

2017

Using Prior Consistent Statements to Rehabilitate Credibility or to Prove Substantive Assertions Before and After the 2014 Amendment of Federal Rule of Evidence 801(d)(1)(B)

Floralynn Einesman
California Western School of Law, fle@cwsl.edu

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/fs>



Part of the [Evidence Commons](#)

Recommended Citation

41 American Journal of Trial Advocacy 1 (2017)

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

Using Prior Consistent Statements to Rehabilitate Credibility or to Prove Substantive Assertions Before and After the 2014 Amendment of Federal Rule of Evidence 801(d)(1)(B)

Floralynn Einesman[†]

Introduction

There are several federal rules of evidence that the legal community often overlooks or misapplies. Two such rules are Federal Rule of Evidence 806, Impeaching a Hearsay Declarant, and Rule 801(d)(1)(B)(i), Non-Hearsay Use of Prior Consistent Statements. In 2014, the Committee on Rules expanded the non-hearsay category of admissible prior consistent statements with Rule 801(d)(1)(B)(ii) to include any statements counsel uses to rehabilitate a declarant's credibility after that credibility has been attacked.¹ Rule 801(d)(1)(B)(i) and (ii) requires that a declarant testify and be subjected to cross-examination about the prior consistent statement.² Under these rules, the time at which the declarant made the consistent statement, and her reason for making it are critical.

When the declarant does not testify, however, under Rule 806 opposing counsel may still attack the declarant's credibility.³ Under these circumstances, it is often challenging to determine the evidence that counsel may use to impeach, and, later, to rehabilitate the credibility of the non-testifying declarant. Moreover, lawyers and judges frequently conflate the two uses of prior consistent statements—non-hearsay

[†] B.A., McGill University; J.D., Boston University School of Law. Floralynn Einesman is the Associate Dean of Experiential Learning and Professor of Law at California Western School of Law, San Diego. The author wishes to thank Matthew Bertolucci for outstanding research and editing support. Special thanks to colleague Mario Conte whose love of Evidence law inspired this Article and who helped enormously by patiently reading several drafts and consistently offering valuable feedback.

¹ FED. R. EVID. 801(d)(1)(B)(i) advisory committee note to 2014 amendment.

² FED. R. EVID. 801(d)(1)(B).

³ FED. R. EVID. 806.

substantive evidence with impeachment-credibility evidence. Through the examination and analysis of two recent federal cases, *United States v. Cotton*⁴ and *United States v. Ledbetter*,⁵ this Article attempts to shed light on the complexities and proper application of these two rules of evidence.

I. The Rules of Hearsay

The Federal Rules of Evidence prohibit the admission of a hearsay statement at trial.⁶ Hearsay is defined under Rule 801 as “[a] statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”⁷ The declarant is “the person who made the statement.”⁸

The rules exempt certain statements from hearsay.⁹ These exemptions are classified as non-hearsay, and include a statement which was made by an opposing party either in an individual or representative capacity,¹⁰ or a statement that an opposing party manifested that he adopted or believed to be true.¹¹

The rules also declare that the following out-of-court statements are not hearsay: a statement offered against a party which was either “made by a person whom the opposing party authorized to make a statement on the subject,”¹² or a statement that “was made by the party’s agent or employee on a matter within the scope of the agency or employment relationship during that relationship.”¹³ Additionally an opposing party’s

⁴ 823 F.3d 430 (8th Cir.), *cert. denied*, 137 S. Ct. 520 (2016).

⁵ 184 F. Supp. 3d 594 (S.D. Ohio 2016).

⁶ FED. R. EVID. 802.

⁷ FED. R. EVID. 801(c)(1)-(2).

⁸ FED. R. EVID. 801(b).

⁹ *See generally* FED. R. EVID. 801(d)(1)(A)-(C), 801(d)(2)(A)-(E) (listing types of statements that are not hearsay).

¹⁰ FED. R. EVID. 801(d)(2)(A).

¹¹ FED. R. EVID. 801(d)(2)(B).

¹² FED. R. EVID. 801(d)(2)(C).

¹³ FED. R. EVID. 801(d)(2)(D).

co-conspirator's statement is not hearsay if the co-conspirator made the statement "during and in furtherance of the conspiracy."¹⁴

Finally, the rules exempt from hearsay (1) prior statements that are "inconsistent with the declarant's testimony at trial that were made under the penalty of perjury";¹⁵ (2) prior statements that are "consistent with the declarant's direct testimony and that are offered to either rebut a claim that the declarant recently fabricated or acted from an improper motive when he testified";¹⁶ (3) "to rehabilitate the declarant's credibility when the declarant's credibility was attacked on another ground";¹⁷ or (4) statements of identification made outside of court.¹⁸ For any of these exemptions concerning prior statements, the declarant must testify and must be subject to cross-examination about the prior statement.¹⁹

Additionally, multiple exceptions to the rule against hearsay permit the introduction of out-of-court statements to prove the truth of the statement's assertion.²⁰ Irrespective of whether the declarant is available to testify or not, Rule 803 allows such out-of-court statements as present sense impressions;²¹ excited utterances;²² statements of then-existing mental, emotional or physical condition;²³ statements made for medical diagnosis;²⁴ and business records.²⁵ If the declarant is deemed unavailable to testify,²⁶ Rule 804 exceptions permit the introduction of a declarant's former testimony,²⁷ and the introduction of any existing dying declara-

¹⁴ FED. R. EVID. 801(d)(2)(E).

¹⁵ FED. R. EVID. 801(d)(1)(A).

¹⁶ FED. R. EVID. 801(d)(1)(B)(i).

¹⁷ FED. R. EVID. 801(d)(1)(B)(ii).

¹⁸ FED. R. EVID. 801(d)(1)(C).

¹⁹ FED. R. EVID. 801(d)(1).

²⁰ See *generally* FED. R. EVID. 803-804 (listing exceptions to the rule against hearsay).

²¹ FED. R. EVID. 803(1).

²² FED. R. EVID. 803(2).

²³ FED. R. EVID. 803(3).

²⁴ FED. R. EVID. 803(4).

²⁵ FED. R. EVID. 803(6).

²⁶ FED. R. EVID. 804(a) (listing the criteria for being deemed unavailable).

²⁷ FED. R. EVID. 804(b)(1).

tion,²⁸ statements against interest²⁹ and statements of personal or family history.³⁰ Under all of these exemptions and exceptions, the court admits these statements as substantive proof of the statement's assertion.

II. Impeaching a Hearsay Declarant Under Rule 806

When a witness testifies, the witness's credibility is open to challenge.³¹ Even if a declarant does not testify in person at the hearing, he may be considered a testifying witness.³² Pursuant to Rule 806, if the court admits a declarant's out-of-court statement into evidence under either a hearsay exemption or exception, the declarant is considered a testifying witness and her credibility may be attacked and then supported.³³

Rule 806 benefits the party against whom the hearsay statement is admitted.³⁴ It allows the opposing party to challenge the credibility of an out-of-court declarant even if that declarant is not present and testi-

²⁸ FED. R. EVID. 804(b)(2).

²⁹ FED. R. EVID. 804(b)(3).

³⁰ FED. R. EVID. 804(b)(4).

³¹ See generally FED. R. EVID. 607, 608, 609, 613 (listing rules available for use when impeaching a witness and attacking a witness's credibility or character).

³² FED. R. EVID. 806 advisory committee note to 1972 proposed rule ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness.").

³³ FED. R. EVID. 806 advisory committee note to 1972 proposed rule ("His credibility should in fairness be subject to impeachment and support as though he had in fact testified.").

