2d 1335, 1349 (10th Cir. 1979) (holding it was proper to allow jury to hear both consistent statements which postdate impeaching statements to evaluate witness's credibility), cert. denied, 452 U.S. 918 (1981).

7 BLACK'S LAW DICTIONARY 1429 (6th ed. 1990). Substantive evidence is introduced for the truth of the matter asserted by being "adduced for the purpose of proving a fact in issue . . . ." Id.
This Note examines the existence of a temporal requirement when admitting prior consistent statements to rebut an alleged fabrication, or improper influence or motive, under Rule 801(d)(1)(B). Part One consists of an analysis of the circuits, which demonstrates the division among the circuit courts with respect to whether a temporal requirement is imposed by Rule 801(d)(1)(B). Where applicable, Part One also indicates those circuits which distinguish between substantive and rehabilitative statements when admitting statements that postdate the motive to fabricate. Part Two examines the necessity of mandating a temporal requirement for the admissibility of all prior consistent statements. Finally, this Note concludes that allowing the admission of statements made after the motive to fabricate confuses a jury, and urges the Supreme Court to resolve this issue.

8 Id. at 1287. Rehabilitative evidence is introduced so that "a witness whose credibility has suffered may be examined again to improve his standing with the trier of fact in matters covered on cross-examination." Id.

9 See Casoni, 950 F.2d at 897 (holding that prior consistent statements were not admissible for rehabilitative purposes); Andrade, 799 F.2d at 532 (admitting both rehabilitative and substantive statements after motive to fabricate); United States v. Bowman, 798 F.2d 333, 228 (8th Cir. 1986) (allowing rehabilitative prior consistent statements to postdate motive to fabricate, but refusing to allow substantive statements to follow motive), cert. denied, 479 U.S. 1043 (1987); Anderson, 782 F.2d at 915-16 (rejecting assertion that rehabilitative or substantive prior consistent statements need to postdate motive).

Some circuits will only admit prior consistent statements if they are solely used for rehabilitative purposes. See Fed. R. Evid. 801(d)(1)(B). The distinction between rehabilitative and substantive evidence is the result of an attempt to analyze the probative value of the statements when determining their admissibility. Id. The appendix Federal Rules of Evidence explains:

Clearly, statements made before an improper motive could have existed are likely to be most probative. Yet other circumstances may suggest that even later statements were made at a time when there was, in fact, no real likelihood of an improper motive to fabricate or of undue influence. In such circumstances courts are likely to exclude evidence.


A prior consistent statement admitted to rehabilitate a witness is not used to prove the truth of the matter asserted. Rather, such a statement is used to rebut an inference raised by the introduction of a prior inconsistent statement that contradicts present testimony. When used for rehabilitative purposes, the accuracy or truthfulness of a prior consistent statement is irrelevant.

Id. at 529. The Supreme Court has neglected to address this issue. See Beech Aircraft Corporation v. Rainey, 488 U.S. 153, 172 (1988). This is the only case in which the Supreme Court has mentioned Rule 801(d)(1)(B), and there was no ruling made on the temporal requirement. Id.
I. ANALYSIS OF THE ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS WITHIN CIRCUIT COURT OPINIONS

A. The First Circuit

The First Circuit has held that the prior consistent statement must precede the motive to fabricate for the statement to be admissible.\(^{10}\) In *United States v. Vest*,\(^{11}\) a prior consistent statement was deemed admissible only after it was determined to have preceded the motive to lie.\(^{12}\) A witness's credibility was challenged when he testified that the defendant was to deliver a $35,000 payment under a prearranged agreement.\(^{13}\) The First Circuit held that the trial court's factual determination on the issue was not erroneous and the evidence of a phone conversation was properly admitted because it was not made before there was a motive to lie.\(^{14}\) The *Vest* court established the First Circuit's requirement for a prior consistent statement to come before a fabrication motive.\(^{15}\)

B. The Second Circuit

The Second Circuit has extensively examined the admissibility of prior consistent statements, and has held that statements must precede the fabrication motive in order to be admitted for substantive purposes.\(^{16}\) However, there has been opposition, within the circuit, on mandating a temporal requirement when the statement is used for rehabilitative purposes.\(^{17}\) Presently, a statement

\(^{10}\) See *Vest*, 842 F.2d at 1329. A factual determination had to be made by the trial court to ascertain that there was no motive to lie at the time the statement was made, before the testimony could be admitted into evidence. *Id.*

\(^{11}\) 842 F.2d 1319 (1st Cir.), cert. denied, 488 U.S. 965 (1988).

\(^{12}\) *Id.* at 1329 (admitting witness's phone conversations only because witness lacked any motive to fabricate at time of conversations).

\(^{13}\) *Id.* at 1328. Vest was convicted on two counts of making false declarations to a grand jury. *Id.* It was suggested that a witness created an elaborate story of police corruption and a prior consistent statement was introduced. *Id.* at 1329.

\(^{14}\) *Id.* at 1329. "[T]he statements were sufficiently consistent and were made before . . . a motive to fabricate." *Id.* at 1330.

\(^{15}\) *Vest*, 842 F.2d at 1329.

\(^{16}\) See United States v. Shulman, 624 F.2d 384, 294 (2d Cir. 1980) (allowing prior consistent statement made before motive to fabricate to place impeaching statements in context); United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979) (admitted memoranda by government agent for rehabilitative use made before motive to fabricate on grounds of completeness rather than Rule 801(d)(1)(B)), aff'd, 449 U.S. 424 (1981); United States v. Quinto, 582 F.2d 224, 235 (2d Cir. 1978). Quinto's seminal decision disallows the use of prior consistent statements after the alleged motive to fabricate. *Id.*

\(^{17}\) See *Rubin*, 609 F.2d at 69. A concurring opinion by Judge Henry J. Friendly contradicts the circuit's position by claiming that "Rule 801(d)(1)(B) simply does not deal with the extent to which prior consistent statements may be used for rehabilitation." *Id.*; United
cannot be admitted if it is made after the alleged motive to lie.\textsuperscript{18} Additionally, the fabrication motive may not have to be clearly identified if the statement will be used for rehabilitative purposes.\textsuperscript{19}

In \textit{United States v. Quinto},\textsuperscript{20} the Second Circuit analyzed the admissibility of prior consistent statements.\textsuperscript{21} An Internal Revenue Service agent's credibility was questioned during his testimony against the defendant, an alleged tax evader.\textsuperscript{22} Counsel for the defendant impeached the agent by implying that he was ruthlessly seeking a conviction, and had an improper motive to falsify trial testimony.\textsuperscript{23} On cross-examination, the government sought to introduce a memorandum, as a prior consistent statement, to corroborate the agent's testimony.\textsuperscript{24}

The Second Circuit established a three-criteria test to determine whether the agent's prior consistent statement could be admitted.\textsuperscript{25} The first requirement was that the prior consistent statement was made before the alleged motive to lie was made. Additionally, the fabrication motive may not have to be clearly identified if the statement will be used for rehabilitative purposes.

