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IX . Evidence

effectiveness.[96] The court's business necessity guidelines, therefore, limit an employer's ability to abuse the business necessity defense in the name of general social good.[97]

BRADFORD FROST ENGLANDER

IX. EVIDENCE

A. *Admissibility of Prior Consistent Statements*

Prior to the promulgation of Federal Rule of Evidence 801(d)(1)(B)[1] in 1975, prior consistent statements[2] were admissible for rehabilitative use but were inadmissible as substantive evidence.[3] In other words, a witness' prior consistent statements were admissible on rebuttal only to corroborate the witness after opposing counsel had impeached the witness on cross-examination by asserting that the witness had fabricated testimony.[4] Prior to 1975, courts regarded prior consistent statements offered substantively to prove the truth of the witness' testimony as inadmissible hearsay.[5] Under rule 801(d)(1)(B),

96. *See* 697 F.2d at 1190-91; *supra* notes 48-52 and accompanying text (Fourth Circuit requires proof of necessity and effectiveness); *cf.* Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972) (as degree of human and economic risk increases, the burden on the employer to establish the relationship between the employment criteria and the job performance decreases).

97. *See* Stohner & Underhill, *supra* note 83, at 28 (establishing necessity and effectiveness of fetal protection program will be expensive and difficult).

1. *See* FED. R. EVID. 801(d)(1)(B); *see also infra* notes 6-8 and accompanying text (discussing Federal Rule of Evidence 801(d)(1)(B)).

2. *See* FED. R. EVID. 801(c). Federal Rule of Evidence 801(a) defines "statement" as an oral or written assertion or nonverbal conduct by a person if the person intends his nonverbal conduct as an assertion. *Id.*

3. *See* FED. R. EVID. 801 advisory committee note (subsection (d)(1)(B)). Prior consistent statements traditionally were admissible to rebut charges of recent fabrication or improper motive but not as substantive evidence. *Id.* Under Federal Rule of Evidence 801(d)(1)(B) prior consistent statements are admissible as substantive evidence. *See id.; see also* Graham, *Prior Consistent Statements, Rule 801(d)(1)(B) of the Federal Rule of Evidence, Critique and Proposal,* 30 HASTINGS L.J. 575, 577-78 (1979) (reviewing history of admissibility of prior consistent statements); *infra* text accompanying notes 4-5 (distinguishing between substantive and rehabilitative use of prior consistent statements).

4. *See* Graham, *supra* note 3, at 578. A party offers substantive evidence to prove the truth of the content of the witness' testimony. *See id.* A party offers rehabilitative evidence solely to corroborate the witness. *See id.* Although before 1800, prior consistent statements were admissible in a litigant's case-in-chief to corroborate a witness, by the early 1800's, prior consistent statements were inadmissible for any reason in a litigant's case-in-chief but were admissible on rebuttal to corroborate an impeached witness. *See id.*

5. *See supra* notes 3-4 and accompanying text (discussing pre-rule 801(d)(1)(B) admissibility of prior consistent statements); *see also* FED. R. EVID. 801(c) ("hearsay" under rule 801 is out-of-court statement proponent offers in evidence to prove truth of matter asserted); C. MCCORMICK, MCCORMICK ON EVIDENCE 604 (2d ed. 1972) (prior consistent statements inadmissible hear-

however, prior consistent statements are now admissible as substantive evidence.[6] Rule 801(d)(1)(B) provides that an out-of-court statement is not hearsay when the declarant testifies at trial and the opposing counsel cross-examines the declarant if the statement meets two express conditions.[7] First, the prior statement must be consistent with the declarant's in-court testimony, and second, the proponent must offer the statement to rebut an express or implied charge of either recent fabrication or improper influence or motive against the declarant.[8]

Although rule 801(d)(1)(B) provides that prior consistent statements must meet only two express conditions to be admissible, courts are split on the issue of whether the rule impliedly includes a third condition for admissibility.[9] A number of circuits have held that in order for a prior consistent statement to be admissible under rule 801(d)(1)(B) for any purpose, the declarant must have made the prior consistent statement before the declarant possessed a motive to lie.[10] In *United States v. Parodi,*[11] the Fourth Circuit considered whether rule 801(d)(1)(B) conditions the admissibility of prior consistent statements offered solely to rehabilitate an impeached witness on the absence of a motive to fabricate at the time the witness made the prior statement.[12]

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say under traditional rule). The rehabilitative use of prior consistent statements presents no hearsay problem because the proponent offers the statement solely to establish that the defendant in fact made the statement and not to prove the truth of anything the defendant asserted. *See* FED. R. EVID. 801 advisory committee note (subsection (c)). The inevitable interplay between the substantive and rehabilitative effect of a prior consistent statement complicates the distinction between the substantive and rehabilitative use of prior consistent statements. *See* Graham, *supra* note 3, at 579-80. By corroborating a witness, a prior consistent statement buttresses the witness' credibility and thus indirectly provides probative evidence of the truth of the content of the witness' testimony. *See id.* at 580.

6. *See* FED. R. EVID. 801 advisory committee note (subsection (d)(1)(B)) (prior consistent statements admissible for substantive as well as rehabilitative use).

7. *See infra* note 8 and accompanying text (discussing rule 801(d)(1)(B)).

8. *See* FED. R. EVID. 801(d)(1)(B). The terms "recent fabrication" and "improper influence or motive" included in rule 801(d)(1)(B) are subject to conflicting interpretations. *See* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 499-500 (3d ed. 1982). The term "recent fabrication" applies to a witness whom opposing counsel charges with a deliberate lie. *Id.* at 500. The term "improper influence or motive" does not apply to a witness whom opposing counsel charges with a deliberate lie but rather to a witness whom opposing counsel alleges may have had a motive to or whom circumstances may have influenced to distort his testimony unconsciously. *Id.* Rule 801(d)(1)(B) permits a trial judge to admit a prior consistent statement to rehabilitate either type of witness. *See id. But see* J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(B) at 801-119 (1981 & Cum. Supp. 1982). Professor Weinstein states that normal usage dictates that the terms "fabrication," "motive," and "influence" in rule 801(d)(1)(B) only cover situations in which the witness deliberately lies on the stand. *See id.* Weinstein notes that rule 801(d)(1)(B) only applies when opposing counsel suggests that the witness consciously fabricated his testimony. *See id.*

9. *See supra* text accompanying note 8 (discussing rule 801(d)(1)(B)); *infra* notes 31-41 & 53-60 and accompanying text (discussing split of authority on admissibility of prior consistent statements).

10. *See infra* notes 34-37 & 58-60 and accompanying text (discussing cases that hold rule 801(d)(1)(B) conditions admissibility of prior consistent statements on absence of motive to fabricate).

11. 703 F.2d 768 (4th Cir. 1983).

12. *See id.* at 781-87.

In *Parodi*, the United States District Court for the Middle District of North Carolina convicted five defendants for conspiracy to violate federal narcotics statutes.[13] Three defendants appealed their convictions to the Fourth Circuit, raising several contentions of error.[14] Defendant Parodi contended that the trial court erred by admitting a government witness' prior consistent statements that the government offered to rehabilitate the witness.[15] The government witness, Ozella, was a coconspirator who was cooperating with the government.[16] On direct examination, Ozella testified about his pretrial interviews with a Drug Enforcement Administration (DEA) agent in which Ozella

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13. *See id.* at 772-73. In *United States v. Parodi*, the government indicted 11 persons for conspiracy to distribute cocaine in violation of federal narcotics statutes. *Id.* The United States District Court for the Middle District of North Carolina eventually convicted 10 defendants but only 3, Parodi, Conway, and Laws, appealed their convictions. *Id.* The appellants in *Parodi* set forth several contentions of error. *Id.* at 773. All three defendants objected, contending that the trial court erred in failing to sequester a Drug Enforcement Administration (DEA) agent during trial and allowing the agent to testify on rebuttal. *Id.* The Fourth Circuit dismissed the objection and found that the trial judge did not abuse his discretion. *See id.* at 773-75. All three defendants also complained that the trial judge's interference in the trial by asking a witness two questions on rebuttal was prejudicial to the defendants. *Id.* at 773, 775. The Fourth Circuit found that the trial judge properly questioned the witness and did not prejudice the defendants. *See id.* at 775-78. Defendant Parodi separately charged that the trial judge's denial of Parodi's motion to sever his trial from that of the other defendants was error. *Id.* at 773, 778. The *Parodi* court dismissed Parodi's objection, finding that the trial judge's denial of Parodi's motion for severance did not result in a miscarriage of justice. *See id.* at 778-81. Parodi also attacked the trial judge's admission of prior consistent statements of Ozella, a government witness, to rehabilitate the witness. *Id.* at 773, 781. The Fourth Circuit found that Ozella's prior consistent statements were admissible. *See id.* at 781-787; *see also infra* notes 26-43 and accompanying text (discussing Fourth Circuit's finding that Ozella's prior consistent statements were admissible). Parodi also contended that the trial judge erred in refusing Parodi's motion for a directed verdict on the ground that the evidence against Parodi was insufficient. *Id.* at 773, 787. The Fourth Circuit found that the evidence was sufficient to convict Parodi. *See id.* at 787-90. Defendant Conway contended that the trial court erred by admitting testimony of meetings between Conway and another coconspirator as well as the trial court's admission of photographs the DEA took of Conway and the coconspirator. *Id.* at 773, 790. The Fourth Circuit found that both the testimony and photographs were admissible. *See id.* at 790. Defendant Laws contended that the trial court erred by admitting a tape recording of telephone conversations between Laws and a coconspirator. *Id.* at 773, 790. The *Parodi* court found that the tape recording was admissible. *See id.* at 790.

14. *See supra* note 13 (discussing defendants' contentions of error in *Parodi*).

15. 703 F.2d at 781.