³⁴ See generally Gregory J. Gianoni, *Lose the Battle, Win the War: The Use, Dangers, and Problems Surrounding Rules 806 and 608(B), and How They Can Be Fixed*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2014-15) (discussing a circuit split in regard to using Rule 806 to impeach a non-testifying hearsay declarant); Alan D. Hornstein, *On the Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(b)*, 56 ARK. L. REV. 543 (2003) (explaining the tension between conflicting policies of Rules 806 and 608(b) when attempting to impeach a non-testifying declarant); David Sonenshein, *Impeaching the Hearsay Declarant*, 74 TEMP. L. REV. 163 (2001) (outlining various trial contexts where Rule 608 is used to impeach an unavailable declarant); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495 (1995) (assessing the deficiencies of Rule 806 in relation to other Federal Rules of Evidence).

fyng in the courtroom. Consequently, opposing counsel may challenge a declarant's credibility by attacking the declarant's character for truthfulness by reputation or opinion evidence pursuant to Rule 608(a),³⁵ specific instances of conduct pursuant to Rule 608(b)³⁶ and prior convictions pursuant to Rule 609.³⁷ Moreover, counsel may attack the declarant's out-of-court statements by introducing the declarant's prior inconsistent statement³⁸ or contradiction.³⁹ Additionally, counsel can attack the declarant's bias, interest, corruption, coercion, or inability to perceive, narrate, or recall the event about which he has testified.⁴⁰

Courts disagree about whether counsel may impeach the non-testifying declarant's credibility with extrinsic evidence regarding specific instances of the declarant's conduct that implicate Rule 608(b).⁴¹ Several courts have found that admitting extrinsic evidence about specific instances of conduct involving truthfulness violates Rule 608(b).⁴² Other courts have disagreed and have indicated a willingness to admit such evidence.⁴³

³⁵ FED. R. EVID. 608(a).

³⁶ FED. R. EVID. 608(b).

³⁷ FED. R. EVID. 609(a)-(b).

³⁸ FED. R. EVID. 613; *see* *United States v. Hale*, 422 U.S. 171, 176 (1975) ("A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness.").

³⁹ *United States v. Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009).

⁴⁰ *United States v. Abel*, 469 U.S. 45, 51 (1984); 27 VICTOR J. GOLD, *FEDERAL PRACTICE & PROCEDURE EVIDENCE* § 6094 (2d ed. 2017); 4 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 607:1 (7th ed. 2016).

⁴¹ *See, e.g.*, *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000) (upholding "Rule 806(b)'s ban on extrinsic evidence of prior bad acts" pertaining to an out-of-court declarant). *But see, e.g.*, *United States v. Uvino*, 590 F. Supp. 2d 372, 374 (E.D.N.Y. 2008) (finding extrinsic evidence of specific instances of conduct admissible when extrinsic evidence is the sole opportunity to introduce such evidence to the jury).

⁴² *Saada*, 212 F.3d at 221; *accord* *United States v. Shayota*, No. 15-CR-00264-LHK, 2016 WL 6093237, at *7 (N.D. Cal. Oct. 19, 2016) (holding Rule 608(b) bars the introduction of extrinsic evidence for impeachment purposes); *United States v. Little*, No. CR 08-0244 SBA, 2012 WL 2563796, at *4 (N.D. Cal. Jun. 28, 2012) (holding a declarant may not be impeached with extrinsic evidence if he is unavailable to testify); *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997) (*per curiam*) (holding counsel could not use extrinsic evidence to support an attack of the declarant's credibility).

⁴³ *Uvino*, 590 F. Supp. 2d at 374 ("By permitting any impeachment evidence that would be admissible had the declarant testified, Rule 806 renders Rule 608's impeachment rules applicable to a declarant's out-of-court statements While Rule 608(b) ordinarily does not permit the introduction of extrinsic evidence of specific

III. Rehabilitation

On the other hand, once the credibility of an out-of-court declarant is attacked,⁴⁴ the cross examiner must understand that the declarant's credibility may be supported by positive evidence.⁴⁵ If the cross-examiner has challenged the declarant's character for truthfulness, then on redirect or rebuttal, counsel may introduce positive evidence about the declarant's character for truthfulness in the form of opinion or reputation testimony.⁴⁶ If the opponent attacks the witness with the declarant's prior inconsistent statement, a court may permit counsel on redirect or rebuttal to introduce the declarant's prior statement, which is consistent with the declarant's out-of-court statements.⁴⁷ The witness's

instances of conduct for [impeachment] purposes . . . extrinsic evidence of specific instances may be admissible through Rule 806 [because] . . . resort to extrinsic evidence may be the only means of presenting [impeachment] evidence to the jury.”) (internal quotation marks omitted) (citing *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988)).

⁴⁴ ROGER C. PARK & AVIVA ORENSTEIN, *TRIAL OBJECTIONS HANDBOOK* § 7:24 (2d ed. 2015).

⁴⁵ GRAHAM, *supra* note 40, at § 607:1 (“Matters brought out on cross-examination attacking credibility of a witness are generally a proper subject for rehabilitation upon redirect examination.”).

⁴⁶ FED. R. EVID. 608(a).

⁴⁷ GRAHAM, *supra* note 40, at § 801:12; *United States v. Ellis*, 121 F.3d 908, 919 (4th Cir. 1997) (“Even before the adoption of the federal rules, this court recognized that ‘where a cross-examiner has endeavored to discredit a witness *by prior inconsistent statements*, it is sometimes permissible to offset the damage by showing *prior consistent utterances*.”) (emphasis added) (quoting *Schoppel v. United States*, 270 F.2d 413, 417 (4th Cir. 1959)); *accord* *United States v. Hoover*, 543 F.3d 448, 454 (8th Cir. 2008) (holding prior consistent statements could be admitted for rehabilitative purposes); *United States v. Kenyon*, 397 F.3d 1071, 1081 (8th Cir. 2005) (“We agree that, in appropriate circumstances, prior consistent statements may be admitted for rehabilitative purposes, even where they do not meet the restrictions of Rule 801(d)(1)(B).”); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986) (“[A] prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition. When the prior statement tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony, its use for rehabilitation purposes is within the sound discretion of the trial judge. Such use is also permissible when the consistent statement will amplify or clarify the allegedly inconsistent statement. It matters not whether such use is deemed a permissible type of rehabilitation or only an invocation of the principle of completeness, though not a precise use of Rule 106.”); *United States v. Santiago*, 199 F. Supp. 2d 101, 106-07 (S.D.N.Y. 2002) (holding the use of a prior consistent statement is admissible for

poor memory or questionable motive for testifying may lead to rehabilitation with the witness's prior consistent statements.⁴⁸ Even though there is no explicit provision in the Federal Rules of Evidence that authorizes rehabilitation of the declarant-witness's credibility by consistent statements, courts permit it under federal common law.⁴⁹ Relevance standards under Rules 401, 402 and 403 govern the admissibility of consistent statements for rehabilitation.⁵⁰ Under federal common law, the time at which the declarant made the prior consistent statement is critical.⁵¹

rehabilitative purposes); DAVID F. BINDER, *HEARSAY HANDBOOK* 4TH § 2:12, at 152 (2011) (“[I]f the credibility of a witness is impeached by a suggestion that the witness is an unreliable historian, then evidence that the witness made a prior statement consistent with the witness’s testimony at trial is relevant to rebut such suggestion and to rehabilitate the witness’s credibility.”); 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 6:102, at 647 (4th ed. 2013) (“When a witness is attacked by a prior inconsistent statement, the attack may be answered by efforts at refutation or repair. Sometimes the repair proceeds simply by suggesting or proving that the witness never made the prior statement, or that it was not actually inconsistent with the testimony. *Sometimes the party sponsoring or defending the credibility of the witness answers the attack in a different way, by proving that the witness has also made statements that are consistent with her testimony.*”) (emphasis added).

⁴⁸ Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(D)(1)(B)*, 46 *CONN. L. REV.* 937, 944 (2014) (discussing the common law evidentiary rules of impeachment and rehabilitation with a prior consistent statement).

