SUPREME COURT OF THE UNITED STATES

No. 93–6892

MATTHEW WAYNE TOME, PETITIONER *v.* UNITED STATES

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

[January 10, 1995]

JUSTICE BREYER, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The basic issue in this case concerns, not hearsay, but relevance. As the majority points out, the common law permitted a lawyer to rehabilitate a witness (after a charge of improper motive) by pointing to the fact that the witness had said the same thing earlier—but only if the witness made the earlier statement *before* the motive to lie arose. The reason for the time limitation was that, otherwise, the prior consistent statement had no *relevance* to rebut the charge that the in-court testimony was the product of the motive to lie. The treatises, discussing the matter under the general heading of "impeachment and support" (McCormick) or "relevancy" (Wigmore), and not "hearsay," make this clear, stating, for example, that a

> "`prior consistent statement has no relevancy to refute [a] charge [of recent fabrication, etc.,] unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated.'" *Ante*, at 5 (quoting E. Cleary, McCormick on Evidence §49, p. 105 (2d ed. 1972)).

The majority believes that a hearsay-related rule, Federal Rule of Evidence 801(d)(1)(B), codifies this

absolute timing requirement. I do not. Rule 801(d)(1)(B) has nothing to do with relevance. Rather, that Rule carves out a subset of prior consistent statements that were formerly admissible only to rehabilitate a witness (a nonhearsay use that relies upon the fact that the statement was made). It then says that members of that subset are "not hearsay." This means that, *if* such a statement is admissible for a particular rehabilitative purpose (to rebut a charge of recent fabrication, improper influence or motive), its proponent now may use it substantively, for a hearsay purpose (*i.e.*, as evidence of its truth), as well.

The majority is correct in saying that there are different kinds of categories of prior consistent statements that can rehabilitate a witness in different ways, including statements (a) placing a claimed inconsistent statement in context; (b) showing that an inconsistent statement was not made; (c) indicating that the witness' memory is not as faulty as a cross-examiner has claimed; and (d) showing that the witness did not recently fabricate his testimony as a result of an improper influence or motive. See *United States* v. *Rubin*, 609 F. 2d 51, 68 (CA2 1979) (Friendly, J., concurring). But, I do not see where, in the existence of several categories, the majority can find the premise, which it seems to think is important, that the reason the drafters singled out one category (category (d)) was that category's special probative force in respect to rehabilitating a witness. Nor, in any event, do I understand how that premise can help the majority reach its conclusion about the common-law timing rule.

I doubt the premise because, as McCormick points out, other categories of prior consistent statements (used for rehabilitation) also, on occasion, seem likely to have strong probative force. What, for example, about such statements introduced to rebut a charge

of faulty memory (category (c) above)? McCormick says about such statements: "[i]f the witness's accuracy of memory is challenged, it seems *clear common sense* that a consistent statement made shortly after the event and before he had time to forget, should be received in support." McCormick on Evidence §49, at 105, n. 88 (emphasis added). Would not such statements (received in evidence to rehabilitate) often turn out to be highly probative as well?

More important, the majority's conclusion about timing seems not to follow from its "especially probative force" premise. That is because probative force has little to do with the concerns underlying hearsay law. Hearsay law basically turns on an out-of-court declarant's reliability, as tested through cross-examination; it does not normally turn on the probative force (if true) of that declarant's statement. The "timing" circumstance (the fact that a prior consistent statement was made after a motive to lie arose) may diminish probative force, but it does not diminish reliability. Thus, from a hearsay perspective, the timing of a prior consistent statement is basically beside the point.