\textsuperscript{18} See \textit{Rubin}, 609 F.2d at 62 (holding that despite strong argument by Judge Friendly, Second Circuit reaffirmed \textit{Quinto} decision, and declared that timing of alleged motive to fabricate is significant when used for rehabilitative purposes).

\textsuperscript{19} See \textit{United States v. Brennan}, 798 F.2d 581, 587 (2d Cir. 1986). In \textit{Brennan}, the exact motive to fabricate was unclear, but the court nevertheless permitted the admission of a prior consistent statement. \textit{Id.}

\textsuperscript{20} 582 F.2d 224 (2d Cir. 1978).

\textsuperscript{21} \textit{Id.} at 229. Quinto was convicted of tax evasion and of willfully subscribing false income tax returns after a six-day jury trial. \textit{Id.} Several other circuits, including the Sixth, Seventh, and Eighth, have cited the \textit{Quinto} decision. See \textit{United States v. Andrade}, 788 F.2d 521, 532 (8th Cir.) (extent to which rehabilitative evidence may be received is left to discretion of trial court), \textit{cert. denied}, 479 U.S. 979 (1984); \textit{States v. DeSisto}, 329 F.2d 929, 930 (2d Cir.) (debating proper admissibility of prior consistent statements for rehabilitative purposes), \textit{cert. denied}, 377 U.S. 979 (1964).

\textsuperscript{22} See \textit{Quinto}, 582 F.2d at 226. The testifying agent stated that during the interview Quinto admitted that he was "trying to screw the government out of some cash if [he] could." \textit{Id.} at 229.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 234. The memorandum summarized an interview with the defendant. \textit{Id.} The defense objected to the admission of the document, and the judge sustained the objection. \textit{Id.} at 229.

\textsuperscript{25} See \textit{United States v. Quinto}, 582 F.2d 224, 234 (2d Cir. 1978).
statement be consistent with the witness’s direct testimony. Second, the party seeking to introduce the statement, had to establish that the statement would rebut an express or implied charge of a false statement. Finally, the asserting party had to demonstrate that the prior consistent statement predated the lie. If this criteria was satisfied, the prior consistent statement could be used for substantive and rehabilitative purposes.

However, in Quinto, the court held that the third requirement was not satisfied. Without meeting the temporal requirement, the Second Circuit considers prior consistent statements to be irrelevant. Since the alleged motive to lie existed, both at the time the memorandum was compiled and at the trial, the prior consistent statement was inadmissible.

In United States v. Rubin, Quinto was reaffirmed despite a forceful concurring opinion by Judge Henry J. Friendly, which argued that the temporal requirement was unnecessary. In Rubin, notes by a government agent were introduced by the prosecution as prior consistent statements to rebut a charge of fabrication made by the defendant. The court reserved making a decision on whether the time limitation was mandatory for rehabilitative purposes, but held that if the agent’s prior consistent statement was

26 See id.
27 See id. Both of these first two requirements are found in Rule 801(d)(1)(B). Id. at 233.
28 See id. at 234. The court stated that “the proponent must demonstrate that the prior consistent statement was made prior to the time that the alleged falsity arose.” Id. For another case where the Quinto criterion was applied, see United States v. Check, 582 F.2d 668, 675 (2d Cir. 1978). In Check, the judgement of conviction was reversed and remanded for a new trial because the prior consistent statements were not offered to rebut an expressed or implied charge of a recent fabrication. Id. The court questioned the admission of the proposed prior consistent statements as possibly being an artful way to introduce what was normally considered inadmissible hearsay. Id. at 679. After acknowledging these potential subversive motives, the court stated that the government was not immunized from the prospective effect of the hearsay rule and the statements should not have been admitted. Id. at 680. The exception to the hearsay rule, set forth in the Federal Rule of Evidence 801(d)(1)(B), was not applicable to the prior statements because they were not offered to rebut an express or implied fabrication. Id. at 681.
29 See Quinto, 582 F.2d at 235.
30 See id.
31 Id.
32 See id. at 234. However, the court did not explain “exactly what improper motive might have existed at trial that did not also exist at the time of the compilation of the memorandum.” Id.
33 609 F.2d 51 (2d Cir. 1979), aff’d, 449 U.S. 424 (1981).
34 Id. at 68 (Friendly, J., concurring).
35 Id. at 62. The notes were considered properly admitted as prior consistent statements despite a contention by the defendant that the notes were unclear. Id. The defendant was convicted of conspiracy to violate statutes prohibiting false statements in connection with loan applications, mail, wire, and securities fraud. Id.
offered as substantive evidence, the temporal requirement would be satisfied.\textsuperscript{36}

In his concurring opinion, Judge Friendly stated that the third element of the Quinto test was not mandated by the Federal Rules, and was contrary to the underlying liberal policy of the Federal Rules.\textsuperscript{37} He claimed that mandating a temporal requirement for rehabilitative evidence was unnecessary.\textsuperscript{38} Judge Friendly's opinion has been relied on by the Seventh Circuit, which strongly disagrees with mandating the third Quinto criterion.\textsuperscript{39} The Seventh Circuit states that evidence offered solely to rehabilitate a witness's credibility should not be subjected to a temporal requirement.\textsuperscript{40}