⁴⁹ Laird C. Kirkpatrick & Christopher B. Mueller, *Prior Consistent Statements: The Dangers of Misinterpreting Amended Federal Rule of Evidence 801(d)(1)(B)*, 84 *GEO. WASH. L. REV. ARGUENDO* 192, 193 (2016) (discussing the 2014 amendment to Federal Rule of Evidence 801(d)(1)(B) and its anticipated effect on the admission of prior consistent statements); accord Richter, *supra* note 48, at 943-46 (explaining the common law evidentiary rules of impeachment and rehabilitation by a prior consistent statement); Joshua Vanderslice, Case Comment, “*Say ‘What’ Again: How Amending Rule 801(D)(1)(B) Made More Evidence Admissible*,” 35 *REV. LITIG.* 161, 162-63 (2016) (“Under the common law temporal priority doctrine, a prior consistent statement was deemed irrelevant unless it occurred before the origination of the source of the bias, interest, influence, or incapacity used to impeach. Temporal proximity provided a rationale for determining relevance when a witness was impeached using a prior inconsistent statement. Since it is unlikely that a witness made two inconsistent statements temporally proximate to one another, a prior consistent statement made near the time of the prior inconsistent statement decreases the likelihood that the prior inconsistent statement occurred at all. Thus, when a prior consistent statement was used to refute a prior inconsistent statement, it was only relevant if the witness denied the prior inconsistent statement and it was made near the time the alleged prior inconsistent statement occurred.”) (footnotes omitted).

⁵⁰ Vanderslice, *supra* note 49, at 163 (discussing how the Federal Rules of Evidence preserved the common law rules for the admission of a prior consistent statement).

⁵¹ *Id.* at 162-63.

IV. Rule 801(d)(1)(B)(i) and (ii): Consistent Statements as Substantive Evidence

Rule 801(d)(1)(B)(i) states that if a declarant testifies and is subject to cross examination about a prior statement, the declarant's out-of-court statement is not hearsay when the consistent statement is offered *to rebut a cross-examiner's claim of recent fabrication, improper influence, or motive on declarant's part*.⁵² The court may admit this evidence as substantive proof of the declarant's assertion,⁵³ not merely as rehabilitation-credibility evidence. The Supreme Court, however, has ruled that a consistent out-of-court statement offered as substantive evidence for rebuttal under Rule 801(d)(1)(B)(i) must have been made *before* the alleged recent fabrication or improper influence or motive emerged.⁵⁴

⁵² FED. R. EVID. 801(d)(1)(B)(i).

⁵³ FED. R. EVID. 801(d)(1)(B) advisory committee note ("Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.").

⁵⁴ *Tome v. United States*, 513 U.S. 150, 167 (1995); *see also* *Gov't of the V.I. v. Muiruri*, 340 F. App'x 794, 797 (3d Cir. 2009) ("The Supreme Court squarely addressed the pre-motive requirement in *Tome v. United States*, stating: 'Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.' The question is whether an out-of-court statement rebuts the alleged link between the declarant's purported motive to lie and her subsequent testimony. The pre-motive requirement exists because '[a] consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive . . . [but] out-of-court statements that postdate the alleged fabrication . . . refute the charged fabrication in a less direct and forceful way.' This distinction is necessary because '[i]f . . . Rule [801(d)(1)(B)] were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones.'") (citations omitted); *United States v. Frazier*, 469 F.3d 85, 92 (3d Cir. 2006) ("The Supreme Court has imputed a 'pre-motive' requirement into Rule 801(d)(1)(B), so that statements are only admissible under the rule 'when those statements were made before the charged recent fabrication or improper influence or motive.' The purpose of this requirement is that, in most instances, a consistent statement that predates the motive is more likely to be truthful than a prior consistent statement made after the motive to fabricate arose. . . . In this sense, the pre-motive requirement reflects the common law temporal requirement that any motive to fabricate must have arisen after the prior consistent statement in order for the statement to be admissible.") (citations omitted).

The adoption of Rule 801(d)(1)(B)(i), however, did not replace the common law rule that prior consistent statements could be used to rehabilitate the declarant's credibility.⁵⁵ It merely added another possible and different use for these statements—substantive proof of the consistent statement's assertions.⁵⁶

There are critical differences between the requirements for admission of a prior consistent statement for substantive, versus credibility, purposes. For substantive purposes, the declarant must testify and be subjected to cross examination about the prior statement.⁵⁷ For rehabilitation purposes, this is not required—the court may admit the declarant's out-of-court consistent statement even if the declarant does not testify and is not cross-examined.⁵⁸ Next for substantive purposes, counsel may offer the out-of-court consistent statement by the declarant-witness to rebut a cross-examiner's claim that the declarant recently fabricated the out-of-court statement he testified to on direct examination, or made that statement because of a recent improper influence or motive.⁵⁹ According to several courts, the rehabilitation purpose does not.⁶⁰ Following this

⁵⁵ Richter, *supra* note 48, at 951.

⁵⁶ United States v. Drury, 396 F.3d 1303, 1316 (11th Cir. 2005).

⁵⁷ FED. R. EVID. 801(d)(1).

⁵⁸ United States v. Cotton, 823 F.3d 430,437 (8th Cir.), *cert. denied*, 137 S. Ct. 520 (2016).

⁵⁹ *Ellis*, 121 F.3d at 919 (citing *Tome*, 513 U.S. at 156); *accord* United States v. Beaulieu, 194 F.3d 918, 920 (8th Cir. 1999); United States v. Acker, 52 F.3d 509, 517 (4th Cir. 1995); United States v. Rubin, 609 F.2d 51, 67 (2d Cir. 1979) (Friendly, J., concurring), *aff'd on other grounds*, 449 U.S. 424 (1981).

⁶⁰ See United States v. Adams, 63 M.J. 691, 696 (A. Ct. Crim. App. 2006) (explaining that prior statements are relevant for rehabilitation and context); United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001) (“[W]here prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, . . . Rule 801(d)(1)(B) and its concomitant restrictions do not apply.”) (quoting *Ellis*, 121 F.3d at 919); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988) (Such use is in accord with the “doctrine of completeness,” which provides that “[t]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.”) (quoting 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2113, p. 653 (J. Chadbourn rev. 1978)) (internal quotation marks omitted); *Pierre*, 781 F.2d at 331 (noting that statements “offered to clarify or amplify the meaning of the impeaching inconsistent statement” have significant rebutting force); *Rubin*, 609 F.2d at 70 (Friendly, J., concurring) (arguing that use of prior consistent statements for rehabilitation should be generously allowed “since they bear on whether, looking at the whole picture, there was any real inconsistency”).

logic, then the requirement in *Tome v. United States*⁶¹ that a declarant's consistent out-of-court statements could only be admitted when those out-of-court statements were made *before* the claimed recent fabrication or improper influence or motive is also inapplicable.⁶² Nevertheless, prior consistent statements for the purpose of rehabilitation "still must meet at least the standard of having 'some rebutting force beyond the mere fact that the witness repeated on a prior occasion a statement consistent with his trial testimony.'"⁶³

In 2014, the Federal Rules of Evidence expanded the non-hearsay category of consistent statements used to rehabilitate the declarant-witness's credibility.⁶⁴ Rule 801(d)(1)(B)(ii) announces that an out-of-court statement is not hearsay if a declarant testifies and is subject to cross examination; the declarant's prior out-of-court statement is consistent with the declarant's current testimony; and the statement is offered to rehabilitate the declarant's credibility, after the declarant's credibility has been attacked on a ground other than recent fabrication or improper influence or motive.⁶⁵ These additional grounds of impeachment may include cross-examination on the witness's prior inconsistent statement or failure to recall,⁶⁶ as well as the witness's bias, interest, corruption, coercion, contradicting statements, or inability to perceive, narrate or recall the event about which he has testified.⁶⁷

Consequently, the party offering the rehabilitating consistent statement under Rule 801(d)(1)(B)(ii) may use it for a substantive purpose—to prove the declarant's assertions within the out-of-court statement.⁶⁸ The

⁶¹ 513 U.S. 150 (1995).

⁶² *Ellis*, 121 F.3d at 919; *Tome*, 513 U.S. at 156 (1995); accord *Richter*, *supra* note 48, at 940 ("Following a charge of recent fabrication or improper motive or influence, a 'pre-motive' prior consistent statement by the witness may be admitted to rehabilitate and for its truth. In contrast, prior consistent statements made by the witness after the inception of the improper motive may never be used for their truth.").

