

SEX ABUSE, ACCUSATIONS OF LIES, AND VIDEOTAPED TESTIMONY: A PROPOSAL FOR A FEDERAL HEARSAY EXCEPTION IN CHILD SEXUAL ABUSE CASES

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I. INTRODUCTION

In January 1995, the Supreme Court decided *Tome v. United States*,¹ imposing a pre-motive requirement on the admissibility of prior consistent statements. This requirement applies when out-of-court statements are admitted to rebut a charge of improper motive or influence, or recent fabrication. *Tome* was a father's appeal from a conviction for sexually abusing his daughter that emerged amidst a custody dispute over the young girl. An issue at trial in *Tome* was whether the accusations against the father, alleging sexual abuse of the daughter, were truthful or fabricated for the purpose of the custody battle.² Because the controversy arose on an Indian reservation, it was heard in federal court, and federal evidentiary rules applied. *Tome* now stands for the proposition that prior consistent statements offered to rebut a charge of improper motive or recent fabrication are admissible under Rule 801(d)(1)(B) of the Federal Rules of Evidence only if the prior statements were made before the alleged motive to fabricate existed. The effect of *Tome* on remand was to make inadmissible certain statements made by the four-year-old girl to her baby sitter, a social worker, and her mother, implicating the girl's father for sexually abusing her.³

The magnitude of the *Tome* holding can only be discerned in light of the current legal climate with respect to child sexual abuse. In recent years, there have been an extremely large number of child sexual abuse cases.⁴ Colorado and many other

1. 115 S. Ct. 696 (1995).

2. See *id.* at 699-700.

3. See *United States v. Tome*, 61 F.3d 1446 (10th Cir. 1995).

4. In 1994 alone, 47 states and the District of Columbia reported a total of 139,980 cases of child sexual abuse. See NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1994: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 4-7 tbl.7 (1996). Nine states included both substantiated and indicated cases of

states have recognized that (1) sexual abuse of children is widespread, (2) alleged victims are often the only eyewitnesses to the purported event, (3) child abuse victims often make poor witnesses in court, and (4) out-of-court statements made by children to adults are often the only evidence of abuse. As a result, state legislative innovations⁵ in this area and judicial interpretations of state evidence rules exhibit a trend toward leniency in admitting hearsay evidence of sexual abuse when the statements are made by children. Many states, including Colorado, have "tender years" statutes, which provide specific exceptions to the hearsay rule for children's statements in sexual abuse cases (when certain procedural requirements designed to protect defendants' rights are met). Amidst this pervasive recognition of the unique challenges that emerge in prosecuting the sex abusers of children, *Tome* represents a bulwark for abusers who are tried in federal courts, shielding them behind a reasonable doubt standard and courtroom objections based on hearsay rules.

Although sexual abuse cases are rarely heard in federal courts, the result in *Tome* exposes the Federal Rules of Evidence as inadequate at protecting the interests of children in sexual abuse cases. First, *Tome* illustrates how the Federal Rules limit the admissibility of many relevant and reliable out-of-court statements made by child victims to the rebuttal of a defendant's charge of improper motive. Second, where statements may be admissible to rebut a charge of recent fabrication, the pre-motive rule is an additional barrier to admissibility. In *Tome*, the daughter's out-of-court statements were deemed inadmissible under Rule 801(d)(1)(B) because the pre-motive rule was not

abuse in their data; 37 states and the District of Columbia included only substantiated cases; and one state included only indicated cases. *See id.*; *see also* ELLEN GRAY, *UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE* 5 (1993) (reporting 155,900 countable cases of child sexual abuse in 1986).

5. For the purposes of this comment, Rules of Evidence will be treated as legislative rather than judicial innovations; however, an Advisory Committee appointed by the United States Supreme Court produced drafts of the Federal Rules, which were ultimately accepted by the Supreme Court and transmitted to Congress pursuant to federal law. *See* 28 U.S.C. §§ 2072-2074 (1994); *see also, e.g.*, COLO. REV. STAT. § 13-25-128 (1987) (granting Supreme Court of Colorado power to prescribe general rules of evidence for the Colorado courts of record, subject to limitations regarding substantive rights and subject to a specific reservation of power by the general assembly).

satisfied. The possible effect of the *Tome* holding⁶—that molesters escape conviction when there is substantial out-of-court evidence implicating them—supports the notion that federal courts should implement protective mechanisms analogous to state procedures for child abuse cases.

This comment proposes an exception to the federal hearsay rule, similar to Colorado's tender years statute, to avoid the problems associated with child hearsay statements in the few sexual abuse cases that are heard in federal courts. If the Federal Rules of Evidence had included a tender years exception to the hearsay rule, the daughter's statements in *Tome* could have been admitted in the prosecution's case-in-chief under that exception, rather than be limited to rebuttal statements under Rule 801(d)(1)(B). Since the latter rule is available only for statements offered to rehabilitate a witness's testimony after an alleged motive to fabricate arose, statements offered under this rule must endure a more technical inquiry regarding their timing and use, as *Tome* indicates. Furthermore, since most states adopt the Federal Rules of Evidence and consider federal interpretations of the Federal Rules persuasive, the creation of a federal tender years exception would likely encourage the remaining states to adopt a similar exception.

Part II of this comment examines the special situation of children who are victim-witnesses in sexual abuse cases. Part III considers the history of the pre-motive requirement, and the background and procedural history in evaluating the Supreme Court's holding in *Tome*. Part IV reviews recent judicial and legislative efforts to protect children who allege abuse by allowing their out-of-court statements to come into evidence, focusing on Colorado's tender years statute. Part V proposes a hearsay exception to the Federal Rules of Evidence for the out-of-court statements of children who allege sexual abuse.

6. On remand, the Tenth Circuit held that some of the statements made by the daughter that were offered under certain exceptions to the hearsay rule were admissible; however, some of the statements did not fit within any of the exceptions under which they were offered, and thus were excluded. See *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995).

II. THE SPECIAL SITUATION OF HEARSAY IN CHILD SEXUAL ABUSE CASES

In child sexual abuse cases such as *Tome*, there are indeed compelling reasons to admit into evidence a child's out-of-court statements to adults when they pose a low hearsay risk.⁷ With little physical evidence to corroborate the young child's testimony,⁸ these statements are often highly probative in establishing the veracity of the allegations. Also, children often make poor witnesses, especially when they are very young. It is not unusual for the trial to occur long after the alleged incident; hence, a child may experience difficulty in remembering the details of the incident,⁹ rendering his or her testimony sparse, strained, unsure, or even inaccurate.

There are other factors that significantly impair a child's testimony on the witness stand. A child is often embarrassed and made to feel uncomfortable by questions directed at him or her about sex, and often does not have a sophisticated enough vocabulary to describe what happened in sufficient detail to produce convincing statements at trial.¹⁰ A child is often reluctant to say something that might incriminate a family member, teacher, or friend.¹¹ Moreover, a child is often unable to recognize and communicate all the relevant information necessary to

7. "Low hearsay risk" is used in conjunction with ad-hoc assessments of the traditionally acknowledged risks associated with out-of-court statements offered to prove the truth of the matter asserted. Commonly acknowledged risks in admitting hearsay statements are the risks of misperception, faulty memory, insincerity, and narrative ambiguity by the declarant. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.2, at 787-90 (1995); see also *infra* text accompanying notes 17-18. That the Federal Rules of Evidence classify prior consistent statements offered to rebut a charge of fabrication as not hearsay suggests that these statements pose less of the risks commonly associated with hearsay statements. See FED. R. EVID. 801(d)(1)(B).

8. "The problems of ineffective testimony and lack of eyewitnesses are compounded by the paucity of physical evidence in many child sexual abuse cases." 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 4.1, at 218 (2d ed. 1992).

9. See generally JOHN E.B. MYERS, CHILD WITNESS LAW AND PRACTICE, ch. 10 (1987) [hereinafter CHILD WITNESS LAW]; see also GRAY, *supra* note 4, at 95 (describing child's self-protective impulse to forget the events in order to go on with her life).

10. See, e.g., *Stevens v. People*, 796 P.2d 946 (Colo. 1990) (holding that a child's age-appropriate sexual terminology was not sufficient corroborative evidence under the child hearsay evidence statute).

11. See CHILD WITNESS LAW, *supra* note 9, § 4.15.

establish that a crime has been committed.¹² Finally, parents often choose not to press charges because of the potential trauma to the child from reliving a painful event¹³ in a long courtroom proceeding in front of strangers.