In \textit{United States v. Brennan},\textsuperscript{41} Judge Friendly's proposed modification to the Quinto requirements resurfaced, but the court did not substantiate the implementation of a less-rigorous standard for rehabilitative evidence.\textsuperscript{42} The defendant, a justice for the Supreme Court of the State of New York, was on trial for taking bribes and corruption of his judicial office.\textsuperscript{43} A witness, who testified about payments made to the defendant, was impeached and the prosecution sought to introduce a fundamentally similar statement made before there appeared to be a motive to fabricate.\textsuperscript{44} The court adhered to the discretion of the trial judge\textsuperscript{45} and did not find any error in permitting the admission of a prior consistent statement, even though the exact motive to fabricate was un-

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\textsuperscript{36} \textit{Id.} at 61. The Court considered it unnecessary to discuss the temporal requirement issue for rehabilitative evidence. \textit{Id.}

\textsuperscript{37} \textit{See id.} at 69 (Friendly, J., concurring). Judge Friendly argued that the third criterion of the test, which made it compulsory for the prior consistent statement to predate the alleged motive to fabricate, was not mandated by the Federal Rules of Evidence. \textit{Id.}

\textsuperscript{38} \textit{See United States v. Rubin, 609 F.2d 51, 66 (2d Cir. 1978)} (Friendly, J., concurring). Judge Friendly stated that "the limitations apply only to the use of prior consistent statements as affirmative evidence and are not controlling when such statements are used only for rehabilitation." \textit{Id.}

\textsuperscript{39} \textit{See United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985)} (analyzing Quinto requirement as unnecessary).

\textsuperscript{40} \textit{Id.} The Seventh Circuit states that the temporal requirement "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements." \textit{Id.}

\textsuperscript{41} 798 F.2d 581 (2d Cir. 1986), \textit{cert. denied}, 490 U.S. 1022 (1989).

\textsuperscript{42} \textit{Id.} at 587.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} The witness acted as a middleman in collecting money for Brennan. \textit{Id.} His credibility was impeached by the defendant's implication that he made a deal with the prosecution. \textit{Id.} The prosecution introduced a statement the witness made prior to the alleged motive to fabricate. \textit{Id.}

\textsuperscript{45} \textit{Id.}
clear.\textsuperscript{46} The Second Circuit forcefully reaffirmed its position that in all situations a prior consistent statement must have been made before the declarant had a motive to fabricate.\textsuperscript{47}

\textbf{C. The Third Circuit}

Contrary to the Second Circuit's approach, the Third Circuit admits prior consistent statements that follow an alleged fabrication.\textsuperscript{48} The circuit has even upheld a decision that permitted the admission of a prior consistent statement without any motive to fabricate.\textsuperscript{49} In United States v. Asher,\textsuperscript{50} statements by a co-conspirator of the defendant, Robert Asher, were admitted into evidence even though there was no implied fabrication.\textsuperscript{51} Since it was unlikely that the admission of the statements constituted irreversible error, the decision based on the improperly admitted evidence, was upheld.\textsuperscript{52}

The Third Circuit has held that rehabilitative evidence may follow the alleged motive to fabricate.\textsuperscript{53} In United States v. Casoni,\textsuperscript{54}
a prior consistent statement was admitted for rehabilitative purposes, even though the statement was made while the witness had an improper motive of saving himself from criminal liability.\textsuperscript{55} The defendant sought to bar statements made by the witness to the prosecutor concerning notes taken on a business document.\textsuperscript{56} The court held that the statements were admissible for the limited rehabilitative purpose offered, even though they were made after the motive to falsify.\textsuperscript{57} Thus, if evidence is not admitted for substantive purposes, the Third Circuit disregards the necessity of a temporal requirement, and permits rehabilitative evidence.\textsuperscript{58}

\textbf{D. The Fourth Circuit}

The Fourth Circuit established that any prior consistent statement, intended to be used as rehabilitative or substantive evidence, should not be admitted if made after the motive to fabricate.\textsuperscript{59} In \textit{United States v. Henderson},\textsuperscript{60} a prior consistent statement to be consistent in every detail.\textsuperscript{67}

\textsuperscript{55} Id. at 907. Casoni was being tried for conspiracy to commit crimes against the United States, interstate travel in aid of racketeering, bribery, and mail fraud. \textit{Id.} at 896. In an attempt to stop the admission of the prior consistent statements, Casoni maintained that the statements were not completely consistent with the testimony at trial. \textit{Id.} at 907.

\textsuperscript{56} Id. at 896. The written out-of-court declarations made to an attorney were after the motive to fabricate. \textit{Id.}

\textsuperscript{57} Id. at 896-97. According to the Third Circuit, the rule does not require the prior consistent statement to be consistent in every detail. \textit{Id.}

\textsuperscript{58} \textit{See} \textit{id.} at 893. In \textit{Casoni}, the court ruled that there was no abuse of discretion in permitting the admission of the statements. \textit{Id.} at 897.

\textsuperscript{59} \textit{See United States v. Henderson}, 717 F.2d 135, 138 (4th Cir. 1983). The \textit{Henderson} court held that prior consistent statements must be made before the motive to fabricate in order to be admissible. \textit{Id.; see also United States v. Bolick}, 917 F.2d 135, 136 (4th Cir. 1990) (stating that admission of prior consistent statements made before impeachment was an error, even if statements were offered only for rehabilitation); \textit{United States v. Weil}, 561 F.2d 1109, 1111 (4th Cir. 1977). “Corroborative testimony consisting of prior, consistent statements is ordinarily inadmissible unless the testimony sought to be bolstered has first been impeached.” \textit{Id.} at 1111. However, the circuit has allowed for an exception to this contention. \textit{See United States v. Parodi}, 703 F.2d 768, 784 (4th Cir. 1983). In \textit{Parodi}, a prior consistent statement of a witness, whose testimony has been allegedly impeached, was deemed admissible irrespective of when the motive to fabricate developed. \textit{Id.} at 785. The \textit{Parodi} court focused on the absence of a temporal requirement within the statutory language of Rule 801(d)(1)(B), stating that “[i]f the drafters of the rule intended any other conditions for admissibility, it must be assumed they would have added them.” \textit{Id.} at 784. Because Rule 801(d)(1)(B) does not affirmatively state the necessity for the motive to precede the statement may just mean that the drafters assumed it was implied. \textit{See infra} notes 168-174 and accompanying text (explaining that drafters intended Rule 801(d)(1)(B) to comply with common-law standard, which did impose temporal requirement). In \textit{Parodi}, if the defendant made a timely objection, the statements would not have been admissible, but because the defendant waited until after his conviction before raising an objection, the court allowed the statement to be admitted. \textit{Parodi}, 703 F.2d at 784. This is apparent because in \textit{Henderson}, the Fourth Circuit refused to allow the statements to postdate the motive and stated that “the holding in \textit{Parodi} ... is fully consistent with our decision in the present case.” \textit{Henderson}, 717 F.2d at 138 n.1.
statement was declared admissible only because the statement was made before the time the supposed motive to falsify arose. A statement made to an FBI agent, by one of the defendant's accomplices, was admitted over the defendant's objection. Since the accomplice was in custody, there was an inference that his in-court testimony was fabricated in return for leniency, and therefore, a prior consistent statement was needed to rehabilitate his testimony. The Fourth Circuit held that it was not error to admit the statement because it was made prior to the time the defendant entered into the plea bargain.