⁶³ *Simonelli*, 237 F.3d at 27-28 (citing *Pierre*, 781 F.2d at 331); accord *United States v. Wilkerson*, 411 F.3d 1, 5 (1st Cir. 2005) (restating *Simonelli* quotation).

⁶⁴ FED. R. EVID. 801 advisory committee note to 2014 amendment.

⁶⁵ FED. R. EVID. 801(d)(1)(B)(ii).

⁶⁶ FED. R. EVID. 801 advisory committee note to 2014 amendment.

⁶⁷ See *supra* notes 31-43 and accompanying text.

⁶⁸ *Berry v. Beauvais*, No. 13-cv-2647-WJM-CBS, 2015 WL 5244892, at *2 (D. Colo. Sept. 9, 2015) ("Before December 1, 2014, a prior consistent statement could be

amendment retains the *Tome* requirement that a consistent statement “offered to rebut a charge of recent fabrication or improper influence or motive, must have been made *before* the alleged fabrication or improper influence or motive arose.”⁶⁹ This amendment simply expands the use of consistent statements for substantive purposes to rehabilitate the credibility of the witness from other attacks.

The amendment does not permit the introduction of consistent statements to bolster the witness’s credibility⁷⁰ nor to merely add facts or expand the witness’s trial testimony.⁷¹ As before, under this amendment a party may only introduce prior consistent statements to rehabilitate a witness’s credibility after an opponent has attacked it.⁷² The court may admit prior consistent statements under this amended rule only if

admitted for the truth of the matter asserted if it was ‘consistent with the declarant’s testimony and [was] offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying.’ Effective December 1, 2014, however, subparagraph (B) was split into two clauses: ‘(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground[.]’ . . . Understanding this new clause requires understanding the overall purpose of Rule 801(d)(1)(B). From the beginning, this Rule was not intended to ensure admissibility of prior consistent statements. Such statements had ‘traditionally . . . been admissible to rebut charges of recent fabrication or improper influence or motive.’ Rule 801(d)(1)(B) was not intended to change that. Rather, the purpose of Rule 801(d)(1)(B) was to *expand* the use of such statements, admitting them not only as pure rehabilitative evidence but also as substantive evidence—*i.e.*, evidence of the truth of the matter asserted. According to the committee commentary on the most recent amendment, clause (ii) addresses prior consistent statements offered for purposes *other than to rebut a charge of recent fabrication*, such as ‘consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness’s testimony’ and ‘consistent statements that would be probative to rebut a charge of faulty memory.’ The committee saw that the Rule, as originally written, left these sorts of prior consistent statements ‘potentially admissible only for *the limited purpose of rehabilitating a witness’s credibility*,’ not as substantive evidence. Clause (ii) clarifies that such statements may be treated as substantive evidence.” (emphasis added) (citations omitted).

⁶⁹ FED. R. EVID. 801 advisory committee note to 2014 amendment.

⁷⁰ *Id.*

⁷¹ Kirkpatrick & Mueller, *supra* note 49, at 193 (discussing the 2014 amendment to Federal Rules of Evidence 801(d)(1)(B) and its anticipated effect on the admission into evidence of prior consistent statements).

⁷² For a critique of the new rule, see generally Kirkpatrick, & Mueller, *supra* note 49.

the statements “properly rehabilitate a witness whose credibility has been attacked.”⁷³ The only difference now is that after counsel attacks a witness’s credibility *on another ground*, the court may admit the witness’s consistent out-of-court statements for substantive, as well as credibility rehabilitation, purposes.⁷⁴

V. The Complexities of Federal Rule of Evidence 806 and Federal Rule 801(d)(1)(B)(i) and (ii)

The Federal Rules of Evidence challenge many attorneys and judges. Rules 806 and 801(d)(1)(B) are particularly problematic. Two recent cases highlight the complexities of Rule 806 and Rule 801(d)(1)(B)(i) and (ii).

A. *United States v. Cotton*⁷⁵

In January 2013, the Drug Enforcement Administration (DEA) investigated and ultimately arrested Jeremy Poe for cocaine trafficking.⁷⁶ After Poe’s arrest, he agreed to cooperate with the DEA.⁷⁷ Poe told the DEA agents that he had received the cocaine from David Frazier.⁷⁸ Poe also implicated Torrance Cotton as the source of the drugs.⁷⁹

⁷³ *Berry*, 2015 WL 5244892, at *2 (citing FED. R. EVID. 801 advisory committee note to 2014 amendment).

⁷⁴ FED. R. EVID. 801 advisory committee note to 2014 amendment. For a detailed discussion of the 2014 Amendment to Rule 801(d)(1)(B)(ii), *see generally* Vanderslice, *supra* note 49 (critiquing the amendment to Rule 801(D)(1)(B)); *see also* Richter, *supra* note 48, at 937 (stating the purpose of the article as finding a “constructive path forward by highlighting the beneficial purposes of the proposed amendment [to Rule 801(d)(1)(B)] and exploring criticisms levied against it.”).

⁷⁵ 823 F.3d 430 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 520 (2016).

⁷⁶ *Cotton*, 823 F.3d at 432.

⁷⁷ *Id.*

⁷⁸ *Id.* at 433.

⁷⁹ *Id.*

Poe's cooperation with the agents led to Frazier's arrest.⁸⁰ One kilogram of cocaine was seized from Frazier's home.⁸¹ After Frazier's arrest on January 18, 2013, Frazier told the interviewing police officer that Torrance Cotton was the source of the cocaine.⁸² Cotton was later arrested and charged with conspiracy to distribute cocaine and possession with intent to distribute cocaine.⁸³

At trial, the Government called cooperating co-conspirator Jeremy Poe to testify against Torrance Cotton.⁸⁴ Poe testified on direct examination that Cotton's co-conspirator, David Frazier, had told Poe before Frazier's January 2013 arrest that Cotton was the source of the cocaine they were selling.⁸⁵ The trial court admitted into evidence Frazier's out-of-court statements to Poe as non-hearsay co-conspirator statements under Rule 801(d)(2)(E).⁸⁶ As such, these statements were substantive proof of the drug conspiracy between Poe, Frazier and Cotton.⁸⁷

Because of the admission of Frazier's out-of-court statement, even though he did not testify at trial, Frazier's credibility was an issue.⁸⁸ Pursuant to Rule 806, Cotton attempted to impeach Frazier's credibility with an inconsistent statement in a July 2013 affidavit that Frazier had provided to Cotton's attorney several months after Frazier's

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Cotton*, 823 F.3d at 435-36.

⁸³ *Id.* at 433.

⁸⁴ *Id.* at 435.

⁸⁵ *Id.* at 435-36.

⁸⁶ *Id.* at 436.

⁸⁷ *Id.* (noting that introduction of Frazier's out-of-court co-conspirator statements did not violate the Sixth Amendment right to confrontation because the statements were not "testimonial"); *see Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (Testimonial statements are "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.") (citations omitted) (internal quotation marks omitted).

⁸⁸ *Cotton*, 823 F.3d at 435.

January 2013 arrest.⁸⁹ In part, Frazier’s affidavit stated, “*I never had any drug involvement with Mr. Cotton at all . . .*”⁹⁰ Pursuant to Rule 806, the court permitted Cotton’s defense counsel to impeach the absent declarant, Frazier, with his inconsistent subsequent sworn statement.⁹¹

Following this impeachment of Frazier’s credibility through this inconsistent statement, the Government sought to rehabilitate Frazier’s credibility by introducing Frazier’s January 2013 post-arrest statement to the interviewing officer.⁹² This earlier post-arrest statement concerning Cotton’s involvement in the drug conspiracy was consistent with Frazier’s pre-arrest co-conspirator statement to Poe, which, under Rule 801(d)(2)(E), the Government had introduced on direct examination.⁹³

The defense objected to the introduction of this consistent statement, arguing that Frazier’s post-arrest statement was inadmissible.⁹⁴ The defense argued that only Rule 801(d)(1)(B)(i) permitted the admission of a witness’s prior consistent statement and only as non-hearsay substantive evidence when opposing counsel had claimed that the witness had recently fabricated his testimony or testified because of an improper motive.⁹⁵

The trial court disagreed and permitted the admission of Frazier’s consistent post-arrest statement.⁹⁶ Following Cotton’s conviction on April 3, 2014, defense counsel raised this issue on appeal.⁹⁷

To understand the “consistent statement” issues in this case, it is helpful to diagram the sequence of the relevant *Cotton* trial testimony:

⁸⁹ *Id.*

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.* at 436.