For the aforementioned reasons, prosecutors may prefer to rely on the testimony of adults regarding the victim's statements made to them after the event occurred, rather than relying on a child's live testimony supported only with general inferences about a child's lack of capacity to fabricate a story.¹⁴ Perhaps this is because a spontaneous statement made by the child to someone he or she trusts, unfettered by the formality of an official proceeding, is more convincing to juries and courts than a child's story on the stand.¹⁵

The practice of admitting out-of-court statements raises hearsay objections.¹⁶ Hearsay statements are traditionally excluded by courts based on the belief that such statements are inferior to live testimony, which is subject to cross-examination by the defense, is given under oath, and reveals demeanor and other tell-tale behavior that help a jury determine how much weight to give to the witness's testimony.¹⁷

However, hearsay exceptions have long been recognized in evidentiary law. These exceptions are usually justified on the grounds that the statements' reliability can be assured without

12. See, e.g., *State v. Brown*, 574 A.2d 745, 748 (R.I. 1990) (justifying the use of leading questions when 16-year-old testified that the defendant touched her vagina, but did not understand prosecutor's questions that were based on the legal necessity of establishing penetration).

13. See GRAY, *supra* note 4, at 96.

14. See, e.g., *Lancaster v. People*, 615 P.2d 720, 723 (Colo. 1980) (admitting into evidence a statement by a two-year-and-10-month-old child regarding a sexual offender; the court noted that "children of tender years are generally not adept at reasoned reflection and at concoction of false stories under such circumstances.").

15. However, some courts have discredited children's statements on the ground that children cannot make a distinction between fantasy and reality. See, e.g., *Brown v. United States*, 152 F.2d 138, 139 (D.C. Cir. 1945) (favoring exclusion of hearsay statements made by young children, the court stated that "[v]ery young children often fail to distinguish between subjective and objective experiences, between events which they dream or imagine and events which happen in the external world.").

16. Hearsay is "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." FED. R. EVID. 801(c). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

17. See MUELLER & KIRKPATRICK, *supra* note 7, § 8.3, at 790-92.

cross-examining the speaker, or that they are used when the countervailing necessity for the statements is predicated on the inability to obtain evidence from other sources.¹⁸ For example, the latter justification might be invoked when the declarant is deceased, insane, or otherwise unavailable; or when the statements have unique evidentiary value.¹⁹ Thus, given the special circumstances of child sexual abuse cases, hearsay statements should be deemed admissible in these cases more often than in other cases because of their unique evidentiary value.²⁰

III. *TOME V. UNITED STATES*: AN UNDESIRABLE RESULT

Tome illustrates the difficulties in admitting the out-of-court statements of young victims of sexual abuse in federal courts, particularly through its imposition of the pre-motive requirement. *Tome* is an unusual case because sexual abuse cases are rarely heard in federal courts. State rules of evidence usually govern the admissibility of out-of-court statements in sexual abuse cases, but in *Tome*, the Federal Rules of Evidence were the operative rules. Still, *Tome's* potential impact on interpretations of state rules of evidence is significant because so many states have adopted language identical or similar to the Federal Rules for their own rules of evidence.²¹ Thus, the Supreme Court's interpretations of the Federal Rules may substantially influence

18. See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1421-1422, at 253 (James H. Chadbourn rev. 1974).

19. See 5 *id.* § 1421, at 253.

20. *But see* *Tome v. United States*, 115 S. Ct. 696, 705 (1995) (acknowledging that "[c]ourts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. . . . But '[t]his Court cannot alter evidentiary rules merely because the litigants might prefer different rules in a particular class of cases.'") (citation omitted). Notably, the *Tome* Court referred to the availability of Rule 803(24) as a potential avenue for the admission of these statements. See *infra* text accompanying notes 157-159. *But see* *United States v. Tome*, 61 F.3d 1446, 1453-55 (10th Cir. 1995) (holding on remand that A.T.'s statements to a social worker and to a baby sitter, and A.T.'s mother's testimony as to statements she overheard A.T. making to the baby sitter were inadmissible under Rule 803(24)).

21. The following 35 states had adopted rules based on the Federal Rules of Evidence by 1994: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See MUELLER & KIRKPATRICK, *supra* note 7, §1.2, at 4 n.2.

state court decisions regarding similar state rules.²² Accordingly, even though *Tome* is not binding on states' interpretations of state rules of evidence, the Supreme Court's reading of Rule 801(d)(1)(B) as embodying a pre-motive requirement could affect subsequent state interpretations of analogous rules.

A. *The Operation and History of the Pre-Motive Requirement*

The pre-motive rule,²³ also referred to as the temporal requirement for the admission of prior consistent statements, is a common law rule. Under the rule, courts may exclude prior consistent statements offered to rebut a charge of recent falsification if they were made after the alleged motive to lie arose. In the 1700s, evidence of prior consistent statements was admissible to corroborate a witness's testimony before any attempt to impeach was made by the opposing party.²⁴ Federal²⁵ and some state

22. See, e.g., *State v. O'Key*, 899 P.2d 663, 672 n.7 (Or. 1995) ("When we cite a decision of the Supreme Court of the United States in interpreting a provision of the Oregon Evidence Code, we do so because we find the views there expressed persuasive, not because we consider this court bound to do so by our understanding of federal doctrines."); see also *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993) ("As the Louisiana Code of Evidence provision on expert testimony is identical to the federal Rule, it follows that this court should carefully consider [federal decisions] that soundly interpret[] an identical provision in the federal law of evidence."); *Beavers v. Northrop Worldwide Aircraft Servs.*, 821 S.W.2d 669, 674 (Tex. Ct. App. 1991) (stating that Rule 803(8) is identical to the analogous Texas rule, "and since the federal rules of evidence are the precursors of our rules of civil evidence, in areas such as this one, where there is a paucity of state authority, the federal cases interpreting the federal rule are very persuasive in our interpretation of our Rule 803(8)").

23. Wigmore explains the pre-motive rule as follows:

A consistent statement, at a *time prior* to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence. The former statements are therefore admissible

4 WIGMORE, *supra* note 18, § 1128(1), at 268 (footnote omitted).

24. See 4 WIGMORE, *supra* note 18, § 1123, at 254-55.

25. See, e.g., *Ellicott v. Pearl*, 35 U.S. 412 (1836).

[T]estimony under oath is better evidence than . . . confirmatory declarations not under oath; and the repetition of . . . assertions does not carry . . . credibility further We say in general, because there are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case: as where the testimony is assailed as a fabrication of a recent date or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.

courts²⁶ began to impose the pre-motive requirement in the 1800s, allowing the admission of statements made before the alleged motive came into play;²⁷ however, courts often limited the admissibility of these statements—they could come in only to repair the credibility of the witness, not for substantive purposes.²⁸

To illustrate the mechanics of the pre-motive rule, an example is helpful. In a trial where the fact in dispute is whether Mr. Jones was murdered or committed suicide, a witness (Mrs. Jones) may make a statement at trial such as: "My husband was murdered." The opposing counsel, on cross-examination, impeaches her statement, suggesting that she is only saying that her husband was murdered because she knows that his life insurance policy (of which she is the beneficiary) does not cover suicide. The counsel who introduced Mrs. Jones as a witness would then offer a statement that Mrs. Jones made to her mother the day after Mr. Jones's death that her husband had been murdered. If the court follows the pre-motive rule for the admission of prior consistent statements, Mrs. Jones's earlier, consistent statement will only be admissible if it can also be shown that she made this statement *before* her motive to fabricate the statement arose, that is, before she was aware of the fact that the life insurance policy would not cover suicide deaths.

Courts have used different justifications for implementing the pre-motive rule. Some courts reason that because a statement was made after the motive to lie arose, it is not relevant to credibility because the same motive to fabricate existed at the time the out-of-court statement was made; therefore, it is no more reliable than the consistent statement made on the witness stand.²⁹ Other courts have expressed concern with the use of

Id. at 439.

26. Notably, the Colorado Supreme Court held that prior consistent out-of-court statements cannot be admitted to fortify testimony unless "a design to misrepresent is charged upon the witness in consequence of his relation to the party or the cause, in which case it seems it may be proper to show that he made a similar statement before the relation existed." *Conner v. People*, 33 P. 159, 162 (Colo. 1893) (quoting *Robb v. Hackley*, 23 Wend. 50 (N.Y. Sup. Ct. 1840)).

27. See 4 WIGMORE, *supra* note 18, § 1123.

28. See, e.g., *Ellicott*, 35 U.S. at 439.

29. See, e.g., *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956).

There is scant basis in reason or experience to admit [prior consistent] statements [to rehabilitate a witness], except in cases where it affirmatively appears that the prior consistent statement was made at a time when the declarant had no motive to fabricate. Only then can such

these statements as a means for validating the credibility merely by way of repetition.³⁰ However, not all courts have accepted these justifications.³¹ Adding to the courts' disagreement regarding whether prior consistent statements should be subject to the pre-motive requirement was the adoption of the Federal Rules of Evidence in 1975. Rule 801(d)(1)(B)³² allowed prior consistent statements to be admitted into evidence for substantive purposes.³³

Nevertheless, nothing in the text of the rule or in the Advisory Committee's notes aided courts when determining whether the rule maintains a pre-motive requirement for admissibility. This had remained for judicial determination on a circuit-by-circuit basis before *Tome*. After the Court of Appeals for the Tenth Circuit added its decision on the matter,³⁴ a total of six circuits refused to adopt the pre-motive rule, and six circuits

evidence be considered as having any reliable element of trustworthiness. *Id.* at 895. Unless, of course, the fact that the live testimony was delivered under oath and subject to cross-examination carries a presumption of reliability.