The Fourth Circuit has also held that a prior consistent statement cannot be admitted until the witness's testimony is impeached. In United States v. Bolick, the court held that the admission of the statements was erroneous because the admission came before the declarants were impeached. The Bolick court declared that an alleged fabrication must be present before the admission of a prior consistent statement so that the jury could understand the statement's significance. If the jury must reserve forming an opinion on the evidence until the impeachment occurs, it would be extremely difficult for them to wait until the court could provide proper instructions on the admissibility of the

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61 Id. at 138. Henderson contended that the motive for fabrication arose at the time of the witness's arrest, but was rejected by the court. Id.
62 Id. at 137.
63 Id. at 138.
64 Id. at 139. The defendant argued that the motive to fabricate arose at the time the witness was arrested. Id. The Fourth Circuit, however, agreed with the government's contention that the defendant's "argument effectively swallows the rule with respect to prior consistent statements made to government officers: by definition such statements would never be prior to the event of apprehension or investigation by the government which gave rise to a motive to falsify." Id.
65 See United States v. Henderson, 717 F.2d 135, 139 (4th Cir. 1983). Each circuit tends to develop a consistent pattern concerning decisions dealing with the admission of prior consistent statements. Id.
66 917 F.2d 135 (4th Cir. 1990).
67 Id. at 138. Bolick was on trial for selling cocaine and conspiring to sell cocaine. Id. at 136. The district court permitted the government's witness to testify about statements made to him by the declarants before any of the declarants had taken the stand. Id. at 137. The defendant made numerous objections to the admission of these statements and the court instructed the jury as follows:

Ladies and gentlemen of the Jury, I will instruct you concerning [a] point of law—at this point, the testimony of this witness, concerning the transactions and discussions that he had with Mr. Ray Dicks, as to statements by Mr. Dicks, will be taken by you not for the proof of what Mr. Dicks is said to have stated, but as corroboration of Mr. Dicks' testimony to come later in this case.

Id.
68 Id. at 140.
E. The Fifth Circuit

The Fifth Circuit provides for the admission of rehabilitative and substantive prior consistent statements to follow the motive to fabricate. In United States v. Gandy, prior consistent statements were made after evidence of an alleged reason to lie was discovered, but the statements were deemed admissible. The court allowed a statement to rehabilitate a witness, who was impeached when the defense counsel established that the witness disliked the defendant.

In United States v. Parry, the Fifth Circuit supported and expanded the Gandy decision, by allowing both substantive and rehabilitative statements to postdate the alleged motive to fabricate. The defendant was permitted to have a substantive prior consistent statement introduced into evidence showing that he was unaware of a DEA agent's identity. The substantive evidence supported the defendant's argument that he lacked criminal intent in conspiring to distribute drugs.

69 Id.

70 See United States v. Parry, 649 F.2d 292, 296 (5th Cir. 1981) (rejecting argument that temporal requirement is necessary); United States v. Gandy, 469 F.2d 1134, 1134 (5th Cir. 1972) (permitting party to introduce evidence of prior consistent statement even though statement was made after motive for fabrication), cert. denied, 410 U.S. 986 (1973).

71 469 F.2d 1134 (5th Cir. 1972), cert. denied, 410 U.S. 986 (1973).

72 Id. at 1135. Gandy was on trial for selling five counterfeit federal reserve notes. Id. The purchaser of the notes made incriminating statements against Gandy. Id.

73 Id. Gandy argued that the prior consistent statement was made after the altercation and should not be admissible. Id. The Court disagreed and affirmed the district court's judgement. Id.

74 649 F.2d 292 (5th Cir. 1981).

75 Id. at 296.

76 Id. at 295. Judge Morgan ruled that it was in error for the district court to exclude the defendant's mother's testimony as inadmissible hearsay. Id. The defendant claimed that "he was working for the agents, assisting them in locating drug dealers." Id. at 294. In support of this position the defense offered evidence of prior conversations between the defendant and his mother, to establish that the defendant knew of the DEA agent's identity from the outset. Id. This assisted Parry in proving that he was unaware of the agent's identity and did not know that he was helping the agents. Id. This constituted substantive evidence and demonstrates that the Fifth Circuit interpreted Rule 801(d)(1)(B) to include the admission of substantive evidence generated after the motive to fabricate. Id. at 296.

77 Id. Parry was convicted of conspiring to distribute phenycylidine hydrochloride. Id. at 292. The court stated that "[u]nder Rule 801(d)(1)(B) [an] implied charge of recent fabrication permitted Parry to introduce as substantive evidence his prior consistent statement . . . ." Id. at 296.
F. The Sixth Circuit

While most circuits have established a criteria for the admissibility of prior consistent statements, the Sixth Circuit allows the trial courts to decide whether a prior consistent statement may post-date the alleged motive to fabricate. The trial courts do not have to apply any temporal requirement when determining admissibility. Thus, substantive and rehabilitative uses for the statements may be accepted after the motive to fabricate.

In *United States v. Hamilton*, the court analyzed and rejected the Second Circuit’s third Quinto requirement that a prior consistent statement be made before the motive to fabricate existed. It was implied that a witness’s account of events was influenced by a deal with the government resulting in a motive to fabricate. The court recognized that, although a motive to falsify may affect a statement’s materiality, that fact alone should not bar the statement from being admitted.