16. *See id.* at 784. Larry Ozella, the prosecution's chief witness, was a coconspirator in the cocaine conspiracy for which the government charged Parodi, Conway, and Laws. *Id.* at 777. The federal authorities did not charge Ozella with conspiracy to distribute cocaine, nor was Ozella the subject of any federal investigation. *See id.* at 777, 784. Ozella, however, was in custody pending prosecution in state court for his part in the conspiracy. *Id.* at 784. While in custody, Ozella solicited an interview with an investigating DEA agent, in which Ozella confessed his guilt both to the violation of the state statute for which the state already had indicted Ozella and to possible federal charges. *Id.* at 777, 784. Ozella, however, did not plead guilty in the state prosecution. *Id.* at 777. On advice of counsel, Ozella solicited the interview with the DEA agent in order to obtain a "deal." *Id.* at 784. Although the agent refused to offer Ozella leniency or immunity in any possible future federal prosecution, Ozella nevertheless confessed his guilt to the agent and detailed his own involvement in the conspiracy. *Id.* In the course of his interviews with the agent, Ozella also implicated Parodi in the narcotics operation. *See id.* at 774-76.

detailed his own involvement in the conspiracy and also implicated Parodi.[17] On cross-examination, Parodi's counsel impeached Ozella by suggesting that Ozella's testimony at trial differed from the statement Ozella made to the DEA agent during Ozella's pretrial interview.[18] On rebuttal, the government introduced the DEA agent who testified detailing Ozella's prior consistent statements.[19] The government offered the agent's testimony to rebut the defense counsel's suggestions that Ozella's pretrial statements differed from Ozella's testimony.[20] When the government first offered the agent's testimony, Parodi's counsel objected, contending that the agent's testimony was hearsay.[21] The trial court, however, ruled that the agent's testimony was admissible only to corroborate Ozella and instructed the jury to consider Ozella's prior consistent statements solely for the purpose of evaluating Ozella's credibility.[22] On appeal, Parodi contended that Ozella's prior consistent statements were inadmissible to corroborate Ozella because Ozella had a motive to fabricate before he made the prior consistent statements.[23] Parodi contended that Ozella had a motive to falsify his pretrial statements because Ozella hoped that the DEA agent would inform the state court in which Ozella faced narcotic charges that he was cooperating with the DEA.[24] At no time during the trial, however, did Parodi object to the DEA agent's testimony of Ozella's prior consistent statements on the ground that Ozella had a motive to fabricate before he made the prior consistent statements.[25]

On appeal, the *Parodi* court affirmed Parodi's conviction and found three grounds upon which to reject Parodi's contention that Ozella's prior consistent statements were inadmissible.[26] First, the Fourth Circuit found that because Parodi failed to object at trial on the grounds he asserted on appeal, Parodi waived his right to object to the trial court's admission of Ozella's prior consistent statements.[27] Second, the Fourth Circuit found that the evidence of

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17. *See id.* at 781-83.

18. *See id.* at 781.

19. *See id.*

20. *See id.*

21. *See id.* When the DEA agent first testified detailing the statements Ozella made during the pretrial interview, Parodi objected to the agent's testimony of Ozella's prior consistent statements on the ground that Ozella's statements constituted statements a coconspirator made after the date of the alleged conspiracy. *Id.* Parodi maintained that the statements Ozella made after the conspiracy were not in furtherance of the conspiracy and thus were hearsay. *Id.* The government responded to Parodi's objection by contending that it offered Ozella's prior consistent statements to rehabilitate Ozella and not substantively to prove the truth of Ozella's statements. *See id.*

22. *See id.* at 782.

23. *See id.* Ozella conceded on cross-examination that he hoped that the DEA agent would tell the state court in which Ozella faced narcotics charges that Ozella was cooperating with the DEA. *See id.* at 784.

24. *See id.*

25. *See id.* at 782.

26. *See infra* notes 27-30 and accompanying text (discussing Fourth Circuit's rejection of Parodi's objection to trial court's admission of Ozella's prior consistent statements).

27. *See* 703 F.2d at 783. Because Parodi failed to object at trial to the admission of Ozella's prior consistent statements on the ground that Ozella made the statements while motivated to fabricate, the Fourth Circuit found that Parodi did not preserve his objection for appeal under

Ozella's motive to fabricate was probably too insubstantial to render Ozella's prior consistent statements inadmissible.[28] The *Parodi* court found no need to determine whether the evidence of Ozella's motive to falsify was insubstantial because the court determined that Ozella's prior consistent statements were admissible for a third reason.[29] The Fourth Circuit held that prior consistent statements of an allegedly impeached witness are admissible to corroborate the witness regardless of whether the witness had a motive to fabricate the prior statements.[30]

The Fourth Circuit recognized that circuit courts are split over whether rule 801(d)(1)(B) impliedly conditions the admissibility of prior consistent statements as rehabilitative evidence on the absence of a motive to fabricate the prior statements.[31] The Fourth Circuit reasoned that if the drafters of rule 801(d)(1)(B) had intended to include the absence of a motive to fabricate as a condition for admissibility, the drafters would have added the condition to the rule.[32] The *Parodi* court, however, conceded that some courts have read such a condition into the rule.[33] The Fourth Circuit identified *United States v. Quinto*[34] as the leading case supporting the view that a witness must make a prior consistent statement before the witness has developed a motive to fabricate in order for the prior statement to be admissible as rehabilitative evidence.[35] According to the Fourth Circuit, the Second Circuit in *Quinto* concluded that under traditional evidentiary law, prior consistent statements that a witness made after the witness had a motive to fabricate were admissible neither for substantive nor for rehabilitative use.[36] Since rule 801(d)(1)(B) does not alter the traditional standard for admissibility of prior consistent statements, the *Quinto* court reasoned that the rule also renders a declarant's statements that postdate the declarant's motive to falsify inadmissible.[37] The Fourth Cir-

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rule 103 of the Federal Rules of Evidence. *See id.; see also* FED. R. EVID. 103. Rule 103 requires that in order to preserve an objection for appellate review, the objection must be specific, timely, and of record. *See id.*

28. *See* 703 F.2d at 784. The *Parodi* court speculated that Ozella's mere hope that the DEA agent would inform the state court in which Ozella faced narcotics charges that Ozella cooperated with the DEA was insufficient to prove that Ozella had a motive to fabricate and thus insufficient to render Ozella's prior consistent statements inadmissible. *See id.; see also supra* notes 23-24 and accompanying text (discussing Ozella's motive to fabricate prior consistent statements).

29. *See* 703 F.2d at 784; *see also infra* text accompanying note 30 (discussing *Parodi*).

30. *See* 703 F.2d at 784.

31. *See infra* notes 53-60 and accompanying text (discussing split of authority on issue of whether rule 801(d)(1)(B) conditions admissibility of witness' prior consistent statements on absence of motive to fabricate).

32. *See* 703 F.2d at 784.

33. *See id.; see also infra* notes 34-37 & 58-60 and accompanying text (discussing circuit courts that interpret rule 801(d)(1)(B) as excluding witness' prior consistent statements that postdate witness' motive to fabricate).

34. 582 F.2d 224 (2d Cir. 1978).

35. *See* 703 F.2d at 784-85 (discussing *Quinto*); *infra* notes 47-48, 80-83 & 91 and accompanying text (same).

36. *See* 703 F.2d at 784-85 (discussing *Quinto*); *infra* notes 47-48, 80-83 & 91 and accompanying text (same).

37. *See* 703 F.2d at 784-85 (discussing *Quinto*); *infra* notes 47-48, 80-83 & 91 and accom-

cuit found that the *Quinto* court's discussion of prior consistent statements as rehabilitative evidence was dictum because the government in *Quinto* offered a witness' prior consistent statements for substantive, rather than for rehabilitative use. [38] Additionally, the Fourth Circuit rejected the *Quinto* court's rationale and followed another line of case authority that held, contrary to *Quinto*, that neither traditional evidentiary law nor rule 801(d)(1)(B) conditioned the admissibility of prior consistent statements on the declarant's lack of a motive to falsify the prior statement.[39]

In rejecting the *Quinto* court's rationale, the Fourth Circuit placed particular reliance on Judge Friendly's concurring opinion in the Second Circuit case of *United States v. Rubin*.[40] Judge Friendly concluded that, contrary to

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panying text (same).

38. *See* 703 F.2d at 784-86 (discussing *Quinto*). The Fourth Circuit and Judge Friendly in his concurrence in *United States v. Rubin* concluded that the Second Circuit's discussion in *United States v. Quinto* of the rehabilitative use of prior consistent statements was dictum. *See id.;* United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring), *aff'd*, 449 U.S. 424 (1981). The Fourth Circuit and Judge Friendly in his *Rubin* concurrence determined that the government in *Quinto* offered a witness' prior consistent statements solely for substantive use. *See* 703 F.2d at 784-86; 609 F.2d at 68-69 (Friendly, J., concurring). An analysis of the record of the trial court's decision in *Quinto* reveals that the trial court admitted a witness' prior consistent statements as both substantive and rehabilitative evidence. *See* United States v. Quinto, 582 F.2d 224, 227-32 (2d Cir. 1978). The trial court in *Quinto* convicted the defendant, Quinto, of tax fraud and the Second Circuit reversed the conviction. *See id.* at 224-25. The government's key witness in *Quinto* was an Internal Revenue Service (IRS) agent who testified that Quinto had incriminated himself during a pretrial investigatory interview with several IRS agents. *See id.* at 227-29. The IRS agents had prepared a memorandum of their interview with Quinto detailing Quinto's incriminating remarks. *See id.* at 229. The defense counsel cross-examined the IRS agent in an attempt to show that the IRS agents had conducted the pretrial interview as an inquisition rather than as an interview and that the IRS investigation of Quinto's financial affairs was inadequate. *See id.* at 227-28. The government in *Quinto* argued that the defense counsel impliedly had attacked the agent's credibility and that the memorandum, therefore, was admissible as both substantive and rehabilitative evidence. *See id.* at 229. The trial judge refused to admit the memorandum as the agent's prior consistent statement during the prosecution's redirect examination of the agent because the trial judge did not believe that the defense counsel had attacked the agent's credibility. *See id.* The trial judge, however, left open the possibility that he would admit the agent's prior consistent statement if defense counsel subsequently attacked the agent's credibility. *See id.* Later in the trial after the defense counsel had presented several witnesses who contradicted the agent's testimony, the trial judge reconsidered his refusal to admit the memorandum as a prior consistent statement and subsequently allowed the prosecution to distribute copies of the memorandum to the jury to consider during their deliberations. *See id.* at 231-32. The trial judge admitted the memorandum as both substantive and rehabilitative evidence after the defense presented its case because the defense counsel's line of argument convinced the trial judge that the defense counsel had attacked the agent's credibility. *See id.* Thus, the Second Circuit's discussion of the rehabilitative use of prior consistent statements was not dictum. *See id.* at 227-32. Cases that the Second Circuit decided after *Quinto* indicate that the Second Circuit regards the *Quinto* discussion of the rehabilitative use of prior consistent statements as binding legal precedent. *See* United States v. Shulman, 624 F.2d 384, 392-93 (2d Cir. 1980) (following *Quinto*); United States v. Rubin, 609 F.2d 51, 61-63 (2d Cir. 1979) (following *Quinto*), *aff'd*, 449 U.S. 424 (1981).