⁹² *Id.* at 435.

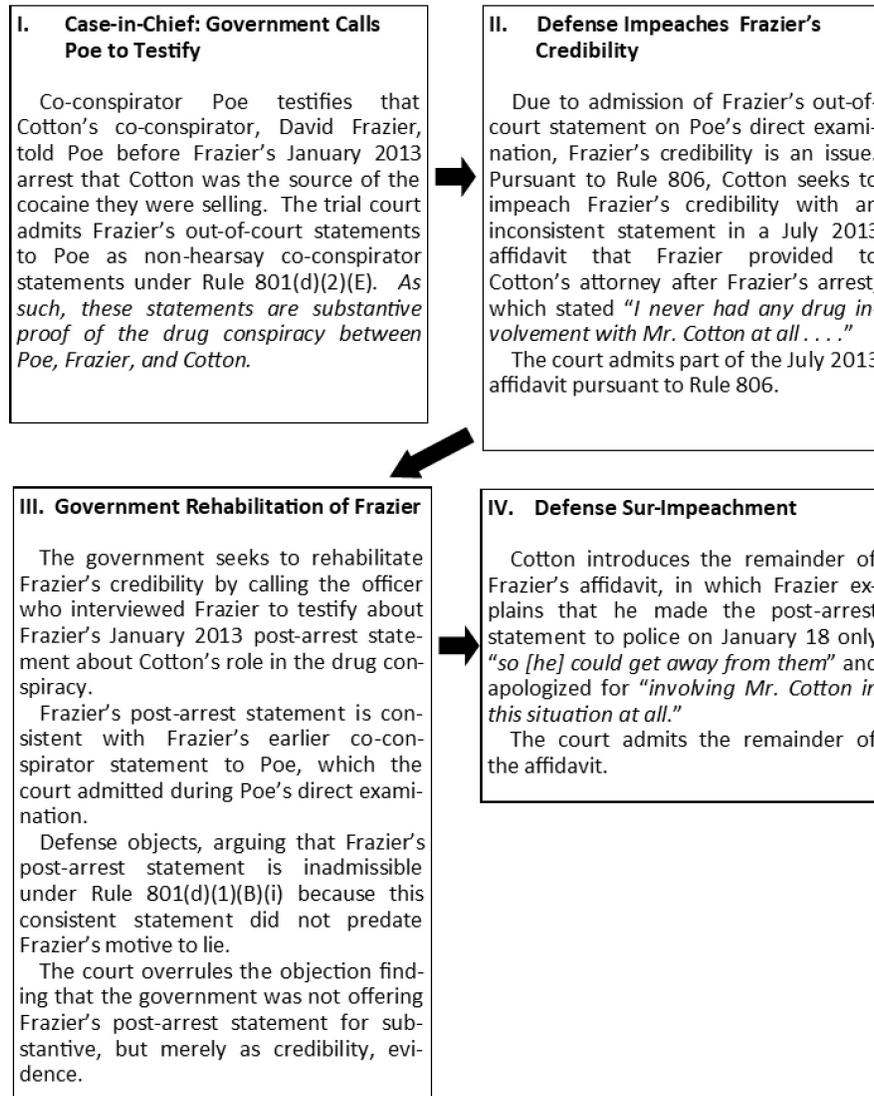
⁹³ *Id.* at 435-36 (Appealing this admission, Cotton first argued that his Sixth Amendment Right to Confrontation was violated when the trial court admitted Frazier’s post-arrest statement. The Eighth Circuit, however, rejected this argument because the Government offered Frazier’s post-arrest statement only as credibility rehabilitation evidence and not as substantive non-hearsay evidence.).

⁹⁴ *Cotton*, 823 F.3d at 436.

⁹⁵ *Id.* at 436-37.

⁹⁶ *Id.* at 437.

⁹⁷ *Id.*



The Eighth Circuit Court of Appeal reviewed the admissibility of the following out-of-court statements by Frazier, the declarant who did not testify at trial: (1) Frazier's pre-January 2013 statement to co-operating witness Poe that Cotton was the source of the drugs, (2) Frazier's July 2013 affidavit which stated that he never had any drug involvement with Cotton, and (3) Frazier's January 2013 post-arrest statement to the

arresting officer concerning Cotton's involvement in the drug conspiracy.⁹⁸

The Eighth Circuit agreed with the trial court that all three statements were admissible.⁹⁹ Frazier's pre-January 2013 statement to Poe qualified under Rule 801(d)(2)(E) as a co-conspirator statement and, therefore, could be considered as substantive evidence of Cotton's participation in the drug conspiracy.¹⁰⁰ Frazier's statement in the July 2013 affidavit qualified under Rule 806 as proper impeachment of Frazier, the non-testifying declarant, through an inconsistent statement.¹⁰¹ It was the last statement—Frazier's consistent January 13, 2013 post-arrest statement—that the Court analyzed closely.¹⁰²

The appellate court recognized there are two ways counsel could seek to admit a declarant's consistent statement made before declarant's inconsistent statement. The first is under Rule 801(d)(1)(B)(i), as non-hearsay substantive evidence offered to rebut a claim of recent fabrication or improper motive. The second is as rehabilitation-credibility evidence, after opposing counsel had impeached the declarant, here Frazier, with an inconsistent statement.¹⁰³ A quick review of the case makes it clear that Frazier's consistent statement could *not* have been admitted under Rule 801(d)(1)(B)(i) because the Government could not satisfy the requirements under that rule.¹⁰⁴ Frazier, the declarant, never testified at trial and he was not subjected to cross-examination by the defense.¹⁰⁵

Nonetheless, the trial court admitted Frazier's post-arrest consistent statement to the police officer.¹⁰⁶ The court stressed that the Government offered this consistent statement for rehabilitation purposes—in response

⁹⁸ *Id.* at 436.

⁹⁹ *Id.* at 436, 438.

¹⁰⁰ *Cotton*, 823, F.3d at 436.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 437.

¹⁰⁴ *See* FED. R. EVID. 801(d)(1) (stating that a declarant-witness's prior statement may only be admitted if the declarant testifies and is subject to cross examination about the prior statement).

¹⁰⁵ *Id.*

¹⁰⁶ *Cotton*, 823 F.3d at 435-36.

to defense counsel's Rule 806 impeachment of Frazier.¹⁰⁷ The language of Rule 806 is explicit that a declarant's credibility may be supported after it has been attacked.¹⁰⁸ As the Eighth Circuit declared: "Pursuant to Rule 806, Frazier's credibility was 'attacked, and [could] then [be] supported, by any evidence that would be admissible for those purposes if [he] had testified as a witness.'"¹⁰⁹ As long as the prior consistent statements were not "merely cumulative" of the witness's testimony, these consistent statements could be introduced to explain the declarant's direct testimony or inconsistent statement.¹¹⁰

The Eighth Circuit stressed that it is within the court's discretion whether to admit a prior consistent statement to rehabilitate the witness's credibility.¹¹¹ Although the trial court did not specify the grounds for admitting Frazier's consistent out-of-court statement, the Eighth Circuit nevertheless found that the trial court did not err in permitting its admission.¹¹²

It is difficult to understand the basis for admitting Frazier's consistent statement. The Eighth Circuit recognized that Frazier's consistent statement was *not* admitted to either explain or clarify Frazier's other out-of-court statements.¹¹³ Moreover, the consistent statement was not admitted to rebut a claim that Frazier's memory was faulty because it does not appear that defense counsel ever made that claim.¹¹⁴ The Government could not claim that it offered the consistent statement to prove that the prior inconsistent statement in the July 2013 affidavit was never made.¹¹⁵ The signed affidavit eliminated that possibility.¹¹⁶ It appears that the court admitted Frazier's consistent statement to the arresting officer to rebut defense counsel's inference that Frazier's non-

¹⁰⁷ *Id.* at 436.