In *United States v. Lawson*, the Sixth Circuit reaffirmed *Hamilton* and declared that the time the prior consistent statement was made should not be a requirement to admissibility. In *Lawson*, the defendant questioned the decision of the court to admit the prior consistent statements of three government witnesses without adhering to the temporal requirement. The court stated

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78 See *United States v. Lawson*, 872 F.2d 179 (6th Cir.), *cert. denied*, 493 U.S. 834 (1989). The court declared that “[b]road discretion is given to the trial court regarding the admission of prior consistent statements,” thus a trial court’s determination, that a prior consistent statement is admissible, may not be overturned because it postdated the motive to fabricate. *Id.*

79 *Id.* at 182. The court stated that “temporal priority should not be a condition precedent to admissibility.” *Id.* To justify this position, the court explained that “there are other indicia of reliability surrounding a prior consistent statement that make it relevant to rebut a charge of recent fabrication or improper motive, then the fact that the statement was made after the alleged motive to falsify should not preclude its admissibility.” *Id.* at 183.

80 See *United States v. Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983). The court stated that while the “Circuit has not directly ruled on the issue, we have indicated our desire for a more relaxed standard of admissibility under Rule 801(d)(1)(B) and our uneasiness with the Quinto decision.” *Id.*


82 See *id.* at 1273. The court stated its desire for a relaxed standard of admissibility and its uneasiness with the *Quinto* decision. *Id.*

83 *Id.* at 1273.

84 *Id.* (citations omitted). “In fact the Fifth Circuit has repeatedly and vigorously rejected such a limitation on that rule.” *Id.*


86 *Id.* at 182.

87 *Id.* Lawson was on trial for conspiring to receive, possess, and manufacture illegal machine guns, as well as aiding and abetting a codefendant’s manufacture and possession of illegal machine guns. *Id.* The admission of statements by three government witnesses
that other factors, including relevancy and probity, should be the bases of determining whether a prior consistent statement is admissible.\textsuperscript{88} This leaves the decision to admit with the respective trial judge.\textsuperscript{89} The Sixth Circuit, in both \textit{Lawson} and \textit{Hamilton}, has failed to distinguish between admitting statements for rehabilitative and substantive purposes.

\subsection*{G. The Seventh Circuit}

In the Seventh Circuit, substantive prior consistent statements are admissible when they are made prior to the alleged motive to fabricate, while rehabilitative statements may postdate the motive to lie.\textsuperscript{90} In \textit{United States v. Harris},\textsuperscript{91} the defendants questioned the admission of a rehabilitative, prior consistent statement made by a witness after the motive to fabricate.\textsuperscript{92} However, the court held that a prior statement must be made before the motive to fabricate only for the admission of the substantive, not rehabilitative, statements.\textsuperscript{93}

The \textit{Harris} court examined the third element of the \textit{Quinto} criteria and decided that the temporal requirement was only necessary for substantive purposes.\textsuperscript{94} According to the court, repetition did not necessarily imply veracity, and evidence which only showed that the declarant said the same thing at trial, as he did on a prior occasion, was of no probative value.\textsuperscript{95}

\footnote{88} \textit{Id.} at 183. The court stated that “where there are other indicia of reliability surrounding a prior consistent statement that make it relevant to rebut a charge of a recent fabrication or improper motive, then the fact that the statement was made after the alleged motive to falsify should not preclude its admissibility.” \textit{Id.} at 182.

\footnote{89} \textit{Id.} The court referred to \textit{Hamilton} and mentions that the trial judge should be required “to examine the circumstances under which the statement was made and make a determination of the statement’s relevancy and probity.” \textit{Id.}

\footnote{90} \textit{See} \textit{United States v. Doyle}, 771 F.2d 250, 252 (7th Cir. 1985). The court found that there was no motive for the witness to lie about the defendant’s role in the bombing at the time the statements were made and therefore, the statements were admitted. \textit{Id.;} \textit{United States v. Harris}, 761 F.2d 394, 399 (7th Cir. 1985). The temporal requirement only needs to be met for statements used for substantive purposes. \textit{Id.}

\footnote{91} 761 F.2d 394 (7th Cir. 1985).

\footnote{92} \textit{Id.} at 398. Yvonne and Josephine Harris were convicted of forging eligibility questionnaires and time sheets for a government-sponsored employment program and illegally receiving government funds. \textit{Id.}

\footnote{93} \textit{Id.} at 399.

\footnote{94} \textit{Id.}

\footnote{95} \textit{Id.} The defendant cited \textit{United States v. Guevara}, 598 F.2d 1094 (7th Cir. 1979), in an attempt to show that the trial judge erred by admitting the testimony, but the \textit{Guevara} case did not address admitting prior consistent statements outside of the scope of Rule 801(d)(1)(B). \textit{See Harris}, 761 F.2d at 399 n.2. In \textit{Guevara}, prior consistent statements were admitted, which “did not rebut the allegations of improper motive raised by the defendant.”
H. The Eighth Circuit

The Eighth Circuit allows the trial court to determine the admissibility of prior consistent statements to rehabilitate testimony. However, unlike rehabilitative statements, the Eighth circuit does not permit substantive statements to postdate the motive to fabricate.

In United States v. Bowman, four of the prosecution’s witnesses were impeached with prior inconsistent statements. The court permitted the introduction of prior consistent statements, that post-dated the motive to fabricate, as rehabilitative evidence. The Bowman court stressed that the better rule imposes the requirement that prior consistent statements must come before the motive to fabricate existed, but only for substantive evidence.

In United States v. Scholle, the court admitted a witness’s prior consistent statement after his testimony was impeached to rehabilitate the witness’s testimony. It was alleged that the incarceration of the witness tainted his testimony. Even though the statements were determined to have been made prior to the motive to fabricate, the court reasserted its position that prior consistent statements used for rehabilitative purposes need not be made prior to the motive to fabricate.