39. *See* 703 F.2d at 785 (citing *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. 1981); *United States v. Rios*, 611 F.2d 1335, 1349 (10th Cir. 1979), *cert. denied*, 452 U.S. 918 (1981); *United States v. Scholle*, 553 F.2d 1109, 1121-22 (8th Cir), *cert. denied*, 434 U.S. 940 (1977)); *infra* notes 54, 56 & 60 (discussing *Parry, Rios*, and *Scholle* respectively).

40. *See* 703 F.2d at 785-86 (citing Judge Friendly's concurrence in *Rubin*); *see also* United

Quinto, courts considering the admissibility of prior consistent statements before the adoption of rule 801(d)(1)(B) followed a flexible rule that gave trial judges latitude to admit prior consistent statements to rehabilitate a witness, provided that the trial judge charged the jury to consider the prior consistent statement only to evaluate the witness' credibility.[41] The Fourth Circuit found

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States v. Rubin, 609 F.2d 51, 68-69 (2d Cir. 1979) (Friendly, J., concurring), *aff'd*, 449 U.S. 424 (1981). The district court in *United States v. Rubin* convicted the defendant of mail, wire, and securities fraud. *See* 609 F.2d at 53-54. The government conducted a pre-indictment interview with the defendant in which government agents took notes of the defendant's remarks. *See id.* at 57-58. One of the agents present at the interview testified at trial that the defendant incriminated himself during the pretrial interview. *See id.* On cross-examination, the defense counsel quoted from the notes to show that the witness' testimony was inconsistent with the notes. *See id.* On rebuttal, the government offered the notes as prior consistent statements to rehabilitate the witness by showing that the witness' testimony was consistent with the notes. *See id.* at 58-59. On appeal, the defendant argued that the notes were inadmissible as rehabilitative prior consistent statements under *Quinto* because the witness had a motive to fabricate when he made the notes. *See id.* at 61. The *Rubin* majority found *Quinto* to be controlling law in the Second Circuit but nevertheless affirmed the defendant's conviction. *See id.* at 62-63. The *Rubin* majority determined that the defendant had waived his right to object to the admission of the notes on appeal because the defendant failed to object at trial to the admission of the notes on the grounds that the witness had a motive to fabricate the notes. *See id.* Judge Friendly, concurring in *Rubin*, took issue with the majority's deference to *Quinto* and found that the *Quinto* court's discussion of the admissibility of prior consistent statements as rehabilitative evidence was merely dictum. *See id.* at 69 (Friendly, J., concurring); *see also supra* note 38 (discussing Judge Friendly's discussion of *Quinto*). Judge Friendly also disagreed with the *Quinto* court's conclusion that rule 801(d)(1)(B) conditions the admissibility of a witness' prior consistent statements as corroborative evidence on the witness' lack of motive to fabricate the prior statements. *See* 609 F.2d at 66-70 (Friendly, J., concurring); *see also infra* notes 41 & 49-50 and accompanying text (discussing Judge Friendly's interpretation of rule 801(d)(1)(B)).

41. *See* 609 F.2d at 68 (Friendly, J., concurring). Judge Friendly found that rule 801(d)(1)(B) applies only to prior consistent statements used as substantive evidence and does not affect prior consistent statements offered as rehabilitative evidence. *See id.* at 69; *see also supra* notes 4-5 and accompanying text (discussing distinction between substantive and rehabilitative use of prior consistent statements). Judge Friendly noted that rule 801(d)(1)(B) establishes that prior consistent statements are not hearsay if the statements meet the conditions set forth in the rule. *See* 609 F.2d at 69 (Friendly, J., concurring); *see also supra* text accompanying notes 7-8 (discussing rule 801(d)(1)(B)). Judge Friendly stated that prior consistent statements offered as rehabilitative evidence are never hearsay because the proponent does not offer the statements to prove the truth of the matter asserted but only to prove the fact that the witness made the statements. *See* 609 F.2d at 69 (Friendly, J., concurring); *see also supra* note 6 (discussing FED. R. EVID. 801 advisory committee note (subsection (d)(1)(B)). Judge Friendly argued that because courts never considered prior consistent statements offered as rehabilitative evidence to be hearsay, the *Quinto* court's position that rule 801(d)(1)(B) applies to such statements is counterintuitive. *See* 609 F.2d at 69-70 (Friendly, J., concurring). While the Fourth Circuit in *Parodi* cited in a footnote Judge Friendly's conclusion that rule 801(d)(1)(B) does not apply to prior consistent statements offered as rehabilitative evidence, the Fourth Circuit did not adopt Judge Friendly's rationale. *See* 703 F.2d at 785-86 & 785 n.13. The *Parodi* court stated that rule 801(d)(1)(B) sets forth two conditions for the admissibility of prior consistent statements to rehabilitate a witness. *See id.* at 784. The Fourth Circuit stated that for a prior consistent statement to be admissible for the limited purpose of rehabilitating a witness, rule 801(d)(1)(B) requires that the prior statement must be consistent with the witness' in-court testimony and the proponent must offer the statement to rebut an express or implied charge of recent fabrication or improper influence or motive against the witness. *See id.* The *Parodi* court merely agreed with Judge Friendly's determination that traditional evidentiary law prior to the adoption of rule 801(d)(1)(B) was flexible and gave

that even the courts that seemed to follow the *Quinto* court's reasoning actually applied a more flexible standard and have upheld the admission of prior consistent statements a witness made with a motive to fabricate.[42] Additionally, the Fourth Circuit rejected Parodi's contention that prior Fourth Circuit law compelled the court to follow the *Quinto* court's interpretation of rule 801(d)(1)(B).[43]

The split of authority on the issue of whether rule 801(d)(1)(B) requires that a witness' prior consistent statements must predate the witness' motive to fabricate to be admissible centers primarily on the state of evidentiary law prior to the adoption of rule 801(d)(1)(B).[44] Rule 801(d)(1)(B) does not alter the traditional conditions under which prior consistent statements were admissible to rehabilitate a witness but merely allows counsel to use prior consistent statements that meet the traditional conditions for admissibility for substantive as well as rehabilitative purposes.[45] Thus, the traditional conditions for admissibility continue to govern which prior consistent statements are admissible as corroborative evidence.[46] The Second Circuit in *Quinto* concluded that under traditional evidentiary law, courts generally excluded a witness' prior consistent statements automatically if the witness had a motive to falsify the prior statements.[47] The *Quinto* court determined, therefore, that under rule 801(d)(1)(B) such statements remain inadmissible.[48] On the other hand, the Fourth Circuit in *Parodi* and Judge Friendly in his *Rubin* concurrence found that prior to the adoption of rule 801(d)(1)(B), courts generally had applied a more flexible standard that allowed trial judges discretion to admit prior consistent statements even when the witness had a motive to fabricate the prior statements.[49] The *Parodi* court and Judge Friendly found that under rule 801(d)(1)(B), prior consistent statements are admissible on a flex-

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trial judges latitude to admit prior consistent statements to rehabilitate a witness even when the witness had a motive to fabricate the prior statement. *See id.* at 786; 609 F.2d at 68 (Friendly, J., concurring). The Fourth Circuit adopted Judge Friendly's position that courts interpreting rule 801(d)(1)(B) also should apply a flexible standard. *See* 703 F.2d at 786; 609 F.2d at 68-70 (Friendly, J., concurring).

42. *See* 702 F.2d at 786-87 (citing *United States v. Sampol*, 636 F.2d 621, 672-73 (D.C. Cir. 1980); *United States v. Baron*, 602 F.2d 1248, 1251 (7th Cir.), *cert. denied*, 444 U.S. 967 (1979); *see also infra* notes 57 & 59 and accompanying text (discussing *Sampol* and *Baron*).

43. *See* 703 F.2d at 787 (citing *United States v. Weil*, 561 F.2d 1109 (4th Cir. 1977)); *see also infra* notes 61-77 and accompanying text (discussing *Weil* and other relevant Fourth Circuit cases).

44. *See supra* text accompanying notes 36-37 & 41 (comparing *Quinto* court's and Judge Friendly's findings regarding evidentiary law prior to adoption of rule 801(d)(1)(B)); *infra* text accompanying notes 47-50 (comparing *Quinto* with *Parodi*).

45. *See Rubin*, 609 F.2d at 69 (Friendly, J., concurring) (prior consistent statements that were traditionally admissible only for rehabilitation now admissible for general use under rule 801(d)(1)(B)); FED. R. EVID. 801 advisory committee note (subsection (d)(1)(B)) (same) *supra* text accompanying notes 4-8 (discussing rule 801(d)(1)(B)); *see also* FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 8, at 499 (prior consistent statements admissible at common law to rebut express or implied charge of recent fabrication or improper motive).

46. *See supra* note 45 and accompanying text (discussing effect of rule 801(d)(1)(B) on traditional standards for admissibility of prior consistent statements).

47. *See Quinto*, 582 F.2d at 232-33.

48. *See id.* at 233.