30. See *State v. Parish*, 79 N.C. 610, 612-14 (1878), cited in 4 WIGMORE, *supra* note 18, § 1124, at 258.

It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement to-day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath The idea that mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth.

Id. at 612-14; see also *United States v. Leggett*, 312 F.2d 566, 572 (4th Cir. 1962) (“[A] person might concoct an entirely false account of some happening and, after relating this account to a dozen of his neighbors, might call them in corroboration when at a later time he told the same untruthful story on the witness stand.”).

31. See DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, 4 FEDERAL EVIDENCE § 420, at 193 n.17 and accompanying text (1980); see also *infra* note 35 and accompanying text.

32. A statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement 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” FED. R. EVID. 801(d)(1)(B).

33. See FED. R. EVID. 801(d)(1)(B) advisory committee’s note.

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

Id. Thus, prior consistent statements, once admitted, may be used to prove the truth of the matter asserted.

34. See *United States v. Tome*, 3 F.3d 342 (10th Cir. 1993) (rejecting pre-motive rule).

did adopt it.³⁶ The Supreme Court granted certiorari in *Tome v. United States* in 1994 to address the disparate interpretations circuit courts had given to this rule.³⁶

B. Background and Procedural History of United States v. Tome

In *Tome v. United States*,³⁷ the petitioner was charged with sexually abusing his four-year-old daughter, A.T. A.T.'s parents had been divorced since 1988. The father, Defendant Matthew Wayne Tome, had primary physical custody of A.T., but A.T.'s mother, Beverly Padilla, had been awarded custody for the summer of 1990. Padilla had remarried and was living in Colorado that summer when, according to the prosecution, A.T. disclosed that her father had abused her when she was in his custody on the Navajo Indian Reservation in New Mexico.³⁸

A.T., then six-and-one-half years old, testified at trial.³⁹ Her direct testimony consisted of one- and two-word answers to several leading questions.⁴⁰ She indicated that her father had engaged in sexual contact with her on several different occasions.⁴¹ The defense spent two days cross-examining A.T., asking 348 questions.⁴² For the most part, A.T. answered all

35. The circuits that have admitted prior consistent statements made after the alleged motive to fabricate arose are *United States v. Tome*, 3 F.3d 342, 351 (10th Cir. 1993); *United States v. Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992); *United States v. Lawson*, 872 F.2d 179, 183 (6th Cir. 1989); *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989); *United States v. Anderson*, 782 F.2d 908, 915-16 (11th Cir. 1986); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. 1981). See Christopher A. Jones, Casenote, *Clinging to History: The Supreme Court (Mis)interprets Federal Rule of Evidence 801(d)(1)(B) as Containing a Temporal Requirement*, 29 U. RICH. L. REV. 459, 471 n.82 and accompanying text (1995). The following circuits have read Federal Rule 801(d)(1)(B) to include a temporal requirement: *United States v. White*, 11 F.3d 1446, 1450 (8th Cir. 1993); *United States v. Lewis*, 954 F.2d 1386, 1391 (7th Cir. 1992); *United States v. Casoni*, 950 F.2d 893, 904 (3d Cir. 1991); *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988); *United States v. Brennan*, 798 F.2d 581, 587 (2d Cir. 1986); *United States v. Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984). See Jones, *supra*, at 471 & n.83.

36. 114 S. Ct. 1048 (1994) (mem.).

37. 115 S. Ct. 696 (1995).

38. See *id.* at 699.

39. See *id.*

40. See *id.*

41. See *United States v. Tome*, 3 F.3d 342, 345 (10th Cir. 1993).

42. See *Tome*, 115 S. Ct. at 699.

questions posed to her on general, background topics on the first day of the cross-examination, including those about distinguishing the truth from lies.⁴³ However, she was substantially more reluctant to answer questions that the defense posed to her on the second day, primarily relating to the allegations of the abuse and her conversations with adults about the alleged abuse.⁴⁴ The trial judge noted that many of the defense's questions were unclear or imprecise, that A.T.'s answers came as much as forty to fifty-five seconds after the questions, and that she appeared to be losing concentration.⁴⁵ Expressing these concerns, the trial judge stated, "We have a very difficult situation here."⁴⁶

Later, the Government called to the stand six witnesses who testified to seven statements allegedly made by A.T. describing the incidents of sexual assault.⁴⁷ These witnesses included A.T.'s baby sitter, who recounted A.T.'s statement to her that she did not want to go back to her father because he "does nasties to me."⁴⁸ A.T. allegedly described "nasties" as when her father removed her clothing, forced her legs open, laid on top of her, and caused a sharp pain in her stomach.⁴⁹ The baby sitter further testified that A.T. had explained that she had to go to the bathroom and wipe the blood off herself with a tissue.⁵⁰ Padilla testified to overhearing A.T.'s statements to the baby sitter after having unsuccessfully questioned A.T. herself.⁵¹ A.T. also made statements to a social worker and three pediatricians describing how and where she had been touched by the defendant.⁵² The physicians testified that their clinical examinations of A.T. indicated that she had been subjected to vaginal penetrations.⁵³

At trial, the court admitted these out-of-court statements under Rule 801(d)(1)(B) over the defense's objection that A.T.'s testimony regarding the sexual abuse was fabricated and that she was improperly motivated by her desire to live with her mother

43. *See id.*

44. *See id.*

45. *See id.*

46. *Id.*

47. *See id.*

48. *United States v. Tome*, 3 F.3d 342, 345 (10th Cir. 1993).

49. *See id.*

50. *See id.*

51. *See id.* at 345-46.

52. *See id.*

53. *See id.* at 346.

in Colorado.⁵⁴ Applying Rule 801(d)(1)(B), the district court accepted the Government's argument that A.T.'s out-of-court statements were admissible, even though they were uttered after the alleged motive to falsify arose.⁵⁵ The court found that A.T.'s statements rebutted the defense's charge that A.T.'s testimony was fabricated so that she could live with her mother.⁵⁶ The district court admitted the statements and the jury convicted the defendant.⁵⁷ The admission of these statements became the primary basis for the defendant's appeal.⁵⁸

On appeal, the defendant argued that the statements should not have been admitted under Rule 801(d)(1)(B) because (1) A.T. was not "subject" to cross-examination concerning the statements as required by the rule since she was virtually unresponsive, (2) the defense's efforts to cross-examine A.T. did not amount to a charge of recent fabrication or improper motive, and (3) the statements fell beyond the scope of the rule because they were made after the motive to lie arose.⁵⁹ The Court of Appeals for the Tenth Circuit disposed of the first claim by affirming a previous holding that as long as a witness answered questions regarding his or her prior statements, he or she could be said to have been subject to cross-examination.⁶⁰ Accordingly, the court found that it is for the finder of fact to determine how much weight to give that testimony, based on the witness's reluctance or inability to remember and to relate the factual bases underlying the prior statements.⁶¹ The court also disposed of the defendant's second claim, concluding that the district court correctly found that the defense's line of questioning upon cross-examination "clearly implied that A.T. had fabricated the allegations of abuse out of a desire to live with her mother."⁶²

54. See *Tome*, 115 S. Ct. at 696.

55. See *id.* at 700.

56. See *id.*

57. See *id.*

58. See *United States v. Tome*, 3 F.3d 342, 344 (10th Cir. 1993).

59. See *id.* at 347.

60. See *id.* (citing *United States v. Owens*, 484 U.S. 554, 562 (1988)).

61. See *United States v. Tome*, 3 F.3d 342, 347 (10th Cir. 1993). Although the court in *Tome* acknowledged that A.T. was reluctant to answer some questions and testified to forgetting having made certain statements, it found that many of defense counsel's questions seemed too complicated for a six-and-one-half-year-old witness. See *id.* at 349. Especially as to specific questions about specific people, "[A.T.] did ultimately answer most of defense counsel's questions." *Id.*

62. *Id.*

As to the final claim, that statements made after the motive to lie arose should not be within the scope of Rule 801(d)(1)(B), the Tenth Circuit declared that this was an issue of first impression, and therefore, *de novo* review was appropriate.⁶³ The court stated that the temporal requirement is a “function of the relevancy rules, not the hearsay rules.”⁶⁴ In other words, the determination whether the statements were uttered before or after the alleged motive to fabricate arose is probative as to how *relevant* the prior statements are to rebut the charge of fabrication. In essence, the Tenth Circuit held that the timing of the alleged improper motive should not determine the admissibility of a prior consistent statement, and criticized the pre-motive rule for being too broad, even as a function of relevance:

[A] per se rule is untenable because it is simply not true that an individual with a motive to lie will always do so. Rather, the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's propensity to lie.⁶⁵

Instead of strictly applying the pre-motive rule, the court performed a balancing test, weighing A.T.'s motive to lie against the probative value of the statements, and determined that there was no error in admitting the statements.⁶⁶ Although the court expressly rejected the pre-motive rule, the Tenth Circuit recognized the importance of the “veracity concerns which underlie the rule.”⁶⁷ Applying this new balancing test to the facts of *Tome*, the court noted that the charge of recent fabrication was indeed a weak one, and that it required a belief that A.T.'s statements were part of a calculated scheme to deceive.⁶⁸ Furthermore, the defendant had not shown that A.T. could even appreciate the causal relationships implicit in the devise of such a scheme.⁶⁹ Thus, the Tenth Circuit rejected the pre-motive rule, and confirmed the admissibility of A.T.'s out-of-court statements.