In United States v. Andrade, the credibility of the prosecution’s FBI witness was questioned during an extensive cross-examination. Prior consistent statements were permitted at the
discretion of the trial court in order to rebut the cross-examination and rehabilitate the witness. The third Quinto criterion was again questioned, and the court determined that it was not necessary for rehabilitative statements. Thus, if a trial court, in its discretion, allows the admission of a rehabilitative statement that post-dates the motive to fabricate, the Eighth Circuit will uphold that decision, unless there has been a prejudicial abuse of discretion.

I. The Ninth Circuit

The Ninth Circuit requires that a prior consistent statement come before the motive to fabricate, regardless of whether it is used for rehabilitative or substantive purposes. In 1972, three years prior to the adoption of Rule 801(d)(1)(B), the Ninth Circuit stated in United States v. Rodriguez, that prior consistent statements were admissible to rehabilitate a witness where it affirmatively appeared that the prior consistent statement was made at a time when the declarant had no motive to fabricate. In Rodriguez, a witness for the prosecution was asked incriminating questions during the defense counsel's cross-examination. These questions impeached her credibility by insinuating that she

mail fraud, wire fraud, and conspiracy. Id. The FBI's witness's credibility was brought into question by Andrade. Id. at 532. Notes written by the FBI witness were offered to rehabilitate and support his testimony Id.

Id.

Id. The Andrade court reinforced the logic found in United States v. Blankinship, 784 F.2d 317 (8th Cir. 1986), by holding that the admissibility of rehabilitative statements should be left to the discretion of the trial court. See Andrade, 788 F.2d at 532. In Blankinship, the court admitted an employee's prior consistent statement, for rehabilitative purposes, to rebut an in-court charge of a recent fabrication even though part of the same statement was used against him. Blankinship, 784 F.2d at 320. The court declared that "where portions of a witness' prior statement are used to impeach him, other portions of the statement are admissible if they relate to the subject about which he was cross-examined, and meet the force of the impeachment." Id. The admission or rejection of the "statement is addressed to the sound discretion of [the] trial court and will not be reversed on appeal except where there has been a prejudicial abuse of discretion." Id.

See United States v. Rohrer, 708 F.2d 429, 433 (9th Cir. 1983) (improperly admitted prior consistent statement that merely illustrated testimony was not reversible error, but circuit mandates temporal requirement); United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972) (mandating that prior consistent statements need to be made when declarant had no motive to fabricate in order to be admissible).

See Rodriguez, 452 F.2d at 1148 (stating necessity for temporal requirement in all situations).

452 F.2d 1146 (9th Cir. 1972).

Id. at 1148. Rodriguez was convicted of importation and transportation of heroin, and conspiracy to commit the substantive crimes. Id.

Id. The witness's direct testimony incriminated the defendant. Id.
may have made a deal in exchange for leniency.\(^{116}\)

In *United States v. Rohrer*,\(^{117}\) the Ninth Circuit held that the admission of a diagram was improperly admitted as a prior consistent statement.\(^{118}\) According to the court, the motive to fabricate already existed when the diagram was formulated, and therefore, the court declared that the admission of the information was an error.\(^{119}\) Although the court held that the admission did not constitute a reversible error, it confirmed the validity of the *Rodriguez* decision by requiring that the prior consistent statement precede the motive for fabrication to conform with the hearsay exception.\(^{120}\)

**J. The Tenth Circuit**

The Tenth Circuit permits prior consistent statements to follow the alleged motive to fabricate.\(^{121}\) In *United States v. Tome*,\(^{122}\) counsel for the defense implied that a child fabricated allegations of abuse in order to live with her mother.\(^{123}\) The prosecution wished to rehabilitate the child's testimony with a prior consistent statement.\(^{124}\) The court permitted the rehabilitation and did not require the statement to come before the alleged motive to lie.\(^{125}\)

In *United States v. Rios*,\(^{126}\) counsel for the defense claimed that the credibility of a witness was impeached when he was asked questions pertaining to his protective custody status.\(^{127}\) The court stated that the admission of prior consistent statements was permitted to rebut a false claim even though they were not made

\(^{116}\) *Id.* A previous conversation of the witness was admitted, which clearly antedated any motive that she may have had to fabricate her testimony. *Id.*

\(^{117}\) 708 F.2d 429 (9th Cir. 1983).

\(^{118}\) *Id.* at 433. The diagram was of the defendant's drug distribution ring. *Id.*

\(^{119}\) *Id.*

\(^{120}\) *Id.*

\(^{121}\) See *United States v. Tome*, 3 F.3d 342, 351 (10th Cir. 1993) (deciding that victim's prior consistent statements were not required to precede time of alleged motive to lie);

*United States v. Rios*, 611 F.2d 1335, 1349 (10th Cir. 1979) (declaring that witness's prior consistent statements may be admitted to rebut claim of recent fabrication even if statements were not made prior to motive to fabricate), cert. denied, 452 U.S. 918 (1981).

\(^{122}\) 3 F.3d 342 (10th Cir. 1993).

\(^{123}\) *Id.* at 346. The defendant was on trial for aggravated sexual abuse. *Id.*

\(^{124}\) *Id.* The court recognized "that prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a constant liar." *Id.*

\(^{125}\) *Id.* The court stated that the temporal requirement is too broad and is "untenable because it is simply not true that an individual with a motive to lie always will do so." *Id.*

\(^{126}\) 611 F.2d 1335 (10th Cir. 1979), cert. denied, 452 U.S. 918 (1981).

\(^{127}\) *Id.* at 1348. The court acknowledged that "evidence showing that the witness is in protective custody may be prejudicial to the defendant." *Id.* at 1349.
prior to the motive to fabricate. According to the court, there was no abuse of discretion in allowing the jury to hear the consistent statements. The court did not distinguish if this pertained solely to rehabilitative evidence or also included substantive evidence.

K. The Eleventh Circuit

The Eleventh Circuit allows the admission of rehabilitative prior consistent statements that postdate the alleged fabrication. In *United States v. Anderson*, the court admitted a witness's prior consistent statement, under Rule 801(d)(1)(B), that concerned a conspiracy to burn down a nightclub. The decision of the trial court was affirmed subsequent to a debate on whether the supporting testimony was impeached. The court declared that there was no impeachment, however, the admission of the testimony constituted harmless error, and a prior consistent statement could post-date the motive to lie.