49. *See Parodi*, 703 F.2d at 768, 786; *Rubin*, 609 F.2d at 68 (Friendly, J., concurring).

ible basis for purposes of rehabilitating an impeached witness.[50] Neither the *Quinto* court nor the *Parodi* court's historical conclusions are entirely correct.[51] Evidentiary law prior to the adoption of rule 801(d)(1)(B) was split on the issue of whether a witness' prior consistent statements made while the witness had a motive to fabricate were admissible to rehabilitate the witness.[52] The circuit court decision following the adoption of rule 801(d)(1)(B) are similarly split.[53] The Fifth,[54] Sixth,[55]

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50. *See Parodi*, 703 F.2d at 786; *Rubin*, 609 F.2d at 69-70 (Friendly, J., concurring). The *Parodi* court did not state expressly that prior consistent statements are admissible under rule 801(d)(1)(B) on a flexible basis that gives trial judges latitude to admit prior statements to rehabilitate a witness. *See* 703 F.2d at 785-87. While the Fourth Circuit did not accept Judge Friendly's *Rubin* concurrence in its entirety, the *Parodi* court did find that Judge Friendly outlined the proper standard for the admissibility of prior consistent statements as rehabilitative evidence. *See id.* at 786; *see also supra* note 41 (discussing Fourth Circuit's disagreement with Judge Friendly's position that rule 801(d)(1)(B) does not apply to rehabilitative use of prior consistent statements). Judge Friendly found that trial courts should admit witness' prior consistent statements on a flexible basis to rehabilitate a witness, notwithstanding the witness' motive to fabricate the prior statement. *See Rubin*, 609 F.2d at 69-70 (Friendly, J., concurring).

51. *See infra* note 52 and accompanying text (discussing state of traditional evidentiary law concerning admissibility of prior consistent statements).

52. *See, e.g.*, United States v. Bentley, 503 F.2d 957, 958 (5th Cir. 1974) (per curiam) (impeached witness' prior consistent statement admissible to rehabilitate witness even though prior statement postdated witness' arrest); United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir. 1972) (per curiam) (witness' prior consistent statement admissible even though witness had motive to fabricate prior statement); United States v. Bays, 448 F.2d 977, 979 (5th Cir.) (per curiam) (witness made prior consistent statement while witness had motive to fabricate but prior statement had probative value and thus was admissible), *cert. denied*, 405 U.S. 957 (1971); United States v. DeLa Motte, 434 F.2d 289, 293 (2d Cir.) (opposing counsel's allegation that witness made prior consistent statement with motive to fabricate insufficient to render witness' prior statement inadmissible), *cert. denied*, 401 U.S. 921 (1970); United States v. Alexander, 430 F.2d 904, 905 (D.C. Cir. 1970) (per curiam) (prior consistent statements admissible at trial judge's discretion). *But see, e.g.*, United States v. Greene, 497 F.2d 1068, 1082 (7th Cir.) (prior consistent statements that witness made before witness had motive to fabricate are admissible at judge's discretion), *cert. denied*, 420 U.S 909 (1974); United States v. Rodriquez, 452 F.2d 1146, 1148 (9th Cir. 1972) (prior consistent statements admissible since prior statement predated witness' motive to fabricate); Felice v. Long Island R.R., 426 F.2d 192, 198 (2d Cir.) (prior consistent statement admissible to rebut charge of recent fabrication only if witness made prior statement before alleged fabrication), *cert. denied*, 400 U.S. 820 (1970); United States v. Fayette, 388 F.2d 728, 733 (2d Cir. 1968) (court approved of case holding prior consistent statement inadmissible because witness made prior statement while motivated to fabricate); United States v. Potash, 118 F.2d 54, 57 (2d Cir.) (prior consistent statement witness made after witness motivated to fabricate was inadmissible), *cert. denied*, 313 U.S. 584 (1941). The admissibility of prior consistent statements defies analysis primarily because courts have refused to follow precedent both within and without their own jurisdictions, producing an irreconcilable conflict in the decisions. *See* Graham, *supra* note 3, at 576.

53. *See infra* notes 54-60 and accompanying text (discussing split of authority).

54. *See* United States v. Parry, 649 F.2d 292, 295-96 (5th Cir. 1981) (prior consistent statement admissible even though witness made prior statement while motivated to fabricate); United States v. Cifarelli, 589 F.2d 180, 185 (5th Cir. 1979) (prior consistent statements need not predate witness' motive to fabricate to be admissible); United States v. Williams, 573 F.2d 284, 289 (5th Cir. 1978) (prior consistent statement witness made while motivated to fabricate held admissible).

55. *See* United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982) (rejecting *Quinto* holding, finding prior consistent statement admissible under rule 801(d)(1)(B) even though witness had motive to fabricate prior statement), *cert. denied*, 103 S. Ct. 753 (1983).

Tenth,[56] and District of Columbia Circuits[57] support the Fourth Circuit's position that a witness' prior consistent statements are not inadmissible under rule 801(d)(1)(B) simply because the witness had a motive to fabricate the prior statements. On the other hand, the Third Circuit supports the Second Circuit's holding in *Quinto* that a witness' prior consistent statements are inadmissible under rule 801(d)(1)(B) if the witness made the prior statements at a time when the witness had a motive to fabricate.[58] The Seventh[59] and Eighth Circuits[60] are split on the issue.

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56. *See* United States v. Rios, 611 F.2d 1335, 1348-49 (10th Cir. 1979) (witness' prior consistent statement admissible even though witness' prior inconsistent statement predated witness' prior consistent statement), *rev'd on other grounds*, 637 F.2d 728 (10th Cir.), *cert. denied*, 452 U.S 918 (1980).

57. *See* United States v. Sampol, 636 F.2d 621, 670-74 (D.C. Cir. 1980) (per curiam). The *Parodi* court cited *United States v. Sampol* as an example of a case in which the court seemed to defer to precedent that requires the exclusion of prior consistent statements a witness made with a motive to fabricate, but in which the court actually applied a more flexible standard. *See* 703 F.2d at 787. The *Sampol* court found that the admissibility of a witness' prior consistent statement turned on whether the witness had a motive to lie when the witness made the prior statement. 636 F.2d at 672. Although the *Sampol* court concluded that the witness in *Sampol* had no motive to fabricate when the witness made the prior consistent statement, the court determined that, irrespective of the witness' alleged motive to fabricate, the defense counsel's introduction of the witness' prior inconsistent statement to impeach the witness entitled the government to introduce the witness' prior consistent statement to rehabilitate the witness under rule 801(d)(1)(B). *See id.* at 671-73.

58. *See* United States v. Provenzano, 620 F.2d 985, 1001-02 (3d Cir.) (witness' prior consistent statement admissible since prior statement predated witness' motive to fabricate), *cert. denied*, 449 U.S 899 (1980).

59. *See* United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979) (witness' prior consistent statement inadmissible since prior statement would not rebut charge of improper motive that existed before witness made prior consistent statement); United States v. McPartlin, 595 F.2d 1321, 1351-52 (7th Cir. 1978) (prior consistent statement witness made after witness had motive to fabricate inadmissible under rule 801(d)(1)(B)), *cert. denied*, 444 U.S. 833 (1979). *But see* United States v. Baron, 602 F.2d 1248, 1250-53 (7th Cir.) (prior consistent statement witness made after witness allegedly had motive to fabricate admissible), *cert. denied*, 444 U.S. 967 (1979). The *Parodi* court cited *United States v. Baron* as an example of a case in which the court seemed to follow *Quinto* but actually applied a more flexible standard. *See* 703 F.2d at 786. The defendant in *Baron* attacked the trial court's admission of an impeached witness' prior consistent statements to rehabilitate the witness on the ground that the witness' prior statements were inadmissible under *Quinto* because the witness had a motive to fabricate the prior statement. *See* 602 F.2d at 1251-53; *see also supra* notes 36-37 & 47-48 and accompanying text (discussing *Quinto*). The *Baron* court upheld the trial court's admission of the prior consistent statements and found that *Quinto* was not controlling primarily because, unlike the situation in *Quinto*, the defendant in *Baron* had impeached the witness with a prior inconsistent statement by using the same written record of the witness' prior statements as the government used to rehabilitate the witness. *See* 602 F.2d at 1253 n.8. Additionally, the *Baron* court stated that whether or not the witness' motive to fabricate existed at the time the witness made the prior consistent statement was a fact question for the jury. *Id.;* United States v. Simmons, 567 F.2d 314, 321-22 (7th Cir. 1977) (prior consistent statement witness made after witness had motive to fabricate admissible on rebuttal to rehabilitate impeached witness).

60. *See* United States v. Lanier, 578 F.2d 1246, 1256 (8th Cir.) (witness' prior consistent statement admissible because witness' motive to fabricate predated witness' prior consistent statement), *cert. denied*, 439 U.S 856 (1978). *But see* United States v. Scholle, 553 F.2d 1109, 1122 (8th Cir.) (witness' prior consistent statement need not predate witness' prior inconsistent statement to be admissible), *cert. denied*, 434 U.S 940 (1977).

The Fourth Circuit cases decided before the adoption of rule 801(d)(1)(B) are also split regarding whether prior consistent statements a witness made while the witness had a motive to fabricate are admissible as rehabilitative evidence.[61] Fourth Circuit cases following the adoption of the rule, however, implicitly support the *Parodi* court's holding that rule 801(d)(1)(B) does not condition the admissibility of a witness' prior consistent statements on the absence of a motive to fabricate.[62] The *Parodi* court rejected Parodi's contention that Fourth Circuit precedent as embodied in *United States v. Weil*[63] compelled the court to construe rule 801(d)(1)(B) as unconditionally excluding a witness' prior consistent statements that postdate the witness' motive to fabricate.[64] The Fourth Circuit in *Weil* affirmed a defendant's conviction for aiding and abetting the passing of counterfeit money, finding that the trial court's admission of a witness' prior consistent statement on redirect examination as corroborative evidence was harmless error.[65] Although the defendant in *Weil* alleged on cross-examination that the government had promised the witness leniency if the witness implicated the defendant, the *Parodi* court correctly found that the *Weil* defendant did not object to the witness' prior consistent statement on the ground that the witness has a motive to fabricate.[66] Rather, the *Weil* defendant maintained that the witness'

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61. *See* United States v. DeVore, 423 F.2d 1069, 1073 (4th Cir.) (extent to which trial judge should admit witness' prior consistent statements to corroborate witness is matter within sound discretion of trial judge), *cert. denied*, 402 U.S. 950 (1970); United States v. Leggett, 312 F.2d 566, 572 (4th Cir.) (although prior consistent statements generally are inadmissible to corroborate witness because witness may have fabricated prior statement, such statements are admissible when opposing counsel alleges witness fabricated testimony or introduces prior inconsistent statement to impeach witness), *cert. denied*, 337 U.S. 955 (1964); Beaty v. United States, 203 F.2d 652, 656 (4th Cir. 1953) (admissibility of witness' prior consistent statements is within trial judge's discretion and jury is able to determine whether prior statements corroborate witness), *cert. denied*, 349 U.S. 946 (1955); Goins v. United States, 99 F.2d 147, 150-51 (4th Cir.) (jury is as capable of evaluating truth of witness' statements as is trial judge), *cert. denied*, 306 U.S. 622 (1938). *But see* Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931) (to be admissible to corroborate a witness, witness' prior consistent statements must predate witness' alleged motive to fabricate).