¹⁰⁸ FED. R. EVID. 806.

¹⁰⁹ *Cotton*, 823 F.3d at 437.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 438.

¹¹³ *Id.*

¹¹⁴ *Id.* at 436-37.

¹¹⁵ *Cotton*, 823 F.3d at 435.

¹¹⁶ *Id.*

hearsay, co-conspirator statements were untrue or never made.¹¹⁷ This is problematic, however, because Frazier made the challenged consistent statement *after* his arrest, at a time when Frazier would likely implicate others in order to curry favor from the Government.¹¹⁸ It is difficult to understand how this would “rehabilitate” Frazier’s credibility after it was impeached with a signed affidavit he provided six months after his post-arrest statement.¹¹⁹

Although defense counsel argued that Frazier’s consistent out-of-court statements could only be admitted if they *predated* Frazier’s motive to fabricate, the court disagreed.¹²⁰ In a footnote the court explained that this prerequisite is only required when counsel is seeking to admit the consistent statement as substantive-rebuttal, not rehabilitation-credibility, evidence.¹²¹ Although accurate, this distinction seems highly problematic. It upholds an inconsistent, and somewhat irrational, approach to rehabilitation with a consistent statement by requiring that for a non-hearsay substantive purpose under Rule 801(d)(1)(B)(i), the consistent statement must predate the declarant’s motive to fabricate, while the rehabilitation-credibility purpose under the federal common law does not.¹²² It is challenging to understand how a post-motive-to-lie consistent statement truly *rehabilitates* a witness’s credibility after counsel has attacked that credibility with an inconsistent statement. Frazier’s post-arrest statement seems merely to be a repetition of Frazier’s earlier alleged co-conspirator statement to Poe.¹²³ Because Frazier never testified, it is difficult, if not

¹¹⁷ *Id.* at 435-36.

¹¹⁸ *Id.* at 435.

¹¹⁹ *See* *Tome v. United States*, 513 U.S. 150, 157 (1995) (“Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.”); *Pierre*, 781 F.2d at 331 (“Of course, not every prior consistent statement has much force in rebutting the effect of a prior inconsistent statement, and the issue ought to be whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.”).

¹²⁰ *Cotton*, 823 F.3d at 436 n.3.

¹²¹ *Id.*

¹²² *Kirkpatrick & Mueller*, *supra* note 49, at 197.

¹²³ *Cotton*, 823 F.3d at 436 n.3; *see Pierre*, 781 F.2d at 331 (“Prior consistent statements still must meet at least the standard of having ‘some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent

impossible, to determine his motives for providing the post-arrest statement implicating Cotton. For that reason, it would have been prudent to prohibit the admission of Frazier's consistent post-arrest statement.

In view of the trial court's permissive and balanced evidentiary rulings, the Eighth Circuit could not conclude that the trial court had abused its discretion in admitting Frazier's consistent post-arrest statement.¹²⁴ Because the trial court allowed Cotton's attorney to introduce Frazier's entire July 2013 affidavit to explain Frazier's earlier post-arrest January 18, 2013 statement implicating Cotton, the jury heard every statement both parties wanted the jury to consider.¹²⁵ The court had admitted (1) Frazier's substantive pre-arrest co-conspirator statements concerning Cotton's involvement in the distribution of cocaine through witness Poe; (2) Frazier's inconsistent statement provided by way of Frazier's July 2013 affidavit; (3) Frazier's January 18, 2013 consistent statement to the arresting officer; and (4) Frazier's full explanation for his post-arrest January 2013 statement in the remainder of the July 2013 affidavit.¹²⁶ The appellate court held that because the lower court admitted all of these statements, the jury was able to fully consider the truth of Frazier's non-hearsay co-conspirator statement and the credibility of Frazier through the inconsistent statements and explanation in the affidavit and the consistent post-arrest statement.¹²⁷

Furthermore, the trial court instructed the jury that it was to consider Frazier's out-of-court inconsistent and consistent statements *solely* to evaluate Frazier's credibility.¹²⁸ Finally, the Eighth Circuit concluded that because Cotton was permitted to introduce the full July 2013

with his trial testimony.”); *Adams*, 63 M.J. at 697 (“Consistency—without more—neither rebuts a specific attack on a witness’ credibility nor offers any further information to explain an apparent weakness. It simply establishes that the witness said the same thing on a prior occasion. ‘Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true.’ As has been said, ‘a lie often repeated does not become the truth.’ Consequently, more than mere reiteration of the same statement is required for a statement to be relevant, and, therefore admissible.”) (citation omitted).

¹²⁴ *Cotton*, 823 F.3d at 438.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 438.

¹²⁸ *Id.*

affidavit—all the evidence he sought to admit on this issue—and because Frazier’s post-arrest statement was not much different or more harmful than Frazier’s admissible co-conspirator statements, the trial court did not abuse its discretion.¹²⁹

In a rather mild understatement, the Eighth Circuit Court of Appeals remarked that this case provides “somewhat complex and unusual circumstances.”¹³⁰ In this “complex and unusual” case, however, there are some critical points for lawyers to consider. First, once an attorney impeaches a non-testifying declarant’s out-of-court statement with a prior inconsistent statement pursuant to Rule 806, that attorney has opened the door for opposing counsel to introduce the declarant’s prior consistent statements to rehabilitate the declarant’s credibility. This is true even though the declarant has never testified. Moreover, as was the case here, if the court admits the prior consistent statement simply to rehabilitate the declarant’s credibility, and not as substantive evidence, the declarant’s out-of-court consistent statements do not have to predate any motive to fabricate.

Next, it is important to consider the following—Rule 806 allows an attack on a non-testifying declarant’s credibility as if the declarant had actually testified.¹³¹ The advisory notes to Rule 806 announce that because “[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness[,] [h]is credibility should in fairness be subject to impeachment and support as though he had in fact testified.”¹³² It is an open question whether opposing counsel could argue, and a court could find, that the absent declarant had constructively “testified” and had been “cross-examined” under Rule 806 and therefore had also satisfied the testimonial requirements of Rule 801(d)(1)(B)(i) or (ii).

This “complex and unusual” case presents an evidentiary challenge for attorneys and judges. It is questionable how many jurors would understand the difference between substantive and impeachment evidence in this complicated scenario.¹³³ It is laudable that the prosecutor and

¹²⁹ *Id.*

¹³⁰ *Cotton*, 823 F.3d at 438.

¹³¹ FED. R. EVID. 806.

¹³² FED. R. EVID. 806 advisory committee note.

¹³³ *Tome v. United States*, 513 U.S. 150, 171 (1995) (Breyer, J., dissenting) (“Juries have trouble distinguishing between the rehabilitative and substantive use of the kind

defense counsel understood the point of each statement in this intricate chain of evidence,¹³⁴ but it is highly unlikely that even with a limiting instruction, the jurors could differentiate between the impeachment and rehabilitation of credibility, rather than the substantive non-hearsay, purpose of this consistent statement evidence.¹³⁵

B. *United States v. Ledbetter*¹³⁶

In October 2014, Robert Ledbetter, along with seventeen co-defendants, was charged with multiple felonies including racketeering, conspiracy, murder in aid of racketeering, murder through the use of a firearm during and in relation to a drug trafficking crime, conspiracy to murder a witness, and use and discharge of a firearm during and in relation to a crime of violence.¹³⁷ During trial, the Government called Latonia Boyce and Ashley Ward as witnesses against the defendants.¹³⁸ In cross-examination, defense counsel sought to impeach these witnesses with evidence of their previous convictions, previous inconsistent statements and bias in favor of the prosecution in order to benefit from the Government's offer of leniency.¹³⁹

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.”); *accord* Vanderslice, *supra* note 49, at 174-75 (discussing the shortcomings of limiting instructions that accompany prior consistent statements offered into evidence for rehabilitation); *accord* Richter, *supra* note 48, at 967 (discussing the confusion generated by limiting instructions for prior consistent statements offered into evidence for rehabilitation).