In *United States v. Pendas-Martinez*, a Coast Guard officer's handwritten report, concerning his pursuit of a boat carrying marijuana, was admitted as a prior consistent statement. The defense alleged that marijuana seeds were discovered on the officer's vessel. The court ruled that the report was improperly intro-

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128 *Id.*

129 See *Rios*, 611 F.2d at 1349. The *Rios* court cited *United States v. Herring*, 582 F.2d 535 (10th Cir. 1978), which was another Tenth Circuit decision. *Id.* In *Herring*, the trial court was given the discretion to make the determination if a statement was being used to rebut a recent fabrication or was used because of an improper influence or motive. *Herring*, 582 F.2d at 541.

130 *Rios*, 611 F.2d at 1349.

131 See *United States v. Pendas-Martinez*, 845 F.2d 938, 942 (11th Cir. 1988) (stating that circuit has repeatedly held that prior consistent statement need not have been made prior to fabrication motive); *United States v. Anderson*, 782 F.2d 908, 915-16 (11th Cir. 1986) (asserting that motive to fabricate is not relevant to admissibility of prior consistent statements).

132 782 F.2d 908 (11th Cir. 1986).

133 *Id.* at 908. The defendants were on trial for various offenses arising from arson and bombing of a nightclub. *Id.*

134 *Id.* at 915.

135 *Id.* The court stated that the circuit has "repeatedly rejected the assertion that a prior consistent statement is inadmissible merely because it was made after the declarant developed a motive to fabricate." *Id.* at 915-16.

136 845 F.2d 938 (11th Cir. 1988).

137 *Id.*

138 *Id.* at 942. The defendants were convicted of conspiracy to possess marijuana with intent to distribute and possession with intent to distribute 50 kilograms of marijuana on board a United States vessel. *Id.*
duced because it contained "hearsay within hearsay."\textsuperscript{139} This abuse of discretion created an error that the court considered prejudicial.\textsuperscript{140} Accordingly, the convictions of the appellants were reversed and the matter was remanded for a new trial.\textsuperscript{141} The court then discussed the relevance of a temporal requirement and concluded that the consistent statement did not have to be made before the alleged motive to fabricate arose.\textsuperscript{142}

\textbf{L. The District of Columbia Circuit}

The District of Columbia Circuit also allows for prior consistent statements to be admitted after the motive to fabricate.\textsuperscript{143} In \textit{United States v. Sampol},\textsuperscript{144} prior consistent statements were offered to offset an expressed or implied charge of fabrication.\textsuperscript{145} A contention, declaring that there were numerous impeaching circumstances at the time of the trial, was introduced.\textsuperscript{146} The court stated that it was well-established law in the District of Columbia Circuit that in such cases the prior consistent statements could be received.\textsuperscript{147} The court permitted the statements even though it was probable that the statements were tainted because they were made after the motive to lie.\textsuperscript{148}

In \textit{United States v. Montague},\textsuperscript{149} the defendant claimed that the admission of a prior consistent statement, by a witness for the prosecution, was improper because there was no implied fabrication.\textsuperscript{150} The court disagreed because it was suggested that the witness fabricated his testimony in the hope of receiving a

\textsuperscript{139} \textit{Id.} The court stated that the report contained additional levels of hearsay which would not be admissible under Rule 801(d)(1)(B). \textit{Id.}

\textsuperscript{140} \textit{Id.} The court stated that the evidence "contained additional levels of hearsay, which rendered it inadmissible." \textit{Id.}

\textsuperscript{141} \textit{United States v. Pendas-Martinez}, 845 F.2d 938, 945 (11th Cir. 1988).

\textsuperscript{142} \textit{Id.} at 942. "This Circuit . . . has held repeatedly that the consistent statement need not have been made prior to the time that the alleged motive to fabricate arose." \textit{Id.}

\textsuperscript{143} \textit{See} \textit{United States v. Montague}, 958 F.2d 1094 (D.C. Cir. 1992); \textit{United States v. Sampol}, 636 F.2d 621 (D.C. Cir. 1980).

\textsuperscript{144} 636 F.2d 621 (D.C. Cir. 1980).

\textsuperscript{145} \textit{Id.} at 671. This case involved a prosecution arising after the former Chilean ambassador to the United States, Orlando Letelier, was assassinated. \textit{Id.}

\textsuperscript{146} \textit{Id.} at 673. The defendants impeached a witness by showing that the witness denied knowledge of the assassination in 1978. \textit{Id.} at 671.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.} The court permitted the admission of the statement declaring that Rule 801(d)(1)(B) provides a court with wide discretion. \textit{Id.}

\textsuperscript{149} 958 F.2d 1094 (D.C. Cir. 1992).

\textsuperscript{150} \textit{Id.} at 1095. Montague was on trial for drug related charges. \textit{Id.}
lighter sentence in his conviction for possession of a firearm. The temporal requirement was then examined and the court disagreed with the necessity for the requirement. The court stated that implementing the requirement would almost totally bar the testimony of defendants who decided to cooperate after arrest.

II. Rehabilitative and Substantive Prior Consistent Statements Should Not Postdate the Motive to Fabricate

A. The Need for a Uniform Temporal Requirement

Rule 801(d)(1)(B) does not expressly impose a temporal admissibility standard, which would require a prior consistent statement to predate the motive to fabricate. The circuit courts are divided as to whether such a requirement exists. The First, Second, Fourth, and Ninth Circuits admit prior consistent statements only if they are made before the alleged motive to fabricate existed. Alternatively, the Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and the District of Columbia Circuits permit the statements to postdate the motive. Some of those circuits, such as the Fifth and Sixth, permit substantive statements to follow the motive to lie, while other circuits, such as the Third, Seventh,

151 Id. at 1096.
152 Id. at 1098. The circuit analyzed the history of admitting prior consistent statements and joined with "the Fifth and Eleventh Circuits in holding that the prior consistent statement need not have preceded the appearance of the motive in order to render the statement non-hearsay, under Rule 801(d)(1)(B)." Id.
153 See supra note 5, at 232. Absent any direct language, different courts use various interpretations, and "[s]ome courts have interpreted this dramatic change as merely creating a second category of admissibility for prior consistent statements which in no way intrudes upon admissibility for traditional rehabilitative purposes." Id. But "[o]thers have seen the promulgation of the Rule as a relaxation of the traditional standards which allows the admission of prior consistent statements for substantive purposes, rehabilitative purposes, or both." Id.
156 See United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), cert. denied, 459 U.S.
and Eighth, only allow rehabilitative statements.\textsuperscript{159}