62. *See infra* notes 63-78 and accompanying text (discussing post-rule 801(d)(1)(B) Fourth Circuit cases).

63. 561 F.2d 1109 (4th Cir. 1977) (per curiam).

64. *See Parodi*, 703 F.2d at 787.

65. *See* 561 F.2d at 1111. The trial judge in *United States v. Weil* admitted a witness' prior consistent statement on direct examination of the witness as well as on redirect examination. *See id.* at 1110. The *Weil* court found that the trial judge erred by admitting the witness' prior consistent statement on direct and redirect examination because the defendant had not impeached the witness first. *Id.* at 1111; *see also supra* note 8 and accompanying text (discussing rule 801(d)(1)(B)). The *Weil* court, however, found that since the defendant failed to object to the admission of the witness' prior consistent statement on direct examination, the trial judge's error in admitting the witness' statement on redirect examination was harmless. *See* 561 F.2d at 1111. The *Weil* court reasoned that any prejudice to the defendant occurred when the trial judge admitted the witness' statement on direct examination. *See id.* Furthermore, the *Weil* court found that because the defendant failed to object to the trial judge's admission of the witness' prior consistent statement on direct examination, the defendant waived the right to object on appeal. *See id.* at 1111 n.3; *see also supra* note 27 (discussing Federal Rule of Evidence 103's requirement that counsel's objection must be specific, timely, and of record to preserve objection for appeal).

66. *See* 703 F.2d at 787; 561 F.2d at 1110-11. The government's chief witness in *Weil* was

prior consistent statement was inadmissible to corroborate the witness because the defendant had not impeached the witness first.[67] The *Weil* court, however, stated in dictum that in the absence of certain kinds of impeaching testimony, a witness' prior consistent statements made subsequent to the origin of the witness' motive to fabricate lack probative value.[68] The *Weil* court thus implies that in the presence of certain kinds of impeaching testimony, such statements in fact possess probative value.[69] The *Weil* court also noted that courts object to prior consistent statements a witness made after the witness had a motive to fabricate not because the statements lack probative value but rather because the statements constitute hearsay.[70] The *Weil* court apparently criticized those courts that deem prior consistent statements to be hearsay, by quoting rule 801(d)(1)(B) to the effect that a witness' prior consistent statement is not hearsay if the proponent offers the statement to rebut an express or implied charge of recent fabrication or improper motive.[71]

The *Parodi* court found that another Fourth Circuit case, *United States v. Dominguez*,[72] provided a closer analogy to the case at hand.[73] The government's key witness in *Dominguez* cooperated with the government to obtain a reward for the capture of certain smugglers.[74] The defense counsel impeached the government witness on cross-examination by implying that the witness' desire to obtain a reward motivated the witness to falsify his testimony.[75] The trial judge in *Dominguez* admitted the witness' prior consistent statements to rehabilitate the witness over defense counsel's objection that the witness' prior consistent statements were inadmissible hearsay under *Weil*.[76] Although the witness' desire to obtain a reward predated the witness' prior consistent

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the defendant's brother who was present at the shopping center where the defendant passed counterfeit bills. *See* 561 F.2d at 1110. The police arrested both the witness and the defendant and the witness gave a statement to the police in which he implicated the defendant. *See id.* The defendant in *Weil* attempted to show on cross-examination of the witness that the government promised the witness leniency if the witness implicated the defendant. *See id.* at 1111. Neither the trial court nor the Fourth Circuit in *Weil* apparently believed that the defendant's cross-examination of the witness constituted impeachment. *See id.*

67. *See id.* at 1110.

68. *See id.* at 1111 n.2. While the *Weil* court stated that in the absence of certain kinds of impeaching testimony, a witness' prior consistent statements that postdate the witness' motive to fabricate lack probative value, the *Weil* court did not define the types of impeaching testimony that must be absent in order to deprive a witness' prior consistent statements of probative value. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. 604 F.2d 304 (4th Cir. 1979).

73. *See Parodi*, 703 F.2d at 787.

74. *See* 604 F.2d at 310-11.

75. *See id.* at 310.

76. *See id.* at 311. The Fourth Circuit in *United States v. Dominguez* quoted rule 801(d)(1)[B] to the effect that an impeached witness' prior consistent statement is not hearsay if the proponent offers the statement to rebut opposing counsel's charge that the witness fabricated testimony. *See id.; see also supra* text accompanying notes 7-8 (discussing rule 801(d)(1)(B)). While the *Dominguez* court determined that its admission of a witness' prior consistent statements was consis-

statements, the *Dominguez* court upheld the trial court's admission of the prior consistent statements, finding that its holding was consistent with *Weil*.[77]

While *Weil* and *Dominguez* implicitly support the *Parodi* court's interpretation of rule 801(d)(1)(B), neither the *Weil* nor *Dominguez* court opinions expressly state that rule 801(d)(1)(B) does not condition the admissibility of a witness' prior consistent statements on the absence of a motive to fabricate.[78] Since the case law among other circuits is split on the issue of whether rule 801(d)(1)(B) renders a witness' prior consistent statements inadmissible as corroborative evidence if the witness had a motive to fabricate the prior statements,[79] the question that remains is whether the *Parodi* court followed the better reasoned line of authority. The Fourth Circuit rejected the *Quinto* court's rationale that prior consistent statements a witness made after the witness had a motive to fabricate are inadmissible as corroborative evidence because the prior statements are not relevant to the issue of the witness' credibility.[80] The *Quinto* court reasoned that only when the witness' prior statement predates the witness' alleged motive to fabricate does the prior statement tend to make the trustworthiness of the witness' testimony more probable.[81] According to the *Quinto* court, when the witness' prior consistent statement predates the witness' alleged motive to fabricate, the fact that the prior statement is consistent with the testimony implies that the witness' testimony was free of the alleged discrediting influence.[82]

Under the *Quinto* interpretation of rule 801(d)(1)(B), an opposing counsel's mere allegation that a witness had reason to lie when the witness made the prior statement renders the prior consistent statement inadmissible to corroborate the witness.[83] The better view is that an opposing counsel's mere

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tent with Fourth Circuit precedent as embodied in the *Weil* holding, the *Dominguez* court did not elaborate on why its holding was consistent with *Weil*. *See* 604 F.2d at 311.

77. *See* 604 F.2d at 310-12. The defendant in *Dominguez* did not attack the trial court's admission of the witness' prior consistent statement on the ground that the witness' motive to fabricate predated the witness' statement, nor did the *Dominguez* court address whether the witness had a motive to falsify the prior consistent statement. *See id.* The witness in *Dominguez*, however, gave his prior consistent statement to the authorities after the witness began cooperating with the government in hope of a reward. *See id.* at 310-11. Therefore, the witness' desire to obtain a reward, which constituted his alleged improper motive, colored the witness' consistent statement as well as his testimony. *See id.*

78. *See Weil*, 561 F.2d at 1110-12; *Dominguez*, 604 F.2d at 310-12; *supra* notes 65-77 and accompanying text.

79. *See supra* notes 53-60 and accompanying text (discussing split of authority on question of whether rule 801(d)(1)(B) requires that witness' prior consistent statements must predate witness' motive to fabricate to be admissible).

80. *See* United States v. Quinto, 582 F.2d 224, 232-33 (2d Cir. 1978); *supra* text accompanying note 39 (discussing *Parodi* court's rejection of *Quinto*).

81. *See* 582 F.2d at 233.

82. *See id.*

83. *See id.* at 233-34. The Second Circuit in *Quinto* did not find that the impeached witness actually had a motive to fabricate his prior consistent statement. *See id.* at 234. Rather, the *Quinto* court held that the witness' prior consistent statement was inadmissible because the government did not prove that the witness made the prior statement before the witness' alleged improper motive arose. *See id.* The *Quinto* court found that rule 801(d)(1)(B) requires the propo-

assertion that the witness' motive to fabricate predated the witness' prior consistent statement is insufficient to render the witness' prior consistent statement inadmissible as a matter of law.[84] Otherwise, the witness' proponent could never rehabilitate the witness with a prior consistent statement in cases in which a theoretical possibility existed that the witness falsified the prior statement.[85]

The *Parodi* court, however, did not contend merely that opposing counsel's allegation that a witness had a motive to fabricate the prior consistent statement is insufficient to render the prior statement inadmissible.[86] The *Parodi* court took the position that even if a witness in fact had a motive to fabricate his prior consistent statement, the statement is not inadmissible automatically under rule 801(d)(1)(B).[87] Nevertheless, the Fourth Circuit's interpretation of rule 801(d)(1)(B) is consistent with the spirit of the rule.[88] The drafters of rule 801(d)(1)(B) stated that if opposing counsel wishes to open the door for the admission of prior consistent statements into evidence, no sound reason is apparent why the trial judge should not admit the statement generally.[89] Contrary to the *Quinto* court's assertion, when opposing counsel attacks a witness' veracity, the witness' prior consistent statements and the circumstances under