¹³⁴ Vanderslice, *supra* note 49, at 174-75 (“Some judges complain that even lawyers do not understand when prior statements are admitted for rehabilitation but not their truth. Meanwhile other judges simply do not entertain arguments that there is a distinction.”).

¹³⁵ *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); *see generally* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407 (2013) (arguing that widely-held misconceptions regarding evidentiary instructions should be abandoned in favor of the idea that limiting instructions not only work but they are necessary for juror understanding).

¹³⁶ 184 F. Supp. 3d 594 (S.D. Ohio 2016).

¹³⁷ *United States v. Ledbetter*, No. 2:14-CR-127, 2014 WL 10297339, at *15-31 (S.D. Ohio Oct. 20, 2014).

¹³⁸ *Ledbetter*, 184 F. Supp. 3d at 596-98.

¹³⁹ *Id.* at 596.

Not surprisingly, after this impeachment the Government attempted to rehabilitate the credibility of these witnesses through third parties by eliciting previous consistent statements made to them by these impeached witnesses.¹⁴⁰ The trial court commented, “[b]ecause these issues continue to arise in this trial, and because the scope of the newly enacted Rule 80(d)(1)(B)(ii) remains somewhat of a mystery to courts and commentators,” the trial court issued a written order on two evidentiary objections.¹⁴¹ In an attempt to dispel this mystery, analysis of these evidentiary objections follows.

1. Michael Boyd’s Prior Consistent Statements

Michael Boyd testified in the Government’s case-in-chief about Ledbetter’s hostility towards one of the victims, Rodriccos Williams, because Williams had married Ledbetter’s former girlfriend, Latonia Boyce.¹⁴² Numerous defense counsel cross-examined Boyce about Ledbetter’s autumn 2007 visit to a nightclub and the statements Boyd later made to Latonia Boyce about Ledbetter’s threats of harm to her husband, Williams.¹⁴³ Defense counsel sought to impeach Boyd by implying that Boyd had fabricated his trial testimony about Ledbetter’s alleged threats in order to gain favor from the Government in the form of possible termination of Boyd’s probation, expungement of his criminal record, and eventual relocation to a new home.¹⁴⁴

The Government later called witness Latonia Boyce, the wife of murder victim Rodriccos Williams.¹⁴⁵ Boyce was at home when four individuals broke in to her home and killed her husband.¹⁴⁶ Boyce testified on direct examination to what she witnessed that night.¹⁴⁷

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 597.

¹⁴³ *Id.*

¹⁴⁴ *Ledbetter*, 184 F. Supp. 3d at 597.

¹⁴⁵ *Id.* at 596.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 596.

The prosecutor then tried to elicit testimony from Boyce about Michael Boyd's report to her of Ledbetter's threats of harm to Boyce's husband, Rodriccos Williams.¹⁴⁸ Defense counsel objected on the grounds of hearsay.¹⁴⁹ The Government countered that, pursuant to Rule 801(d)(1)(B)(i), Boyd's out-of-court prior statements to Boyce were not hearsay.¹⁵⁰ Rather, they were prior statements that were consistent with Boyd's earlier trial testimony.¹⁵¹ The Government was offering these consistent statements to rebut a charge by defense counsel that Boyd had fabricated his testimony about these threats because of an improper influence or motive.¹⁵²

The court noted that Rule 801(d)(1)(B)(i) required the following criteria to find a consistent out-of-court statement is not hearsay:

- (1) The declarant testifies and is subject to cross-examination about the prior statement.
- (2) The prior statement is consistent with the declarant's in-court testimony.
- (3) The prior statement is offered to rebut an express or implied charge that the declarant recently fabricated his testimony or acted from a recent improper influence or motive in so testifying.
- (4) The prior statement was made before any supposed motive to lie arose.¹⁵³

Here the court found that all four criteria existed.¹⁵⁴ First, on direct examination, Boyd testified about Ledbetter's threats to harm Williams before Williams's 2007 murder.¹⁵⁵ Defense counsel cross-examined Boyd about his out-of-court statements to Boyce concerning Ledbetter's threats toward Williams.¹⁵⁶ Second, the statements about which the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Ledbetter*, 184 F. Supp. 3d at 596.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 597.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Ledbetter*, 184 F. Supp. 3d at 597.

Government asked Boyce were consistent with Boyd's earlier trial testimony about Ledbetter's hostility and threats towards Williams.¹⁵⁷ Third, the Government introduced Boyd's consistent statements to Boyce to rebut the defense charge through its impeachment of Boyd that Boyd had fabricated his trial testimony about these alleged threats in order to curry favor from the Government for Boyd's own criminal problems.¹⁵⁸ Finally, Boyd's prior consistent statement predated any communication with the Government.¹⁵⁹ Significantly, Boyd spoke to law enforcement in 2009, two years *after* Williams's murder in 2007.¹⁶⁰ On the other hand, Boyd made the statements to Boyce soon after Williams's murder in November 2007.¹⁶¹ Consequently, the Government argued that Boyd made the statements about Ledbetter's threats well before Boyd talked to law enforcement and "well before any alleged improper motive influence or motive" on Boyd's part to curry favor from the Government could have arisen.¹⁶²

The trial court found that Boyd's 2007 statements to Boyce about Ledbetter's threats to harm Williams met the criteria under Rule 801(d)(1)(B)(i).¹⁶³ As such the statements were admissible as substantive, non-hearsay evidence, which the Government could use to prove that Ledbetter had threatened to harm Williams.¹⁶⁴ Moreover, because these out-of-court statements were substantive evidence of Ledbetter's threats to harm Williams, the court was not required to instruct the jury to limit its consideration of this evidence solely for impeachment purposes.¹⁶⁵

Interestingly the court found it was insignificant that the Government elicited Boyd's consistent statements from Boyce rather than Boyd.¹⁶⁶ As long as Boyd had already testified on direct examination about

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 598.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Ledbetter*, 184 F. Supp. 3d at 598.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 597 n.1.

Ledbetter's threats to harm Williams and defense counsel had cross-examined Boyd about those prior statements, it was inconsequential that the Government sought to elicit Boyd's *earlier* consistent statements from witness Boyce, rather than from declarant Boyd himself.¹⁶⁷ This finding is consistent with the decisions of other courts.¹⁶⁸

2. Ashley Ward's Prior Consistent Statements

The Government also called Ashley Ward as a prosecution witness in its case-in-chief.¹⁶⁹ Ward had a relationship with co-defendant Rastaman Wilson, who had died before trial.¹⁷⁰ Wilson had allegedly told Ward details about an underlying offense in this case—the 2007 murder of Donathan Moon.¹⁷¹ On cross-examination defense counsel sought to impeach Ward by eliciting testimony that although Ward had information about Moon's murder in August 2007, Ward did not share this informa-

¹⁶⁷ *Id.*

¹⁶⁸ See *United States v. Caracappa*, 614 F.3d 30, 39 (2d Cir. 2010) (stating that prior consistent statements of declarant can be proffered through any witness with personal knowledge of the statement pursuant to rule 801(d)(1)(B)); *accord* *United States v. Green*, 258 F.3d 683, 692 (7th Cir. 2001) (“Rule 801(d)(1)(B) does not bar the introduction of a prior consistent statement through the testimony of someone other than the declarant, so long as the declarant is available for cross-examination about the statement at some time during trial.”); *United States v. Montague*, 958 F.2d 1094, 1099 (D.C. Cir. 1992) (“We therefore hold that Rule 801(d)(1)(B) does not bar introduction of the prior consistent statement through a witness other than the declarant.”); *United States v. Piva*, 870 F.2d 753, 758 (1st Cir. 1989) (finding that statements from a third party regarding declarant's prior consistent statements admissible under rule 801(d)(1)(B)); *United States v. Griggs*, 735 F.2d 1318, 1325-26 (11th Cir. 1984) (“The court admitted Viel's testimony as being non-hearsay.”); *United States v. Dominguez*, 604 F.2d 304, 311 (4th Cir. 1979) (stating “[r]ule 801(d)(1) of the Federal Rules of Evidence provides that a prior consistent statement of a person who has testified and who has been subject to cross-examination is ‘not hearsay’ and is admissible if it ‘is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.’”); *United States v. Roye*, No. 3:15-cr-29 (JBA), 2016 WL 4147133, at *1 n.1 (D. Conn. 2016) (“The prior consistent statement need not be proffered through the testimony of the declarant but may be proffered through any witness who has firsthand knowledge of the statement.”); *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 2012 WL 2568972, at *5 (S.D.N.Y. 2012) (“These documents are prior consistent statements and admissible under Rule 801(d)(1)(B).”).