63. *See id.*

64. *Id.* at 350.

65. *Id.*

66. *See id.*

67. *Id.*

68. *See id.* at 351.

69. *See id.*

C. *The Supreme Court*

Tome appealed his conviction to the Supreme Court. The majority⁷⁰ concluded that prior consistent statements admitted under 801(d)(1)(B) are subject to the pre-motive rule.⁷¹ In determining that Rule 801(d)(1)(B) embodied the common law temporal requirement, the Court looked to the text of the rule “in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in its use of wording which follows the language of the common-law cases.”⁷² In addition, the Court considered the Advisory Committee’s notes accompanying the rule and the Government’s theory that the pre-motive rule is a function of relevancy rather than hearsay analysis.⁷³

Justice Kennedy, writing for the majority, found that the “weighty non-hearsay status” afforded to prior consistent statements admitted under 801(d)(1)(B) demonstrated that these statements were intended to have limited admissibility—only to refute a “charge” as described in the rule.⁷⁴ Thus, as a precondition to admissibility, a statement being offered under 801(d)(1)(B) must *actually* refute the charge of fabrication or improper motive, and cannot merely bolster the veracity of the declarant’s live testimony.⁷⁵ The relevant consideration for the Court in *Tome*

70. Justice Kennedy wrote the opinion for the majority, joined by Justices Stevens, Souter, and Ginsburg. Justice Scalia concurred in part and concurred in the judgment. Chief Justice Rehnquist and Justices O'Connor and Thomas joined Justice Breyer's dissenting opinion. See *Tome*, 115 S. Ct. at 696.

71. See *id.* at 700.

72. *Id.* at 702.

73. See *id.* at 705; see also *supra* text accompanying notes 64-65.

74. See *Tome*, 115 S. Ct. at 701. According to some scholars, there are three possible readings of *Tome*—that prior consistent statements are (1) “*only admissible* to repair credibility if they help rebut claims of improper motive or fabrication”; (2) “*only admissible, when offered to refute claims of improper motive or fabrication, if made before the motive came into play, and then can be used as substantive evidence*”; and (3) “*admissible on many different theories, but can be used as substantive evidence only if admitted to refute claims of improper motive or fabrication, and then only if made before the improper motive came into play.*” See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE—DOCTRINE AND PRACTICE § 8.25 (1996 Supp.) (footnote omitted).

75. Justice Kennedy wrote:

In the present context, the question is whether A.T.'s out-of-court statements rebutted the alleged link between her desire to be with her mother and her testimony, not whether they suggested that A.T.'s in-court testimony was true. The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.

was, therefore, whether A.T.'s out-of-court statements rebutted the alleged motive to fabricate that the defense raised.⁷⁶

In addition, the Court found that the special non-hearsay status that 801(d)(1)(B) confers on prior consistent statements admitted under that rule reinforced the requirement that the out-of-court statements predate the alleged improper motive.⁷⁷ The Court explained, "[T]he forms of impeachment within the rule's coverage are the ones in which the temporal requirement makes the most sense."⁷⁸ Furthermore, while prior consistent statements made before an alleged motive existed effectively rebut that allegation of recent fabrication or improper motive, prior consistent statements will not rebut other forms of impeachment.⁷⁹

While the majority acknowledged that sometimes post-motive prior consistent statements might have probative value in refuting an alleged motive to fabricate by suggesting that the in-court testimony was true, the Court found this type of rebuttal less direct and less forceful.⁸⁰ Moreover, if this was what the drafters of Rule 801(d)(1)(B) had envisioned, the Court could not find any good explanation as to why the drafters limited the admissibility of prior consistent statements to this kind of impeachment.⁸¹

In addition, the *Tome* Court refuted the Government's theory—that *any* prior consistent statement bolsters the truth of the witness's in-court testimony, and thus also rebuts any allegation of fabrication—by noting that the rule's language was strikingly similar to the "somewhat peculiar language . . . used in common law cases that describe the pre-motive requirement."⁸² The majority reasoned that this language supported its conclusion that Congress had intended 801(d)(1)(B) to embody the pre-motive rule because Congress could easily have adopted different language such as "a witness' prior consistent statements are admissible whenever relevant to assess the witness's truthfulness

Tome, 115 S. Ct. at 701.

76. *See id.*

77. *See id.*

78. *Id.*

79. *See id.*

80. *See id.*

81. *See id.* at 702.

82. *Id.*

or accuracy.”⁸³ The Court noted that the Advisory Committee’s Notes to the Federal Rules of Evidence “disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary.”⁸⁴ Furthermore, while the notes generally reveal where the rules depart from the common law, the notes to Rule 801(d)(1)(B) are silent regarding any abandonment of the pre-motive rule.⁸⁵

The majority found that A.T.’s statements to her doctors, baby sitter, and social worker did not refute the defense’s charge that she fabricated her testimony because of her desire to live with her mother. Notably, the Court was aware of the potential danger in not finding a temporal requirement embodied in Rule 801(d)(1)(B): “[T]he whole emphasis of the trial could shift to out-of-court statements, not the in-court ones.”⁸⁶

Finally, the majority rejected the Government and Tenth Circuit’s case-by-case balancing test, which weighed each statement’s probative value against its prejudicial effect as an alternative to the categorical exclusion of hearsay. The Court’s disdain for the balancing approach was predicated on the Advisory Committee’s warnings of the dangers of such an approach to a hearsay analysis: “It involves considerable judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted.”⁸⁷

83. *Id.*

84. *Id.*

85. “Here, we do not think the drafters of the Rule intended to scuttle the whole pre-motive requirement and rationale without so much as a whisper of an explanation.” *Id.* at 703.

86. *Id.* at 705. The Court elaborates on this idea, using the *Tome* trial as an example of this danger:

In response to a rather weak charge that A.T.’s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.’s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A.T. had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.

Id. at 705.

87. *Id.* at 704-05.

Justice Breyer's dissenting opinion challenges the majority's explanation of Rule 801(d)(1)(B)'s non-hearsay status, which the majority reasoned could only be justified by implying a temporal requirement in the rule.⁸⁸ Instead, the dissent states that the drafters of Rule 801(d)(1)(B) provided non-hearsay status for statements admitted under that rule only to clarify the notion that prior consistent statements admitted for rehabilitative purposes (to rebut a charge of recent fabrication or improper influence or motive), once admitted, may be used for their substantive (hearsay) purposes (that is, as evidence of the statements' truth).⁸⁹ While this reading of the permissive use of these statements as substantive evidence once admitted is not inconsistent with the majority's interpretation of the rule,⁹⁰ the dissent found this to be the reason that 801(d)(1)(B) singles out this particular use of prior consistent statements for non-hearsay designation.⁹¹ The conclusion reached by the dissent is consistent with the Government's theory that the issue underlying the pre-motive rule is relevancy, not hearsay.⁹² Although favoring the

88. *See id.* at 707 (Breyer, J., dissenting). Justice Breyer is not convinced by the majority's conclusion that of the several kinds of rehabilitating prior consistent statements that may be admitted under the Federal Rules of Evidence, those offered to refute a charge of fabrication are more probative in rehabilitating a witness than the others. *See id.* (Breyer, J., dissenting). Justice Breyer was referring to the following kinds of rehabilitating prior consistent statements:

- 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 improper influence or motive.

Id. (Breyer, J., dissenting) (citation omitted). Further, Justice Breyer does not see how the majority's conclusion, even if he were to agree with it, is related to the Court's imposition of a pre-motive rule on 801(d)(1)(B) statements "because probative force has little to do with the concerns underlying hearsay law." *Id.* (Breyer, J., dissenting). Instead, Justice Breyer suggests that juries may have trouble distinguishing between a statement admitted for rehabilitative purposes and one admitted for substantive purposes. Thus, the "hearsay-related" reason of avoiding jury confusion, Justice Breyer argues, may be the real reason the drafters limited the availability of non-hearsay status to 801(d)(1)(B) statements. *See id.* (Breyer, J., dissenting).

89. *See id.* (Breyer, J., dissenting).

90. *See id.* at 701 (citing FED. R. EVID. 801(d)(1) advisory committee's notes).

91. *See id.* at 707 (Breyer, J., dissenting).