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nent of a witness' prior consistent statement to demonstrate to the trial judge's satisfaction either that the witness had no motive to fabricate or that the witness' prior consistent statement predated the witness' alleged improper motive. *See id.*

84. *See* United States v. DeLaMotte, 434 F.2d 289, 293 (2d Cir.) (if defendant's mere contention that witness had motive to fabricate prior consistent statement was sufficient to render prior statement inadmissible, prosecution could never rehabilitate witness with prior consistent statement when theoretical possibility existed that witness had motive to lie before witness made prior statement), *cert. denied*, 401 U.S. 921 (1970); United States v. Grunewald, 233 F.2d 556, 566 (2d Cir.) (same), *rev'd on other grounds*, 353 U.S. 391 (1957); *see also* J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE ¶ 607[08] at 607-95-96 (1981 & Cum. Supp. 1982) Weinstein agreed with Judge Friendly's concurring opinion in *Rubin* that prior to the adoption of the Federal Rules of Evidence, courts used a flexible approach in determining the admissibility of prior consistent statements as rehabilitative evidence. *See id; see also supra* text accompanying note 41 (discussing Judge Friendly's *Rubin* concurrence). Weinstein also states that since the drafters of the Federal Rules of Evidence intended to expand rather than contract the admissibility of evidence, Judge Friendly's flexible approach to the admissibility of prior consistent statements seems a more sensitive and useful reading of rule 801(d)(1)(B) than the *Quinto* court's interpretation of the rule. *See* 3 WEINSTEIN'S EVIDENCE, *supra*, at 607-96; *see also supra* note 41 and accompanying text (discussing Judge Friendly's *Rubin* concurrence); *supra* notes 80-83 and accompanying text (discussing *Quinto*); *infra* note 91 and accompanying text (discussing *Quinto*). *But see* MCCORMICK, *supra* note 5, at 105 (prior consistent statement irrelevant to refute opposing counsel's charge that witness falsified testimony unless witness made prior statement before witness' motive to fabricate arose).

85. *See supra* note 84 (discussing *DeLaMotte* and *Grunewald*).

86. *See infra* note 87 and accompanying text (discussing *Parodi*).

87. *See Parodi*, 703 F.2d at 784. The *Parodi* court held that Ozella's prior consistent statements were admissible irrespective of whether a motive to fabricate existed on Ozella's part. *See id.* The Fourth Circuit also found that under rule 801(d)(1)(B) as well as under traditional evidentiary law, "the existence" of a motive to fabricate when the witness made the prior consistent statement does not render the prior statement inadmissible to corroborate the witness. *See id.* at 785.

88. *See infra* text accompanying note 89 (discussing intent of drafters of rule 801).

89. *See* FED. R. EVID. 801 advisory committee note (subsection (d)(1)(B)).

which the witness made the prior statements are relevant to the jury's evaluation of the witness' credibility.[90]

Under the *Quinto* interpretation of rule 801(d)(1)(B), a witness' prior consistent statements that postdate the witness' motive to fabricate are inadmissible, regardless of the method by which opposing counsel has impeached the witness.[91] The *Parodi* court, on the other hand, held that trial judges should take a flexible approach in admitting a witness' prior consistent statements as rehabilitative evidence.[92] The *Parodi* court's interpretation of rule 801(d)(1)(B) allows trial judges to admit a witness' prior consistent statements in situations in which the witness' prior consistent statements are particularly relevant to the jury's evaluation of the witness' credibility.[93] The method by which opposing counsel has impeached the witness has considerable bearing on whether the witness' prior consistent statements should be admissible to answer the impeachment.[94] When, as in *Parodi*, an opposing counsel has impeached a witness with an alleged prior inconsistent statement and the witness responds that he did not make the inconsistent statement but rather asserts that his pretrial statements were consistent with his testimony, proof of a prior consistent statement assists the jury in determining whether the witness uttered the alleged inconsistency.[95] Since the jury must determine whether the witness

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90. *See* United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir. 1972) (per curiam) (when opposing counsel puts witness' motive at issue, evidence of prior consistent statements and circumstances under which witness made statement is relevant to jury's evaluation of witness' motive for making prior statement); United States v. Bays, 448 F.2d 977, 979 (5th Cir.) (per curiam) (defendant thoroughly attacked witness' motive and veracity, thus prior consistent statements witness made after witness' alleged improper motive originated had probative value that could assist jury in evaluating witness' credibility), *cert. denied*, 405 U.S. 957 (1971). *But see* FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 8, at 105 (witness' prior consistent statements are probative and admissible if prior statements predate witness' motive to lie); Note, *Hearsay Under the Proposed Federal Rules - A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1092 (1969) (witness' prior consistent statement that postdates witness' motive to falsify would not rebut opposing counsel's charge that witness fabricated testimony).

91. *See Quinto*, 582 F.2d at 232-35. The *Quinto* court held that a witness' prior consistent statements are inadmissible to rehabilitate the witness under rule 801(d)(1)(B) if the witness made the prior statements after the witness allegedly had a motive to lie, without addressing whether the method by which opposing counsel impeached the witness had any bearing on the admissibility of the prior statements. *See id.*

92. *See supra* note 50 and accompanying text (discussing *Parodi* court's interpretation of rule 801(d)(1)(B)).

93. *See infra* notes 95-97 and accompanying text (discussing when prior consistent statements are particularly relevant to jury's evaluation of witness' credibility).

94. *See* MCCORMICK, *supra* note 5, at 103. McCormick states that the admissibility of an impeached witness' prior consistent statement turns on whether the prior statement is logically relevant to explain the impeaching evidence. *See id.* According to McCormick, to be admissible, the rehabilitating evidence must meet opposing counsel's impeaching evidence directly. *See id.*

95. *See supra* text accompanying note 18 (discussing Parodi's impeachment of Ozella in *Parodi*); Graham, *supra* note 3 at 599. Graham states that when a witness denies making an alleged prior inconsistent statement and asserts that the prior statement was consistent with his testimony, proof of the witness' prior consistent statement contradicts the extrinsic proof of the offered inconsistent statement. *See id.; see also* WIGMORE, 4 WIGMORE ON EVIDENCE § 1126, at 258-62 (Chadbourne Rev. 1972 & Cum. Supp. 1983); The *Parodi* court adopted Judge Friendly's

uttered the prior inconsistent statement to evaluate the witness' credibility, proof of the witness' consistency at other times is relevant to the jury's consideration of the witness' credibility.[96]

In rejecting the *Quinto* court's interpretation of rule 801(d)(1)(B), the Fourth Circuit in *Parodi* followed the better reasoned line of authority concerning the admissibility of prior consistent statements.[97] Rather than impose a rigid prohibition on the admission of prior consistent statements a witness made after the witness had a motive to lie, the *Parodi* court's mandate of flexibility allows trial courts to admit prior consistent statements as rehabilitative evidence when those statements help the jury to evaluate the witness' credibility.[98] Since the drafters of the Federal Rules of Evidence designed the rules to expand the admissibility of evidence,[99] *Parodi* represents both a useful reading of rule 801(d)(1)(B) and an appropriate rejection of the inflexible and arbitrary exclusion of evidence.

SETH CALVEN PRAGER

B. *Permissible Judicial Commentary on a Defendant's Credibility*

A federal judge in a criminal trial may comment on the credibility of witnesses and the sufficiency of the evidence.[1] Juries generally accord great weight to a judge's comments that disclose his opinion on the merits of a

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conclusion in *Rubin* that if opposing counsel uses some portions of a witness' prior statement to impeach the witness, the principle of completeness as embodied in rule 106 of the Federal Rules of Evidence, requires that the court allow the proponent to use the same prior statement to rehabilitate the witness. *See Parodi*, 703 F.2d at 786; *Rubin*, 609 F.2d at 70 (Friendly, J., concurring); FED. R. EVID. 106. Rule 106 of the Federal Rules of Evidence states that when a party introduces a writing or recorded statement into evidence, the adverse party may require the other party to introduce any other part of the writing or recorded statement which fairness dictates the jury ought to consider contemporaneously with the initially introduced writing or recorded statement. *See id.* Unlike the situation in *Rubin* in which the defendant quoted from the witness' written memorandum to impeach the witness, Parodi quoted from Ozella's unrecorded pretrial conversation with the DEA to impeach Ozella. *Compare Rubin*, 609 F.2d at 57-59 *with Parodi*, 703 F.2d at 781-83 (comparing impeaching evidence). Federal Rule of Evidence 106 is limited to writings and recorded statements and does not apply to conversations. *See* FED. R. EVID. 106 advisory committee note.

96. *See* Graham, *supra* note 3, at 599 (discussing relevance of prior consistent statements).

97. *See supra* notes 79-96 and accompanying text (discussing split of authority).

98. *See supra* notes 93-96 and accompanying text (discussing *Parodi*).

99. *See supra* note 84 (discussing Federal Rules of Evidence drafters' intent to expand admissibility of evidence). The purpose of the Federal Rules of Evidence is to secure fairness and promote the growth and development of evidentiary law toward the end that courts may ascertain the truth and determine litigation in a just fashion. *See* FED. R. EVID. 102.

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1. *See* Gant v. United States, 506 F.2d 518, 520 (8th Cir. 1974) (federal judges may comment fairly and impartially on weight of evidence and credibility of witnesses), *cert. denied*, 420

case.[2] Allowing a judge unbridled discretion in using the privilege of commentary therefore creates the possibility of judicial usurpation of the jury's factfinding function.[3] The chances of judicial overreaching are particularly acute

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U.S. 1005 (1975). If the trial judge comments on the evidence, the judge must instruct the jury that they are not bound by his comments regarding the witness' credibility or evidentiary issues. *See* 506 F.2d at 520; *infra* note 7 and accompanying text (discussing judge's instruction to jury limiting effect of commentary). The federal practice permitting commentary derives from the common-law notion of the authority and function of the judge during trial. *See* Herron v. Southern Pacific Company, 283 U.S. 91, 95 (1931) (function and authority of federal trial judge patterned after common-law courts). At common law, the judge was not simply a trial moderator, but was an active participant in the trial proceeding. *Id. See generally* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, 185 (1898).