At the same time, one can find a *hearsay*-related reason why the drafters might have decided to restrict the Rule to a particular category of prior consistent statements. Juries have trouble distinguishing between the rehabilitative and substantive use of the kind of prior consistent statements listed in Rule 801(d)(1)(B). Judges may give instructions limiting the use of such prior consistent statements to a rehabilitative purpose, but, in practice, juries nonetheless tend to consider them for their substantive value. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(1)(B)[01], p. 801–188 (1994) ("[A]s a practical matter, the jury in all probability would misunderstand or ignore a limiting instruction [with respect to the class of prior

consistent statements covered by the Rule] anyway, so there is no good reason for giving one."). It is possible that the Advisory Committee made them "nonhearsay" for that reason, *i.e.*, as a concession "more of experience than of logic." Advisory Committee's Notes on Fed. Rule Evid. 801(d)(1)(B), 28 U. S. C. App., p. 773 (also noting that the witness is available for cross-examination in the courtroom in any event). If there was a reason why the drafters excluded from Rule 801(d)(1)(B)'s scope other kinds of prior consistent statements (used for rehabilitation), perhaps it was that the drafters concluded that those other statements caused jury confusion to a lesser degree. On this rationale, however, there is no basis for distinguishing between *pre* and *post*motive statements, for the confusion with respect to each would very likely be the same.

In sum, because the Rule addresses a hearsay problem and one can find a reason, unrelated to the premotive rule, for why it does so, I would read the Rule's plain words to mean exactly what they say: if a trial court properly admits a statement that is "consistent with the declarant's testimony" for the purpose of "rebut[ting] an express or implied charge . . . of recent fabrication or improper influence or motive," then that statement is "not hearsay," and the jury may also consider it for the truth of what it says.

Assuming Rule 801(d)(1)(B) does not codify the absolute timing requirement, I must still answer the question whether, as a *relevance* matter, the common-law statement of the premotive rule stands as an absolute bar to a trial court's admission of a postmotive prior consistent statement for the purpose of rebutting a charge of recent fabrication or improper influence or motive. The majority points to statements of the timing rule that do suggest that, for reasons of relevance, the law of evidence *never* permits their admission. *Ante*, at 5. Yet, absolute-

sounding rules often allow exceptions. And, there are sound reasons here for permitting an exception to the timing rule where circumstances warrant.

For one thing, one can find examples where the timing rule's claim of "no relevancy" is simply untrue. A post-motive statement *is* relevant to rebut, for example, a charge of recent fabrication based on improper motive, say, when the speaker made the prior statement while affected by a far more powerful motive to tell the truth. A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances *also* make clear to the speaker that only the truth will save his child's life. Or, suppose the postmotive statement was made spontaneously, or when the speaker's motive to lie was much weaker than it was at trial. In these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation; it may have been made not *because of*, but *despite*, the improper motivation. Hence, postmotive statements can, *in appropriate circumstances*, directly refute the charge of fabrication based on improper motive, not because they bolster in a general way the witness' trial testimony, see *ante*, at 8, but because the circumstances indicate that the statements are not causally connected to the alleged motive to lie.

For another thing, the common law premotive rule was not as uniform as the majority suggests. Cf. *United States* v. *Abel*, 469 U. S. 45, 50 (1984) (stating that where the common law was *unanimous*, the drafters of the Federal Rules likely intended to preserve it). A minority of courts recognized that postmotive statements could be relevant to rebut a charge of recent fabrication, improper influence or motive under the right circumstances. See, *e.g.*, *United States* v. *Gandy*, 469 F. 2d 1134, 1135 (CA5 1972); *Copes* v. *United States*, 345 F. 2d 723, 726 (CADC 1964); *State* v. *George*, 30 N. C. 324, 328

(1848). I concede that the majority of courts took the rule of thumb as absolute. But, I have searched the cases (and the commentators) in vain for an explanation of why that should be so. See, *e.g.*, McCormick on Evidence §49, at 105, and n. 88 (citing cases).

One can imagine a possible explanation: Trial judges may find it easier to administer an absolute rule. Yet, there is no indication in any of the cases that trial judges would, or do, find it particularly difficult to administer a more flexible rule in this context. And, there is something to be said for the greater authority that flexibility grants the trial judge to tie rulings on the admissibility of rehabilitative evidence more closely to the needs and circumstances of the particular case. 1 Weinstein's Evidence ¶401[01], pp. 401–8 to 401–9 ("A flexible approach . . . is more apt to yield a sensible result than the application of a mechanical rule."). Furthermore, the majority concedes that the premotive rule, while seemingly bright-line, poses its own administrative difficulties. *Ante*, at 15.