92. "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." *Id.* (Breyer, J., dissenting).

admission of post-motive statements to refute charges of recent fabrication, Justice Breyer points out that

[i]n most cases, this approach will not yield a different result from a strict adherence to the pre-motive rule for, in most cases, postmotive statements will not be significantly probative. And, even in the 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 the in-court testimony.⁹³

Furthermore, because the Tenth Circuit found A.T.'s statements to be relevant to refute her alleged motive to lie, under the dissent's approach these statements would have been admitted.⁹⁴

D. Analysis of the Supreme Court's Holding

Tome illustrates the inherent difficulties in prosecuting sexual abusers when the victim and main witness is a child. There are substantial barriers to obtaining strong testimony from children alleging sexual abuse,⁹⁵ and as even the *Tome* majority recognizes, "in almost all cases [of alleged child abuse] a youth is the prosecution's only eyewitness."⁹⁶ When the Federal Rules of Evidence apply, there are additional barriers to the admission of out-of-court statements that might support a child's allegation. For statements that do not fit into other hearsay exceptions, the prosecution must wait for the defense to attack the credibility of the child witness in order to offer the potentially corroborating hearsay evidence under Rule 801(d)(1)(B). The *Tome* Court's imposition of a pre-motive requirement adds the limitation that the statements sufficiently pre-date the alleged motive. Thus the out-of-court statements, if they survive these stringent requirements, are introduced as a defensive maneuver to repair credibility, rather than as a means to support the prosecution's case-in-chief.

Moreover, as might well be the case in *Tome*, the alleged motive (A.T.'s desire to live with her mother) may be *consistent*

93. *Id.* at 710 (Breyer, J., dissenting).

94. *See id.* (Breyer, J., dissenting).

95. *See supra* Part II.

96. *Tome*, 115 S. Ct. at 705.

with the testimony—probably, if her father had been sexually abusing her, A.T. *would* prefer to live with her mother. Thus, what the defense charges as the improper *cause* of the allegations of sexual abuse might really be an *effect* of the sexual abuse. The pre-motive rule requires that the prosecution offer proof that the motive to fabricate is not the cause of the allegations. If the motive is actually an effect of and consistent with the allegations of abuse, the prosecution cannot likely prove that the motive did not influence the allegations because the child will admit that the motive is true. In other words, the complaint of abuse and the “motive” may be interrelated, arising simultaneously.

This scenario sheds light on a complex determination that the pre-motive rule implicitly requires—when did the motive to fabricate arise? Arguably, the defense risks opening the door for the admission of prior consistent statements when impeaching a witness with a charge of recent fabrication or improper motive. However, if the alleged motive is vague enough, such that a court may not easily determine when the motive arose, or if the alleged motive can be attached to a distant moment in the past, it is unlikely that the opposing party will be able to offer any prior consistent statement that satisfies the pre-motive rule as a means to repair the witness’s damaged credibility.

The pre-motive requirement articulated by the *Tome* Court effectively blocked the receipt of some of A.T.’s out-of-court statements.⁹⁷ In sexual abuse/custody cases similar to *Tome*, suppressing these prior consistent statements could potentially determine a jury’s decision whether to render a conviction. Ultimately, if such evidence is excluded, a young child might be returned to the custody of the parent who abused him or her. Not only is the possibility that a child must remain with an abuser socially unacceptable, it is also not warranted by evidentiary law and traditional hearsay analysis. Two of the major risks usually associated with the admission of hearsay statements,⁹⁸ the absence of live testimony and the opposing party’s inability to

97. See *United States v. Tome*, 61 F.3d 1446 (10th Cir. 1995). While the Tenth Circuit held on remand that A.T.’s statements to her doctors were admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment, the court did not find admissible the child’s statements made to the social worker and the baby sitter, or those overheard by A.T.’s mother, which were offered under the residual exception to the hearsay rule. See *id.*; see also FED. R. EVID. 803(4); FED. R. EVID. 803(24).

98. See *supra* note 7, and text accompanying *supra* notes 17-18.

cross-examine the declarant, are not present in cases like *Tome*. A.T. testified at trial, and was subject to cross-examination concerning her out-of-court statements to the six witnesses. Thus, several of the justifications for excluding out-of-court statements are inapplicable to this situation. Based on the unique situation of child testimony in sexual abuse cases and the potential for such a drastic effect, courts and legislatures should consider alternative methods of dealing with this problem.

IV. LEGAL AVENUES FOR AVOIDING THE UNDESIRABLE RESULT IN *TOME*

A. *Judicial Recognition & Response*

In cases like *Tome*, the prosecution may be forced to wait until the defense impeaches the witness for the opportunity to offer statements as non-hearsay under Rule 801(d)(1)(B). However, there are several ways that the prosecution may offer statements made by a child sexual abuse victim for substantive purposes in its case-in-chief under the Federal Rules of Evidence or similar state rules. If the child made the statements very soon after the alleged incident occurred, they might be admissible under the excited utterance exception to the hearsay rule.⁹⁹ The theory behind this exception is that statements made shortly after a startling event are reliable because they are unlikely to be the product of fabrication since little time existed for the declarant's conscious reflection, and there is little chance of memory loss.¹⁰⁰ However, perhaps there is an even more compelling justification for this exception when the declarant is a child: "The element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in 'the lack of capacity to fabricate rather than the lack of time to fabricate.'"¹⁰¹ In *Tome*, however, the "excited utterance" exception would not have applied. There were no facts indicating that A.T.'s statements were made under the stress of

99. See FED. R. EVID. 803(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule, even though the declarant is available as a witness.).

100. See 2 MYERS, *supra* note 8, § 7.28.

101. *In re O.E.P.*, 654 P.2d 312, 318 (Colo. 1982) (quoting FED. R. EVID. 803(2) advisory committee's note).

excitement of any of the incidents of the abuse. Furthermore, as children might not always realize something improper and serious has happened, the exception is largely unavailable for their casual out-of-court statements that come after "the stress of excitement" has passed.

The Tenth Circuit's opinion on remand demonstrates another means by which out-of-court statements by children who are victims of sexual abuse may surpass hearsay objections¹⁰²—"statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as *reasonably pertinent to diagnosis or treatment*" are not excluded by the hearsay rule.¹⁰³ Under this exception, A.T.'s statements to her pediatricians were admitted, including those identifying her father as the abuser.¹⁰⁴ In addition, the court referred to the Advisory Committee's Notes to the rule in explaining that the rule covers statements made by the declarant to physicians, ambulance drivers, hospital attendants, and sometimes family members.¹⁰⁵ However, where the victim-declarant did not seek treatment or diagnosis, or where the subject matter of the statements cannot be established as "reasonably pertinent to diagnosis or treatment,"¹⁰⁶ this avenue for the admission of a child's out-of-court statements is unavailable.

Another way that a court may admit a hearsay statement is through a "residual" exception to the hearsay rule.¹⁰⁷ The

102. See *United States v. Tome*, 61 F.3d 1446, 1449-51 (10th Cir. 1995).

103. FED. R. EVID. 803(4) (emphasis added).

104. See *United States v. Tome*, 61 F.3d 1446, 1450 (10th Cir. 1995) (citing *United States v. Joe*, 8 F.3d 1448, 1495 (10th Cir. 1993): "[A] hearsay statement revealing the identity of a sexual abuser who is a member of the victim's family or household 'is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes 'reasonably pertinent' to the victim's proper treatment.'").

105. See *United States v. Tome*, 61 F.3d 1446, 1451 (10th Cir. 1995) (stating that the test for admissibility under this rule is whether the substance of the statements is reasonably pertinent to diagnosis or treatment).

106. FED. R. EVID. 803(4).

107. See, e.g., *Tome*, 115 S. Ct. at 705 (suggesting that Rule 803(24) may provide a means to admit "out-of-court statements that contain strong indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available."). *But see* *United States v. Tome*, 61 F.3d 1446, 1453-55 (10th Cir. 1995) (holding on remand that A.T.'s statements to a social worker and to a baby sitter, and A.T.'s mother's testimony as to statements she

residual exception, also referred to as the "catch-all" exception, is an innovation adopted in some jurisdictions whereby a court has authority to admit hearsay statements when there are sufficient indicia of reliability. However, the use of this exception is subject to the court's discretion, and the statement must pass all the requirements enumerated in the rule, including that the statement be independently trustworthy. The application of this hearsay exception to child sexual abuse cases is thus limited to jurisdictions that recognize the exception, and to courts with judges who choose to exercise this discretion. Furthermore, the Tenth Circuit on remand did not find several of A.T.'s statements admissible under the residual exception, providing a cautionary statement that the exception should only be used in extraordinary circumstances "where the court is satisfied that the evidence offers guarantees of trustworthiness and is material, probative and necessary in the interest of justice."¹⁰⁸

The prosecution may also avoid suppression of out-of-court statements regarding sexual abuse by using the "fresh complaint

overheard A.T. making to the baby sitter were inadmissible under Rule 803(24)). Rule 803(24), or the residual exception provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is not excluded by the hearsay rule, even though the declarant is available as a witness] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