The common-law courts considered the power of judicial commentary to be an inherent part of trial by jury. *See* Note, *Evidence - Jury Trials - Weight of Evidence - Credibility of Witnesses - Judicial Comment Thereon*, 27 N.D. L. REV. 199, 200 (1951). The purpose of judicial commentary has been to assist the jury in the factfinding process. *See e.g.*, Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979) (federal judge may comment on facts adduced at trial for purposes of clarification); United States v. Hickman, 592 F.2d 931, 933 (6th Cir. 1979) (commentary by judge often necessary to clarify complex issues for jury); United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970) (federal trial judge empowered to assist jury in sorting out and drawing inferences from evidence), *cert. denied*, 400 U.S. 1020 (1971). A federal judge generally has wide discretion in determining when and how often he will advise the jury on the evidence introduced at trial. *See* J. WEINSTEIN & M. BERGER, 1 WEINSTEIN'S EVIDENCE ¶ 107[03] at 39 (ed. 1982) (scope of judge's comment on evidence adduced at trial is almost entirely within judge's discretion) [hereinafter cited as 1 WEINSTEIN'S EVIDENCE]. The judge, however, must always exercise the privilege of commentary in accordance with the constitutional guarantee of trial by jury. *Id.* at 41; *see infra* note 6 and accompanying text (accused has constitutional right to jury trial).

2. *See, e.g.*, Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968) (jurors are highly sensitive to trial judge's comments on the evidence), *cert. denied*, 409 U.S. 843 (1972); United States v. Ah Kee Eng, 241 F.2d 157, 161 (2d Cir. 1957) (judge must remember that jury is influenced by any indication of judge's view of proceedings); Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944) (opinion of trial judge is likely to carry great weight with jury because juries generally consider a judge's opinions to be informed and well-reasoned).

3. *See* Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950) (judge's expression of opinion on sufficiency of evidence amounted to judicial usurpation of jury's factfinding task). Although a federal judge may comment on the evidence to assist the jury in reaching a just decision, the jury must be the ultimate arbiter of all factual issues. *See* Quercia v. United States, 289 U.S. 466, 469 (1933) (judge may comment on evidence provided he clearly submits all matters of fact for jury determination); *see also* Note, *The Limits of Judicial Intervention in Criminal Trials and Reversible Error*, 11 GA. L. REV. 371, 377 (1977) (although judge controls proceedings in criminal trial, jury is ultimate arbiter of guilt or innocence) [hereinafter cited as *Judicial Intervention*]. A judge's comments usurp the jury's factfinding role when a juror's knowledge that the judge considers the defendant guilty causes the juror to abandon reasonable doubts. *See* 1 WEINSTEIN'S EVIDENCE *supra* note 1, ¶ 107[03], at 44; *see also* Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 36 (1978) (introduction of judge's beliefs at trial is likely to influence deliberations of each juror).

The degree of impact of a judge's comments on the jury's deliberations depends on the particular circumstances of the case. *See* United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970) (reviewing court must evaluate fairness of judge's comments in context of whole trial); *see generally* 1 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 107[07], at 73 (appellate courts tend to rely on particular facts of case in determining propriety of trial judge's comments on evidence). Courts also weigh the possible mitigating effect of corrective instructions when assessing whether a judge's commentary influenced the jury. *See infra* note 7 and accompanying text (discussing curative charge on respective roles of judge and jury).

when the defendant's credibility as a witness is central to the defense's case and is the subject of judicial comment.[4] A trial judge's display of partiality regarding the defendant's credibility may undermine the jury's ability to make an independent evaluation of the defendant's guilt.[5] Because of the potential

4. *See, e.g.*, United States v. Anton, 597 F.2d 371, 373 (3d Cir. 1979) (judge should refrain from commenting on veracity of defendant's testimony when defendant's credibility is critical to defense); United States v. Candelaria-Gonzales, 547 F.2d 291, 297 (5th Cir. 1977) (judge should avoid displaying partiality when determination of guilt depends primarily on whether jury believes testimony of key witness). A federal judge may use his power to comment on the credibility of witnesses in two ways. *See* 1 WEINSTEIN'S EVIDENCE, *supra* note 1, at 47. The judge has the power to advise the jury on what factors to consider when evaluating credibility. *Id.* The judge is also permitted to express his own views on the believability of a witness. *Id.* at 47-48. If a judge discloses his opinion on a witnesses' credibility, he must instruct the jury that they are not bound by the judge's views. *See infra* note 7 and accompanying text (discussing instruction that judge's opinion is not binding on jury). Although a federal judge may comment on a witness' credibility, a judge's remarks generally cannot reflect his views on the believability of a defendant's testimony. *See, e.g.*, Quercia v. United States, 289 U.S. 466, 472 (1933) (judge's remark that defendant's wringing of hands while testifying showed he was not telling truth held improper); United States v. Anton, 597 F.2d 371, 373 (3d Cir. 1979) (conviction reversed due to trial judge's characterization of defendant as being entirely devoid of credibility); United States v. Stephens, 486 F.2d 915, 916-17 (9th Cir. 1973) (judge's comments expressing disbelief in defendant's testimony repudiating confession amounted to prejudicial error). Some courts, however, have upheld the propriety of comments attacking a defendant's credibility. *See, e.g.*, United States v. Gaines, 450 F.2d 186, 191 (3d Cir.) (judge's statement that defendant's testimony did not make sense and should not fool jury did not constitute reversible error), *cert. denied*, 405 U.S. 927 (1971); United States v. Kravitz, 281 F.2d 581, 584-85 (3d Cir.) (judge's remark that he did not believe all of defendant's testimony held not improper exercise of commentary power), *cert. denied*, 364 U.S. 941 (1960).

5. *See* United States v. Dopf, 434 F.2d 205, 208 (5th Cir. 1970) (judge's charge that evidence against defendant was overwhelming and sufficient for conviction deprived jury of traditional factfinding role). A federal judge must maintain an attitude of impartiality at all times. *See, e.g.*, United States v. Butera, 677 F.2d 1376, 1382 (11th Cir. 1982) (trial judge has duty to conduct trial fairly and impartially), *cert. denied*, 103 S. Ct. 735 (1983); United States v. Musgrave, 444 F.2d 755, 763 (5th Cir. 1971) (judge must avoid giving jury impression that judge believes defendant is guilty); United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945) (federal judge must remain detached and aloof and cannot exhibit prosecutorial zeal).

While a trial judge's comments on the evidence must not be biased, the judge may exercise discretion in deciding which facts to mention in his commentary. *See* United States. v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970) (trial judge may exercise discretion in selecting evidence to include in commentary); *see infra* notes 39-48 and accompanying text (discussion of judge's exercise of discretion in *Tello* in choosing facts to mention in commentary). The trial judge must, however, guard against providing a one-sided commentary that might prejudice a defendant's right to a fair and impartial trial. *See, e.g.*, United States v. Natale, 526 F.2d 1160, 1169 (2d Cir. 1975) (one-sided commentary of trial judge may prejudice defendant's right to a fair trial), *cert. denied*, 425 U.S. 950 (1976); Ray v. United States, 367 F.2d 258, 262 (8th Cir. 1966) (judge's comments should never unfairly emphasize one party's testimony); *see also* United States v. Hickman, 592 F.2d 931, 936 (6th Cir. 1979) (judge's persistent interjections into trial evidenced bias and thus deprived defendant of right to trial by jury). In addition, a federal judge is not permitted to express an opinion on the defendant's guilt. *See, e.g.*, United States v. Van Horn, 553 F.2d 1092, 1094 (8th Cir. 1977) (while judge may express opinions on facts if judge gives limiting instructions, expression of opinion of guilt of accused is reversible error); United States v. Smith, 399 F.2d 896, 899 (6th Cir. 1968) (conviction reversed when trial judge expressed opinion that defendant was guilty beyond reasonable doubt). *See generally* Annot., 7 A.L.R. FED. 377 (1971) (discussing propriety of judge expressing opinion on guilt of defendant).

for prejudice to an accused's constitutional right[6] to trial by jury, the judge must include with his commentary an instruction that the jury is the final arbiter of the witness' credibility and the weight of the evidence.[7] In *United States v. Tello*,[8] the Fourth Circuit recently considered the permissible scope of judicial commentary on a defendant's credibility.[9]

In *Tello*, customs officials at Dulles International Airport arrested the defendant when they discovered cocaine in the defendant's suitcase.[10] Federal officers at the airport charged the defendant with knowingly importing and possessing cocaine with the intent to distribute.[11] At trial, the defendant did not deny possessing the drugs or transporting the drugs into the country.[12] The defendant asserted, however, that an unknown drug smuggler had used him as a "mule" to transport the cocaine into the United States.[13] The defendant testified that an unidentified woman had approached him while he was shopping for luggage in Peru and sold him the suitcase in which the customs officials found the cocaine.[14] The defendant thus claimed that he had unknow-

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6. *See* U.S. CONST. amend. VI (in all criminal prosecutions accused shall enjoy right to trial by impartial jury).

7. *See* United States v. Buchanan, 585 F.2d 100, 102 (5th Cir. 1978) (if trial judge chooses to comment on evidence, judge must instruct jury that they are sole judges of facts and are not bound by judge's comments); *see also* United States v. Dixon, 469 F.2d 940, 942 n.4 (D.C. Cir. 1972) (trial judge may comment on evidence if ultimate resolution of factual issues is clearly left to jury). The trial judge must include an instruction with the commentary that emphasizes the limited effect of the judge's remarks on the evidence. *See* WEINSTEIN'S EVIDENCE, *supra* note 1, at 13. To ensure that the jury clearly understands the limited effect of the judge's commentary, the judge must give the instructions in close temporal proximity to the comments. *See, e.g.*, United States v. Natale, 526 F.2d 1160, 1169 (2d Cir. 1975) (judge must give limiting instructions simultaneously with comments on evidence), *cert. denied*, 425 U.S. 950 (1976); United States v. Gaines, 450 F.2d 186, 190 (3d Cir. 1971) (defendant not prejudiced by judge's remarks when judge immediately instructed jury after commentary that jury was final factual arbiter). Limiting instructions, however, frequently cannot remedy comments that are highly prejudicial. *See, e.g.*, United States v. Jacobo-Gil, 474 F.2d 1213, 1216 (9th Cir. 1973) (judge's prejudicial remark that evidence presented at trial was sufficient to convict defendant not remedied by instructions that jury could disregard comment); United States v. Porter, 398 F.2d 270, 276 (6th Cir. 1967) (judge's comments evidencing belief in defendant's guilt not cured by judge's statement that jury was not bound by remarks).