This Court has acknowledged that the Federal Rules of Evidence worked a change in common-law relevancy rules in the direction of flexibility. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U. S. ____ (1993). Article IV of the Federal Rules, which concerns relevance, liberalizes the rules for admission of relevant evidence. See *id.*, at ____ (slip op., at 7). The Rules direct the trial judge generally to admit all evidence having "any tendency" to make the existence of a material fact "more probable or less probable than it would be without the evidence." Fed. Rules Evid. 401, 402. The judge may reject the evidence (assuming compliance with other rules) only if the probative value of the evidence is substantially outweighed by its tendency to prejudice a party or delay a trial. Rule 403. The codification, as a general matter, relies upon the trial judge's administration of

Rules 401, 402, and 403 to keep the barely relevant, the time wasting, and the prejudicial from the jury. See, *e.g.*, *Abel, supra,* at 54 ("A district court is accorded a wide discretion in . . . [a]ssessing the probative value of [proffered evidence], and weighing any factors counseling against admissibility."); 1 Weinstein's Evidence ¶401[01] (discussing broad discretion accorded trial judge); 22 C. Wright & K. Graham, Federal Practice and Procedure §5162 (1978 and 1994 Supp.).

In *Daubert*, this Court considered the rule of *Frye* v. *United States*, 293 F. 1013 (CADC 1923), which had excluded scientific evidence that had not gained general acceptance in the relevant field. 509 U. S., at ____ (slip op., at 5). Like the premotive rule here at issue, the *Frye* rule was "rigid," setting forth an "absolute prerequisite to admissibility," which the Court said was "at odds with the `liberal thrust' of the Federal Rules." *Id.*, at ____ (slip op., at 8). *Daubert* suggests that the liberalized relevancy provisions of the Federal Rules can supersede a pre-existing rule of relevance, at least where no compelling practical or logical support can be found for the pre-existing rule. It is difficult to find any strong practical or logical considerations for making the premotive rule an absolute condition of admissibility here. Perhaps there are other circumstances in which categorical common-law rules serve the purposes of Rules 401, 402, and 403, and should, accordingly, remain absolute in the law. But, for the reasons stated above, this case, like *Daubert*, does not present such a circumstance. Thus, considered purely as a matter of relevancy law (and as though Rule 801(d)(1)(B) had not been written), I would conclude that the premotive rule did not survive the adoption of the Rules.

Irrespective of these arguments, one might claim that, nonetheless, the drafters, in writing Rule 801(d)(1)(B), relied on the continued existence of the

common-law relevancy rule, and that Rule 801(d)(1)(B) therefore reflects a belief that the common-law relevancy rule would survive. But, I would reject that argument. For one thing, if the drafters had wanted to insulate the common-law rule from the Rules' liberalizing effect, this would have been a remarkably indirect (and therefore odd) way of doing so—both because Rule 801(d)(1)(B) is utterly silent about the premotive rule and because Rule 801(d)(1)(B) is a rule of hearsay, not relevancy. For another thing, there is an equally plausible reason why the drafters might have wanted to write Rule 801(d)(1)(B) the way they did—namely, to allow substantive use of a particular category of prior consistent statements that, when admitted as rehabilitative evidence, was especially impervious to a limiting instruction. See *supra*, at 3–4.

Accordingly, I would hold that the Federal Rules authorize a district court to allow (where probative in respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication, improper influence or motive (subject of course to, for example, Rule 403). Where such statements are admissible for this rehabilitative purpose, Rule 801(d)(1)(B), as stated above, makes them admissible as substantive evidence as well (provided, of course, that the Rule's other requirements, such as the witness' availability for cross-examination, are satisfied). In most cases, this approach will not yield a different result from a strict adherence to the premotive rule for, in most cases, postmotive statements will not be significantly probative. And, even in cases where the statement is admitted as significantly probative (in respect to rehabilitation), the effect of admission on the trial will be minimal because the prior consistent statements will (by their nature) do no more than repeat in-court testimony.

In this case, the Court of Appeals, applying an approach consistent with what I have described

above, decided that A. T.'s prior consistent statements were probative on the question of whether her story as a witness reflected a motive to lie. There is no reason to reevaluate this factbound conclusion. Accordingly, I would affirm the judgment of the Court of Appeals.