108. *United States v. Tome*, 61 F.3d 1446, 1452 (10th Cir. 1995) (citing *United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993)). The Tenth Circuit in the remand opinion of *Tome*, considered several factors that the U.S. Supreme Court identified in *Idaho v. Wright*, 497 U.S. 805 (1990), to determine whether a child witness's out-of-court statements in sexual abuse cases are reliable. See *Tome*, 61 F.3d at 1452. For a discussion of why *Wright*, a Confrontation Clause case, had bearing on Rule 803(24)'s "circumstantial guarantees of trustworthiness" determination, see *United States v. Tome*, 61 F.3d 1446, 1452 n.5 (10th Cir. 1995). The factors included: "the spontaneity of the child's statement, the consistent repetition of the child's allegation, the mental state of the child, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate." *Id.* at 1452-53.

doctrine."¹⁰⁹ This common law doctrine allows a victim's prompt complaint of non-consensual sexual abuse to be admitted to corroborate testimony provided at trial.¹¹⁰ At common law, to uphold a charge of rape, evidence of a victim's immediate complaint of the rape was required to corroborate the charge.¹¹¹ Modern courts have justified this admission using three separate theories:¹¹² (1) the jury will assume the charge is a recent fabrication if there is no evidence of a timely complaint, (2) the complaint is a prior consistent statement offered to corroborate the witness's recently impeached testimony,¹¹³ and (3) the complaint falls within the excited utterance exception¹¹⁴ to the hearsay rule.¹¹⁵ However, this doctrine is not codified in the Federal Rules of Evidence.

Although the original requirements for the fresh complaint doctrine no longer apply, some courts still regularly admit this type of evidence.¹¹⁶ Notably, the promptness requirement has broken down.¹¹⁷ Also, there has been a significant expansion in

109. Connecticut refers to this as "constancy of accusation":

In essence, the constancy of accusation doctrine allows a complainant in a sexual offense case to testify that he or she informed others of the attack. These other individuals are then allowed to testify concerning the complaint made by the victim and are permitted to relate the details of the attack as the victim narrated This doctrine has been alternatively defined as an exception to the hearsay rule, and the testimony is therefore admissible as substantive evidence of the defendant's guilt, or as evidence simply corroborative of the victim's testimony and therefore relevant only to the credibility of the victim.

State v. Saraceno, 545 A.2d 1116, 1129 n.6 (Conn. App. Ct. 1988), *quoted in* 2 MYERS, *supra* note 8, §7.31, n.408.

110. *See* 2 MYERS, *supra* note 8, §7.31.

111. The evidentiary use of immediate complaints began in England in the 1700s: "[I]n all charges of violence, the accuser must show, to sustain his charge, that he made hue and cry, alarming the neighborhood freshly after the occurrence." 6 WIGMORE, *supra* note 18, § 1760, at 240, *quoted in* 2 MYERS, *supra* note 8, § 7.31, at 182.

112. *See* Michael H. Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLAMETTE L. REV. 489, 489-90 (1983).

113. *See, e.g., State v. Ramsey*, 573 S.W.2d 720, 721 (Mo. Ct. App. 1978) (holding that in a prosecution of a prisoner for anal sodomy of another prisoner, the victim's note passed to jailers about his fear of sexual attack "tend[s] to negative the possibility of fabrication in a sexual crime which is often dependent for proof upon the participants' testimony without more.").

114. *See* FED. R. EVID. 803(2).

115. *See* FED. R. EVID. 802.

116. *See* 2 MYERS, *supra* note 8, § 7.31, at 183.

117. *See, e.g., Commonwealth v. Brenner*, 465 N.E.2d 1229, 1231 (Mass. App. Ct. 1984) (noting that "[i]n prosecutions involving sexual abuse of or assault of children, the cases have not insisted on great promptness in the making of the

the type of cases to which this doctrine applies.¹¹⁸ Some states have codified the doctrine by statute or in rules,¹¹⁹ but generally limit the admission of the complaint only to corroborate the testimony, not to bolster its truth.¹²⁰ In states that permit this type of evidence, an out-of-court statement made by a child regarding sexual abuse may be admitted for non-hearsay purposes. Most states, however, will not allow fresh complaint evidence to be used for substantive purposes, and courts often limit the amount of detail admitted under the fresh complaint doctrine.¹²¹ Because of the limitations on the fresh complaint doctrine and above hearsay exceptions, lawmakers have begun to address the problem of weak evidence in child sexual abuse cases.

B. Legislative Recognition and Response

Recent legislative innovations in the field of victim testimony in child sexual abuse cases suggest a growing trend toward leniency in applying traditional rules governing depositions, trial testimony, out-of-court statements, and other evidentiary matters when the alleged victim is a young child. Many states have now implemented statutes that afford special protections for children who are victims of sexual abuse, recognizing the factors that distinguish a child victim from an adult victim.¹²²

These legislative innovations have taken several forms. Some states have revised definitions of child sexual abuse to

complaint" because the perpetrators of the abuse are often friends or relatives of the victim, "have his or her confidence, and by persuasion or threat, express or implied, induce the child's silence" (citations omitted); *see also* *Fitzgerald v. United States*, 443 A.2d 1295 (D.C. 1982) (holding that the lapse of time between the sexual assault and the complaint should affect the weight, not the admissibility of the statement).

118. *See, e.g.*, *Pillod v. People*, 200 P.2d 919 (Colo. 1948) (upholding use of fresh complaint doctrine for indecent assault and battery cases); *Brenner*, 465 N.E.2d at 1231 (Mass. App. Ct. 1984) ("Fresh complaint' testimony has not been confined to cases of forcible rape, where its rationale is most evident, but has been received in other cases of sexual assaults, including those where consent is immaterial" (citations omitted)).

119. *See, e.g.*, LA. CODE EVID. ANN. art. 801(d)(1)(D) (West 1995); *see also* OR. EVID. CODE 803(18a).

120. *See, e.g.*, *State v. Daniels*, 388 N.W.2d 446, 450 (Neb. 1986) (stating that where either the victim of sexual abuse or the person whom he or she tells of the abuse testifies to their conversation, "the general statement of the complaint is not necessarily offered for the truth of the matter asserted. It is offered to demonstrate the relevancy of the conversation.").

121. *See* 2 MYERS, *supra* note 8, § 7.31, at 198-99.

122. *See supra* Part II.

include a wider range of prosecutable behaviors.¹²³ A few states have enacted special statutory provisions that adjust court proceedings when child victims are involved,¹²⁴ and several states have extended statutes of limitation for cases of sexual assault on young victims.¹²⁵ Another prominent innovation has been the adoption of statutes that permit a videotape of the child's testimony.¹²⁶ The tape is then presented to the jury at trial. This is an effort to spare the child from having to relate his or her explanation of the alleged events on several occasions, thus expediting his or her involvement in the judicial process. Although defendants have challenged videotaping statutes and other innovative statutes allowing alternative forms of child testimony as violative of their Sixth Amendment Confrontation Clause rights,¹²⁷ these innovations have been upheld by most courts.¹²⁸

123. See, e.g., WASH. REV. CODE ANN. § 9A.64.020 (West 1988) (expanding by 1982 amendment the statutory definition of incest to include sexual contact, not just sexual intercourse).

124. See, e.g., WIS. STAT. ANN. § 950.055(2)(a) (West 1996) (requiring that legal proceedings be conducted in child-appropriate language); *id.* § 971.105 (West 1985) (requiring that legal proceedings be conducted expeditiously to minimize the child's stress and involvement in the proceedings).

125. See, e.g., ALA. CODE § 15-3-5(a)(4) (1995) (no statute of limitations for sex offenses involving children under 16 years); ARK. CODE ANN. § 5-1-109(h) (Michie 1993) (statute of limitations tolled until victim is 18 years old); COLO. REV. STAT. § 16-5-401(6), (7) (Supp. 1996) (statute tolled for seven years if victim is under 15 at the time crime is committed); FLA. STAT. ANN. § 775.15(7) (West Supp. 1997) (statute tolled until victim reaches 16 years or the violation is reported to a law enforcement agency or other governmental agency); MASS. ANN. LAWS ch. 277, § 63 (Law. Co-op. 1992) (statute tolled until victim reaches 16 years or the violation is reported to a law enforcement agency); N.J. STAT. ANN. § 2C:1-6(b)(4) (West 1995) (when victim is under 18 at the time of the offense, prosecution may be commenced within five years of victim's 18th birthday or within two years of the discovery of the offense by the victim).

126. "As of 1994, thirty-seven states allowed videotaped testimony by children in child abuse cases, and thirty states permitted alleged child abuse victims to testify via one-way or two-way closed circuit television." Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 220 (1995) (citations omitted).

127. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI; see also *Pointer v. Texas*, 380 U.S. 400, 403 (1965) ("[T]he Sixth Amendment's [Confrontation Clause] is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

128. "[F]ace-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth . . . [but] where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would

Perhaps the most effective legislative effort to address the inherent difficulties in child sexual abuse cases has been through the reform of evidence rules. On the federal level, recent additions to the Federal Rules of Evidence suggest that there is a compelling justification for admitting character evidence that might otherwise be excluded to prove sexual assault or child molestation.¹²⁹ Rule 414 provides that evidence of a "defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant" in a criminal prosecution for alleged child molestation.¹³⁰ Similarly, Rule 415 provides for the admission of this type of evidence in civil cases that include issues of sexual assault or child molestation.¹³¹ These additions are especially noteworthy since so few sexual abuse cases invoke the Federal Rules; such cases are usually heard in state courts. These amendments suggest that the promulgators of the Federal Rules of Evidence were aware that a lack of corroborative evidence of an alleged act of sexual abuse often impedes the conviction of an offender.

At the state level, the excited utterance exception, the medical diagnosis treatment exception, and the residual hearsay exception are being used more frequently in child sexual abuse cases.¹³² In addition, tender years exceptions to hearsay rules for child declarants in sexual misconduct cases¹³³ directly acknowl-

in fact *disserve* the Confrontation Clause's truth-seeking goal." *Maryland v. Craig*, 497 U.S. 836, 856-57 (1990) (approving child testimony via closed circuit television as not "out-of-court" for the purposes of Confrontation Clause analysis) (citations omitted). *Craig's* holding has been expanded by most state courts to include videotaped depositions as functionally equivalent to live testimony. See Marks, *supra* note 126, at 220 n.66.

129. See FED. R. EVID. 413-415 (enacted by Congress as part of the Violent Crime Control & Law Enforcement Act of 1994, 42 U.S.C. §§ 13701-14223; effective July, 1995).

130. FED. R. EVID. 414.

131. See FED. R. EVID. 415.

132. See Marks, *supra* note 126, at 212.

133. See ALA. CODE §§ 15-25-31, -32, -34 to -38 (1995); ALASKA STAT. § 12.40.110 (Michie 1996) (pertaining only before grand jury); ARIZ. REV. STAT. ANN. § 13-1416 (West 1989); ARK. R. EVID. 803(25); CAL. EVID. CODE § 1228 (West 1995); COLO. REV. STAT. § 13-25-129 (1987); DEL. CODE ANN. tit. 11, § 3513 (1995); FLA. STAT. ANN. § 90.803(23) (West Supp. 1997); GA. CODE ANN. § 24-3-16 (1995); IDAHO CODE § 19-3024 (1987); 725 ILL. COMP. STAT. ANN. 5/115-10 (West Supp. 1996); KAN. STAT. ANN. § 60-460(dd) (1994); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1996); MD. CODE ANN. CTS. & JUD. PROC. § 9-103.1 (1995); MASS. ANN. LAWS ch. 233, § 81 (Law. Co-op. Supp. 1996); MICH. R. EVID. 803A; MINN. STAT. ANN. § 595.02(3) (West 1988); MISS.

edge the need to admit these kinds of statements despite the common risks associated with admitting hearsay evidence.¹³⁴ Among the thirty states that have enacted tender years statutes,¹³⁵ Colorado's section 13-25-129 exemplifies how these statutes operate to admit out-of-court statements made by children alleging sexual abuse, while protecting defendants' rights.

C. Colorado's Tender Years Statute

Colorado enacted a child hearsay statute in 1983, which codified a tender years exception (section 13-25-129) for cases of sexual abuse.¹³⁶ The statute has been used by Colorado courts to allow otherwise inadmissible hearsay statements to come into evidence. Because this statute operates as an exception to the hearsay rule,¹³⁷ it was carefully drafted to reduce the risks usually involved with hearsay.¹³⁸

The statute permits the admission of an out-of-court statement "made by a child . . . describing any act of sexual contact, intrusion, or penetration . . . performed with, by, on, or in the presence of the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay"¹³⁹ The exception applies if

- (a) the court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (b)

CODE ANN. § 13-1-403 (Supp. 1996); MO. ANN. STAT. § 491.075 (West 1996); NEV. REV. STAT. ANN. § 51.385 (Michie 1996); N.J. R. EVID. 803(c)(27); OHIO R. EVID. 807; OKLA. STAT. ANN. tit. 12, § 2803.1 (West 1993); OR. EVID. CODE 803(18b); 42 PA. CONS. STAT. ANN. § 5985.1 (West Supp. 1996); R.I. GEN. LAWS § 11-37-13.1 (1994) (pertaining to grand jury only); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); TEX. CODE CRIM. P. ANN. art 38.072 (West Supp. 1997); VA. CODE ANN. § 63.1-248.13:2 (Michie 1995); WASH. REV. CODE ANN. § 9A.44.120 (West 1988).

134. Commonly acknowledged risks of admitting hearsay statements are misperception, faulty memory, insincerity, and narrative ambiguity by the declarant. See MUELLER & KIRKPATRICK, *supra* note 7, § 8.2.

135. For a comparative look at the current tender years statutes in force, see Marks, *supra* note 126, at 236-46.

136. COLO. REV. STAT. § 13-25-129 (1987).

137. See COLO. R. EVID. 802. ("Hearsay is not admissible except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado.")

138. See *supra* note 7.

139. COLO. REV. STAT. § 13-25-129(1) (1987).

the child either: (I) Testifies at the proceedings; or (II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.¹⁴⁰

Furthermore, the statute requires that a jury instruction be issued by the court directing the jury to determine the weight and credit to give the out-of-court statement and that "in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor."¹⁴¹ Finally, the statute requires that the adverse party be given reasonable notice of the offering party's intent to use the statement, and of the contents of the statement.¹⁴²

One principle justifying the exclusion of out-of court statements is the law's preference for in-court testimony, which is subject to three crucial safeguards of the trial process: the opportunity for the adverse party to cross-examine the witness, the fact that the witness is testifying under oath, and the contribution that a witness's demeanor adds to the jury's assessment of the credibility of a given statement.¹⁴³ In the Colorado tender years statute, the drafters have acknowledged the need for these safeguards by requiring that the child declarant either testify at trial or be declared "unavailable" as a witness, and that corroborative evidence supports the truth asserted by the statement.¹⁴⁴ Furthermore, before the court may admit the statement, findings must be made in a pre-trial hearing as to whether the statement satisfies the statutory conditions of admissibility that are based on an analysis of the time, content, and circumstances in which the statement was made.¹⁴⁵

Courts have taken their pre-trial responsibilities seriously, considering factors such as whether (1) the statement was spontaneous, (2) the child was still upset or in pain, (3) the language of the out-of-court statement was consistent with the declarant's age, (4) the allegation was made in response to leading questions, (5) either the child or the hearsay witness was

140. *Id.* § 13-25-129(1)(a)(b).

141. *Id.* § 13-25-129(2).

142. *See id.* § 13-25-129(3).

143. *See* MUELLER & KIRKPATRICK, *supra* note 7, § 8.3; *see also supra* note 86 and accompanying text (discussing *Tome*, 115 S. Ct. at 705).

144. *See* COLO. REV. STAT. § 13-25-129(1)(b) (1987).

145. *See* *People v. Bowers*, 801 P.2d 511 (Colo. 1990).

biased against the defendant or had a motive to lie, (6) any other event occurred between the alleged abuse and the time of the statement that could explain the contents of the statement, (7) more than one person heard the statement when it was made, and (8) the general character of the child was truthful.¹⁴⁶ Thus, the Colorado statute implements valuable precautionary measures against the well-known risks associated with admitting hearsay into evidence. Significantly, the aforementioned factors numbered (5) and (6) effectively address some of the most compelling concerns of which promulgators of Rule 801(d)(1)(B) and its implicit pre-motive requirement were wary.

The Colorado Supreme Court has considered the legislative intent of the tender years statute in determining whether an alleged victim's age-appropriate sexual terminology, use of anatomically correct dolls, and behavioral changes constituted corroborative evidence of her sexual abuse under section 13-25-129: "The enactment of section 13-25-129 represents the legislature's attempt to ensure that child abusers do not go free merely because the prosecutor is unable to obtain witnesses to the abuse other than the child"¹⁴⁷ This suggests that the legislature was aware of the risks of allowing such statements to come into court, but balanced them against the risk of failing to obtain a conviction for a serious offense, merely because the nature of the crime makes it unlikely that there will be a witness other than the victim.

Some decisions have broadly construed section 13-25-129's procedural requirements, implying that the objective of admitting statements that inculcate the alleged sexual offender is more important than the hearsay risks associated with the admission of such statements. For example, the Colorado Supreme Court has ruled that the failure to give a limiting instruction to the jury pursuant to section 13-25-129(2) will only be plain error if the court can "say with fair assurance that 'the omission to instruct

146. See *People v. District Court*, 776 P.2d 1083, 1089-90 (Colo. 1989). The Colorado Supreme Court has since announced that the lack of one of these elements does not foreclose the admissibility of the statements; however, the trial court shall be required to place on the record each specific factor relating to time, content, and circumstances. See *Bowers*, 801 P.2d 511 (Colo. 1990).