Prior consistent statements are admissible to rehabilitate or substantiate testimony that has been impeached.\textsuperscript{160} A charge of recent fabrication or improper influence may impeach the validity of the testimony, either by insinuating that the declarant has purposely misrepresented the testimony or by inferring that an improper influence tainting his credibility exists.\textsuperscript{161} If the prior consistent statement was made before the motive to fabricate, the statement is credible because it comes before the alleged influence.\textsuperscript{162} The prior consistent statement assists in rehabilitating the witness by refuting the implication that his or her statement is contrived.\textsuperscript{163}

If the motive to fabricate was already in existence at the time the prior consistent statement was made, it would be subjected to the same forces which initiated the impeachment of the witness's testimony.\textsuperscript{164} The prior statement would be no more valid than the present statement, and the fact that the witness made the same declaration, at a time when the motive to lie existed, does not assist in rehabilitating the witness.\textsuperscript{165} Therefore, any benefit that the statement may have presented is negated.\textsuperscript{166}

\textsuperscript{1117} (1983); United States v. Parry, 649 F.2d 292 (5th Cir. 1981).
\textsuperscript{159} See United States v. Casoni, 950 F.2d 893 (3d Cir. 1991); United States v. Andrade, 788 F.2d 521 (8th Cir.), cert. denied, 479 U.S. 963 (1986); United States v. Harris, 761 F.2d 394 (7th Cir. 1985).
\textsuperscript{161} See \textit{FED. R. EVID. 801(d)(1)(B)}.
\textsuperscript{162} See Archer, \textit{supra} note 160, at 772-73. "A statement that antedates the fact or event giving rise to an improper motive to fabricate is sufficiently independent of the motive to aid the trier of fact in ascertaining the veracity of the in-court testimony." \textit{Id}.
\textsuperscript{163} \textit{Id}.
\textsuperscript{164} See United States v. Quinto, 582 F.2d 224 (2d Cir. 1978). The court stated that any statement admitting after the motive to fabricate would not be relevant. \textit{Id.} at 233; John D. Bennett, \textit{Prior Consistent Statements and Motives to Lie}, 62 N.Y.U. L. REV. 787, 809 (1987). The author states:

\textit{Evidence which merely shows that the declarant said the same thing at trial as he did on a prior occasion is 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.} \textit{Id}.

\textsuperscript{165} Quinto, 582 F.2d at 232. "The rationale for excluding most, but not all, prior consistent statements being offered to establish the witness's credibility is one of relevancy." \textit{Id}.
\textsuperscript{166} See Archer, \textit{supra} note 160, at 773. "A prior consistent statement made while the impeaching fact is in existence . . . is subject to the same motive to falsify as the in-court testimony. The out-of-court statement is no more credible than the already impeached trial testimony and is mere repetition." \textit{Id}.
B. Legislative Intent

Although the temporal requirement is not expressly provided for in Rule 801(d)(1)(B), such an application may be inferred.167 Opponents of the temporal requirement argue that had the drafters required a temporal requirement, Rule 801(d)(1)(B) would have expressly provided for such.168 This is incorrect because the drafters did not intend to modify common law admissibility standards.169 Rule 801(d)(1)(B) was only intended to establish a hearsay exception for prior consistent statements, which would satisfy common law admissibility requirements.170

Specifically, the common law required that a prior consistent statement was only admissible if made before the motive to fabricate existed.171 Because a prior consistent statement would be barred from postdating the motive to fabricate under the common law, Rule 801(d)(1)(B) applies the same standard.172 Thus, because the express provisions of the rule do not contradict the common law, the temporal requirement should continue to be followed.173

167 See id. at 773-74. The author states:
Admissibility of prior consistent statements under FRE 801(d)(1)(B) should be limited to those statements made prior to, and independent of, the discrediting influence, because only then are they responsive to the impeachment. Because FRE 801(d)(1)(B) presumes that prior consistent statements will be responsive to the impeachment, it is implicit in the rule that only those statements antedating the motive to fabricate will be admitted.

Id.

168 See Bennett, supra note 164, at 811. It has been argued that reading a temporal requirement into the rule is asking too much of the court. Id. The author comments:
[A] requirement that a declarant have had no motive to fabricate when a prior consistent statement was made goes beyond the language of Rule 801(d)(1)(B) and unnecessarily complicates judicial analysis of admissibility by requiring a judge to inquire into whether motives existed at some time before the trial. Abandonment of the condition would leave consideration of the motives behind these statements to the jury, where the policies and the logic of the Rule suggest they belong.

Id.

169 Archer, supra note 160, at 775. "[T]he drafters intended to give substantive effect only to those prior consistent statement that would have been admissible at common law for rehabilitation." Id.

170 See Fed. R. Evid. 801(d)(1)(B) advisory committee's note. The admissibility to rehabilitate prior consistent statements at common law is given a substantive effect by the Rule. Id.

171 See Archer, supra note 160, at 775. "Courts at common law required that the prior consistent statement be made before the motive to fabricate arose. Thus, restricting admissibility under the Rule to those statements made independent of the alleged motive to fabricate best comports with the intent of the drafters." Id.

172 See id. at 775 (stating that at common law prior consistent statement must have preceded motive to fabricate to be admissible).

173 See Fed. R. Evid. 801(d)(1)(B); see also Archer, supra at 160, at 775 (stating that since temporal requirement existed at common law, it should continue to be applied).
CONCLUSION

Based upon the analysis of circuit court opinions, the admission of a prior consistent statement should be limited to the situation where the motive to lie post-dated the prior consistent statement. Such a standard would be applicable whether the statement was admitted for substantive or rehabilitative purposes. Although a uniform standard would be the application intended by the drafters of Rule 801(d)(1)(B), without its existence, the Supreme Court must address this issue. The Supreme Court should mandate that prior consistent statements may not post-date the fabrication motive.

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