¹⁶⁹ *Ledbetter*, 184 F. Supp. 3d at 598.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

tion until *after* the 2011 arrest of her boyfriend, Rastaman Wilson.¹⁷² Defense counsel intended to show that Ward had merely provided this information to gain leniency for her boyfriend.¹⁷³

The Government later called as a witness Captain Chris Barbuto, the lead investigator for the Moon murder.¹⁷⁴ Barbuto testified about the Moon murder investigation and the role Ward played in it when she came forward with her information.¹⁷⁵ The Government then sought to introduce Ward's statements to Barbuto about the 2007 Moon murder, which were consistent with her trial testimony.¹⁷⁶ Defense counsel objected again on the grounds of hearsay.¹⁷⁷ The Government argued once again that, under Rule 801(d)(1)(B)(i), these out-of-court statements were not hearsay because the consistent statements were being offered to rebut the defense's argument that Ward had fabricated her testimony to gain benefits for her boyfriend.¹⁷⁸ Moreover, they were not hearsay under the newly adopted Rule 801(d)(1)(B)(ii) because the Government was seeking to rehabilitate Ward's credibility after being attacked on another ground.¹⁷⁹ The Government, however, did not specify those other grounds.¹⁸⁰

The court reiterated the four criteria that were required under Rule 801(d)(1)(B)(i) and Rule 801(d)(1)(B)(ii) to rule that a consistent out-of-court statement is not hearsay.¹⁸¹ The Government satisfied some, but not all, of the required criteria.¹⁸² Declarant Ashley Ward did testify that Wilson had told her about the murder of Donathan Moon, and defense counsel cross-examined her about those statements.¹⁸³ Ward's prior

¹⁷² *Id.* at 598-600.

¹⁷³ *Id.* at 599.

¹⁷⁴ *Id.*

¹⁷⁵ *Ledbetter*, 184 F. Supp. 3d at 599.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Ledbetter*, 184 F. Supp. 3d at 599.

¹⁸² *Id.* at 600.

¹⁸³ *Id.* at 598.

statement to Captain Barbuto was consistent with her in-court testimony and the Government offered it to rebut a charge that Ward, the declarant, was offering her testimony because of a recent improper influence—helping her boyfriend Rastaman Wilson.¹⁸⁴ The court ruled, however, that the prior consistent statement was not admissible as non-hearsay because Ward did not make it *before* any supposed motive to lie arose.¹⁸⁵

During cross-examination of Ward, defense counsel attacked Ward’s credibility on “the ground[s] of recent fabrication or improper influence.”¹⁸⁶ Counsel argued that Ward provided information about the Moon murder solely to gain leniency for her recently arrested boyfriend.¹⁸⁷ Nonetheless, the court found that under Rule 801(d)(1)(B)(i) the Government could not introduce Ward’s consistent out-of-court statements to law enforcement because those consistent statements did *not* predate her alleged improper motive of seeking to help her arrested boyfriend.¹⁸⁸ As the court declared, “When a declarant-witness or, in this instance, their loved one is arrested and *then* the witness begins cooperating with authorities by sharing information with them—the motivation to lie arises *before* the ‘prior consistent statement’ in question is made.”¹⁸⁹ In other words, for non-hearsay substantive purposes, the declarant must make the prior consistent statement before the motive to fabricate arose.¹⁹⁰

Furthermore the court found that newly adopted Rule 801(d)(1)(B)(ii) did not apply here because that rule applies “only to prior consistent statements [which are] offered ‘to rehabilitate the declarant’s credibility . . . on another ground.’”¹⁹¹ The Government failed to argue that it was seeking to offer Ward’s consistent out-of-court statements to Captain Barbuto for *another reason*.¹⁹² Consequently, the court concluded that

¹⁸⁴ *Id.* at 599.

¹⁸⁵ *Id.* at 600.

¹⁸⁶ *Id.*

¹⁸⁷ *Ledbetter*, 184 F. Supp. 3d at 600.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ *Tome v. United States*, 513 U.S. 150, 167 (1995).

¹⁹¹ *Ledbetter*, 184 F. Supp. 3d at 601 (quoting FED. R. EVID. 801(d)(1)(B)(ii)).

¹⁹² *Id.* at 599.

the amended rule was inapplicable here, and prohibited testimony about Ms. Ward's prior consistent statements to Captain Barbuto.¹⁹³ The trial court admitted Michael Boyd's consistent statement but excluded Ashley Ward's consistent statement.¹⁹⁴

It is important to note that if the prosecutor in this case had followed the lead of the prosecutor in *United States v. Cotton*¹⁹⁵ and argued that he was not seeking to introduce Ward's prior consistent statement as non-hearsay substantive evidence, the prosecutor may have succeeded in admitting Ward's consistent statement. The prosecutor could have argued that he was simply using Ward's prior consistent statement to rehabilitate Ward's credibility after defense counsel attacked it by implying that Ward lied to the police to curry favor for her arrested boyfriend. In *Cotton*, the court seemed to suggest that this was acceptable if the Government was simply offering the consistent statement to rehabilitate the witness's credibility and not as substantive evidence of the consistent statement's assertions.

Conclusion

Like many Rules of Evidence, Rules 806, 801(d)(1)(B)(i) and (ii) are complex. Unless counsel is fully familiar with all the requirements and consequences of these rules, it is easy for counsel to be confused and ultimately derailed by them. Although an attorney may intend simply to impeach a witness with a prior inconsistent statement or a claim of bias, that attorney may very well open the door to the admission of damaging consistent out-of-court statements by the witness. Even if a declarant does not testify, if counsel attacks the declarant's credibility on cross-examination, then opposing counsel may succeed in introducing prior consistent statements to rehabilitate the declarant's credibility. Furthermore, although an out-of-court statement should not be admitted

¹⁹³ *Id.* at 601 (quoting *United States v. Kubini*, No. 11-14, 2015 WL 418220, at *9 (W.D.Pa. Feb. 2, 2015) ("Where, as here, defense counsel does not open the door to further rehabilitation through use of 'other attacks on a witness—such as the charges of inconsistency or faulty memory,' Rule 801(d)(1)(B)(ii) has no role to play.")).

¹⁹⁴ *Id.*

¹⁹⁵ 823 F.3d 430, 437 (8th Cir.), *cert. denied*, 137 S. Ct. 520 (2016).

under Rule 801(d)(1)(B)(i) or (ii), if counsel is not fully familiar with these intricate rules and fails to object, an opponent may successfully admit a damaging prior consistent statement under Rule 801(d)(1)(B)(i) or (ii) as substantive evidence of the statement's assertion. Moreover, counsel must also be aware that counsel may use these prior consistent statements in two possible and potentially damaging ways: as rehabilitation-credibility evidence, as in *United States v. Cotton*, or as substantive-non hearsay evidence as in *United States v. Ledbetter*.