147. *Stevens v. People*, 796 P.2d 946, 951 (Colo. 1990) (affirming conviction for sexual assault on a child despite the defendant's contentions that evidence admitted by the trial court under the tender years statute lacked sufficient corroboration to fall within the scope of the statute).

the jury in accordance with section 13-25-129(2) so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction."¹⁴⁸ This is a high standard to meet.

At other times, the Colorado Supreme Court has recognized the dangers the statute, without procedural safeguards, might pose to the interests of the defendant:

It is clear that the procedural safeguards imposed by the legislature are designed to safeguard those rights of the defendant which are implicated when a hearsay statement is permitted into evidence. That is, the procedures are designed to protect the defendant's right of confrontation and his due process right to a fair trial.¹⁴⁹

Yet, even when the Colorado Supreme Court explicitly acknowledges these risks, it continues to consider them in light of the general lack of evidence in the typical prosecution of a child molester.¹⁵⁰ Furthermore, the Colorado Supreme Court has ruled that admission of a child's out-of-court statements describing acts of sexual conduct under section 13-25-129 does not violate the defendant's Sixth Amendment Confrontation Clause rights.¹⁵¹

V. A PROPOSAL FOR A FEDERAL EXCEPTION TO THE HEARSAY RULE

If *Tome* had been tried in Colorado courts, under Colorado Rules of Evidence, A.T.'s prior statements probably would have been admitted under the tender years statute, rather than being forced into the rebuttal posture of Rule 801(d)(1)(B). Colorado, like other states, has made great strides both in implementing legislative devices and in demonstrating judicial consideration for the special situation of child witnesses¹⁵² to protect the interests

148. *People v. Wilson*, 838 P.2d 284, 290 (Colo. 1992) (quoting *People v. Wood*, 743 P.2d 422, 428 (Colo. 1987)).

149. *People v. McClure*, 779 P.2d 864, 866 (Colo. 1989) (requiring that section 13-25-129 be strictly construed in favor of the accused).

150. *See id.* ("However, particularly in a sexual assault case, admission of the child's hearsay statements may be necessary for the prosecution to prove its case.")

151. *See People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989); *see also supra* note 127.

152. *See supra* Part IV.

of children against the obstacles that prevent convictions of sexual abusers.¹⁵³

Tome exposes how fatal the Federal Rules and their federal interpretations can be to cases that must rely on child hearsay statements for successful convictions of molesters.¹⁵⁴ Perhaps because so few sexual abuse cases are tried in federal courts, the federal system has not addressed the potential for a result like *Tome's*. Although unwilling to "distort the requirements of Rule 801(d)(1)(B),"¹⁵⁵ the *Tome* majority recognized the special situation of child sexual abuse declarants: "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers."¹⁵⁶ In fact, the Court suggests that Rule 803(24) may provide a potential avenue for the admission of "out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available."¹⁵⁷ However, as discussed above, the use of Rule 803(24) is highly discretionary,¹⁵⁸ and the Tenth Circuit, on remand, deemed several of A.T.'s out-of-court statements inadmissible under Rule 803(24).¹⁵⁹

Moreover, in the past, federal courts have frequently expressed reluctance or have refused to hear certain domestic relations cases despite diversity jurisdiction, especially where children are involved.¹⁶⁰ This suggests that federal courts recognize that in many domestic relations disputes, states are generally better equipped with statutes and procedural rules to

153. See *supra* notes 8-14 and accompanying text.

154. See *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995) (admitting some of A.T.'s statements on remand under Rule 803(24) but excluding several other statements as inadmissible hearsay).

155. *Tome*, 115 S. Ct. 696, 705 (1995).

156. *Id.*

157. *Id.*

158. See *supra* notes 107-108 and accompanying text.

159. See *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995).

160. See generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 12.2 (2d ed. 1988). Clark states, "The uncertainty and confusion are compounded where the custody of children, as distinguished from alimony or property, is the subject of the claim in the federal courts." *Id.* § 12.2, at 417; see also *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978) ("Federal courts have traditionally refused to exercise diversity jurisdiction in a variety of domestic relations cases The reasons for federal abstention in these cases are apparent: the strong state interest in domestic relations matters, the competence of state courts in settling family disputes . . ." (citations omitted)).

adjudicate matters in the best interests of children or with respect to other concerns specific to domestic relations cases.¹⁶¹ The tender years statute is exactly the kind of mechanism that states have implemented to deal with sensitive matters that usually arise only in state courts. The federal courts have recognized the expertise of state courts in dealing with issues surrounding children in domestic relations cases and should do so in contexts similar to *Tome*.

Furthermore, recent additions to the Federal Rules of Evidence, Rules 414 and 415,¹⁶² support the notion that promulgators of the rules are sensitive to the potential difficulties of sexual abuse cases, especially where the purported victim is a child. The presence of these two rules also supports the notion that even though it is rare that sexual abuse cases are heard in federal courts, the absence of certain procedural protections for children such as those embodied in Rules 414 and 415 might produce an undesirable result. This proposition should also be acknowledged for the out-of-court statements of child sexual abuse victims.

An exception to the Federal Rules of Evidence for the admission of hearsay statements made by children in sexual abuse prosecutions would be an effective mechanism to address the inadmissibility of crucial evidence necessary to convict abusers. By limiting the exception's application to child declarants in sexual abuse cases, the *Tome* majority's concerns respecting the availability of the non-hearsay status of 801(d)(1)(B) to post-motive statements¹⁶³ would be preserved. Adopting an exception does not disrupt the application of the pre-motive rule to prior consistent statements offered under 801(d)(1)(B); instead, a general exception to the hearsay rule for children's out-of-court statements regarding sexual abuse would provide an alternate avenue by which these statements could be admitted. While under Rule 801(d)(1)(B) prior consistent statements must pass the admissibility test—they must refute the alleged motive to

161. "Valid reasons have been given in support of federal courts abstaining from exercising jurisdiction over domestic relations cases. The field of domestic relations involves local problems 'peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts.'" *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981) (quoting *Buechold v. Ortiz*, 401 F.2d 371, 373 (9th Cir. 1968)).

162. See *supra* text accompanying notes 129-131.

163. See *supra* text accompanying notes 80-81.

fabricate—before they may be used substantively, under a tender years exception, these statements would be admissible as substantive evidence notwithstanding their possible rehabilitative function. Also, because many states have borrowed their rules of evidence from the Federal Rules,¹⁶⁴ states in which there is currently no tender years exception¹⁶⁵ might adopt one, taking a cue from the Federal Rules.¹⁶⁶

The Colorado tender years statute is admirable in its implementation of procedural safeguards to protect the rights of defendants, and it would be a helpful model for a Federal Rules exception. Thus, the *Tome* Court's holding that Rule 801(d)(1)(B) embodies the pre-motive rule would not impair the admissibility of this kind of evidence because the prosecution would not have to wait for impeachment and be limited to post-motive statements to rebut an alleged improper motive. By implementing a tender years exception, young victims of sexual abuse would not be left unprotected from potential repeated abuse because of technicalities of jurisdiction and evidence law.

VI. CONCLUSION

Usually, cases of sexual abuse are not brought in federal court. Despite the fact that *Tome* is an unusual example of a sexual abuse case brought in federal court, the case highlights the serious limitations that the Federal Rules of Evidence impose on the admissibility of child hearsay statements in sexual abuse cases. When out-of-court statements may be the most reliable evidence available to implicate a defendant, Rule 801(d)(1)(B) and its pre-motive requirement threaten the admissibility of these statements, often producing a harsh effect that could be avoided with a tender years statute.

Most states have revised rules, enacted legislation, or promulgated decisions modifying the hearsay rule and courtroom

164. See *supra* note 21.

165. See *supra* note 133 (listing thirty states that have a tender years exception).

166. See, e.g., *King v. People*, 785 P.2d 596, 601 (Colo. 1990) ("Although we are not bound by federal precedent interpreting the Colorado counterpart of the Fed.R.Evid. 803(4), the fact that CRE 803(4) is a mirror image of the federal rule prompts us to construe the Colorado rule in light of the text and purpose of the federal rule." (Subsequently, the court cites federal decisions interpreting Federal Rules in construing the analogous Colorado rule)); see also *supra* note 22.

procedures to permit the introduction, in certain circumstances, of out-of-court statements of children who are victims of sexual abuse. In recognition of the evidentiary barriers to the successful prosecution and conviction of child sex abusers, it is in the interest of justice that we recognize the inadequacies of our current federal evidentiary system. Although most states have used the Federal Rules of Evidence as a model for their own rules of evidence, it is time for the Federal Rules to take a cue from the states—evidentiary law should be more lenient in applying hearsay restrictions to out-of-court statements children make to the people they turn to for help and guidance, when the risks of offending the defendant's rights are balanced by procedural safeguards.