8. 707 F.2d 85 (4th Cir. 1983).

9. *Id.* at 86.

10. *Id.* In *Tello*, the customs and immigration officials first became suspicious of the defendant when the defendant displayed nervousness while being processed through customs. *See* Brief for Appellee at 10, United States v. Tello, 707 F.2d 85 (4th Cir. 1983). After initial questioning, the officials performed a routine customs inspection of the defendant and his belongings. 707 F.2d at 86. Although a cursory inspection yielded no evidence of contraband, custom officials eventually discovered 510 grams of cocaine after dismantling the defendant's suitcase. *Id.*

11. *See id; see also* 21 U.S.C. §§ 952, 960 & 841(a)(1) (1976).

12. *See* 707 F.2d at 87.

13. *Id.* The defendant introduced expert testimony showing that the use of unknowing "mules" was a common drug smuggling technique. *Id.* The expert witness testified that narcotics smugglers sometimes plant the drugs on automobiles, seagoing vessels, or on individuals. *Id.* The smuggler retrieves the contraband once the "mule" clears international borders. *Id.*

14. *Id.*

ingly carried the drugs into the country.[15] Since knowledge and intent are elements of the crimes the defendant allegedly committed,[16] the defendant argued that he was not guilty of the offenses because he was unaware that he had possession of the drugs.[17] After a one day trial, the judge submitted the case to the jury.[18] The jury, however, was unable to reach a verdict after several hours of deliberation.[19] The district judge therefore reinstructed the jury on the government's burden of proof regarding the essential elements of the offenses charged.[20] The trial judge also commented to the jury on parts of the defendant's testimony that the judge deemed determinative of the critical issue of the defendant's mental state.[21] The jury subsequently convicted the defendant of both of the charged offenses.[22]

The defendant appealed to the Fourth Circuit on the ground that the judge's comments prejudiced the accused's right to a fair and impartial trial.[23] The government, however, maintained that the district judge did not abuse his discretion when he commented on the defendant's testimony.[24] The Fourth

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15. *Id.*

16. *See* 21 U.S.C. § 960 (1976) (unlawful to knowingly and intentionally import a controlled substance); 21 U.S.C. § 841(a)(1) (1976) (unlawful to possess a controlled substance with intent to distribute). To obtain a conviction, the prosecution must prove beyond a reasonable doubt that the defendant had the required mental state when he performed the unlawful acts. *See In re* Winship, 397 U.S. 358, 361 (1970) (prosecution must establish every element of charged offense beyond a reasonable doubt).

17. *See* 707 F.2d at 87.

18. *Id.*

19. *Id.* In *Tello*, the jury commenced deliberations the morning after the trial concluded. *See* Brief for Appellee at 20, United States v. Tello, 707 F.2d 85 (4th Cir. 1983). Approximately two hours later, the jury sent a note to the court indicating that they were deadlocked. *Id.* The court thereupon reconvened and the judge instructed the jury on their factfinding role. *Id.* After deliberating for approximately two more hours, the jury sent another note to the court indicating that they were deadlocked at 6-6. *Id.* at 21.

20. *See* Brief for Appellee at 22, United States v. Tello, 707 F.2d 85 (4th Cir. 1983).

21. *See* 707 F.2d at 87. The district judge's commentary on the evidence focused primarily on the circumstances surrounding the defendant's purchase of the suitcase from an unidentified woman. *Id.* The judge remarked that, according to the defendants' testimony, the defendant was walking through an outdoor market when "some faceless individual" in the crowd called to him and asked him if he wanted to buy a bag. *Id.* The judge told the jury that "you have got to decide for yourselves" whether "at the time this faceless person called to [the defendant]...somebody else already put cocaine in [the bag]." *Id.* The district judge also pointed out weaknesses in the defendant's story, such as the accused's testimony that he never informed the "faceless" woman of his destination. *Id.* The judge remarked that if the woman didn't have "any idea where he was going...how would [she] ever catch up with the cocaine if [she] had dumped it on somebody to bring into the United States?" *Id.* The judge concluded his commentary by adding, "So, you stop and think about all that sort of thing, because these are the facts in the case." *Id.*

22. *Id.* at 86.

23. *Id.; see supra* note 6 (sixth amendment guarantees right to fair and impartial trial). The defendant argued that the judge erred by failing to mention the accused's defense theories during the commentary. *Id.* The defendant also claimed that the judge's remarks discounting the defendant's testimony were tantamount to a directed verdict of guilt. *Id.*

24. *See* Brief for Appellee at 19, United States v. Tello, 707 F.2d 85 (4th Cir. 1983).

Circuit held that the trial judge's remarks, although damaging to the defendant's case, did not exceed the permissible bounds of judicial commentary on the evidence.[25] The Fourth Circuit therefore affirmed the defendant's conviction.[26]

The *Tello* court began an analysis of the propriety of the trial judge's commentary by emphasizing that the primary limitation on a federal judge's power to comment on the evidence is that the comments must aid the jury in performing its factfinding function.[27] The Fourth Circuit stated that the proper role of a judge in the trial process is that of a trial arbiter, who directs the jury's attention toward material issues and facilitates the correct application of law to fact.[28] The *Tello* court pointed out that the federal court system encourages trial judges to assist juries by commenting on the evidence.[29] The Fourth Circuit recognized that the federal practice permitting judicial commentary presumes that the comments will have an impact on jury decisionmaking.[30] The *Tello* court explained that grounds for reversal exist if the judge's comments have a prejudicial effect on the defendant's right to a fair trial.[31] According to the *Tello* court, a trial judge commits reversible error when his comments effectively remove issues of fact from the jury's consideration, thereby usurping the jury's exclusive factfinding function.[32] The Fourth Circuit noted that the appellate court must consider the judge's remarks in the context of the trial to determine whether the judge impermissibly invaded the province of the jury.[33]

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25. *See* 707 F.2d at 88-90.

26. *Id.* at 90.

27. *Id.*; *see* Quercia v. United States, 289 U.S. 466, 469-70 (1933) (judges may comment on evidence when commentary is necessary to aid jury in reaching just decision); *supra* note 1 (purpose of judicial commentary is to assist jury in factfinding process).

28. *See* 707 F.2d at 90.

29. *Id.* Although federal trial judges have broad discretion in commenting on the evidence, the Fourth Circuit noted that many state jurisdictions either prohibit or severely curtail a trial judge's authority to comment on the evidence. *Id.; see Judicial Comment on the Evidence, supra* note 1, at 205 (most states restrict judge's commentary power either by statute, constitutional provision, or judicial decision). *See generally* 1 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 107[01] at 10-11 n.15 (survey of state practices regarding scope of judicial commentary on the evidence).

30. *See* 707 F.2d at 90.

31. *Id.*

32. *Id.* The Fourth Circuit reasoned that a judge's comments are improper if the remarks compel the jury to decide an issue in a particular way. *Id.; see* United States v. Jacobo-Gil, 474 F.2d 1213, 1216 (9th Cir. 1973) (judge's comment regarding defendant's knowledge usurped jury's function by removing issue of defendant's mental state from jury consideration).

33. 707 F.2d at 90; *see* 1 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 107[01], at 18. The extent to which a trial judge's commentary influences the jury's deliberations depends on the particular facts of the case. *See* 1 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 107[01], at 18. The complexity and length of the trial, the nature of the evidence on which the judge commented, and the personality of the trial judge are all relevant factors in determining the impact of a judge's remarks on a jury. *Id.* at 17. Since the influence of a judge's comments depends on a variety of factors, reviewing courts tend to decide cases of alleged judicial impropriety on an ad hoc basis. *Id.* at 73; *see* United States v. Allied Stevedoring Corp., 241 F.2d 925, 934 (2d Cir.) (impossible to prescribe general rule that precisely defines limit of judicial authority), *cert. denied*, 353 U.S. 984 (1957).

The Fourth Circuit assessed the propriety of the district judge's comments in *Tello* by applying the guidelines for judicial commentary pronounced by the Supreme Court in *Quercia v. United States*.[34] In *Quercia*, the Supreme Court held that a trial judge may comment on the evidence when the commentary is necessary to assist the jury in reaching a just decision.[35] The *Quercia* court pointed out that although a judge's privilege to comment on the evidence is discretionary, the privilege is subject to inherent limitations.[36] The Supreme Court explained that a trial judge's comments must be fair and impartial and must not include deductions and theories not readily inferrable from the record.[37] The Fourth Circuit in *Tello* examined whether the trial judge's remarks to the jury comported with the broad standard set out in *Quercia*.[38]

In applying the *Quercia* standard to the *Tello* case, the Fourth Circuit first addressed the defendant's contention that the district judge prejudiced the accused by commenting only on part of the evidence adduced at trial.[39] The *Tello* court determined that the trial judge's limited comments were properly designed to aid the deadlocked jury in resolving the sole disputed issue in the case.[40] The Fourth Circuit explained that the defendant's guilt depended on whether the accused knowingly and intentionally transported the cocaine into the country.[41] Although strong circumstantial evidence of knowledge

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34. 707 F.2d at 88; *see* 289 U.S. 466 (1933). In *Quercia*, the trial judge had remarked to the jury that the defendant was wringing his hands during his testimony. *Id.* at 468. The judge commented that the defendant's actions indicated that he was lying. *Id.* The trial judge further stated that "every single word that man said...was a lie." *Id.* The Supreme Court granted the defendant's petition for a writ of certiorari, and reversed the conviction. *Id.* at 472. The *Quercia* Court held that the judge's prejudicial remarks had deprived the defendant of his right to a fair trial. *Id.* The Court reasoned that the trial judge did not comment on the defendant's testimony to assist the jury, but merely to disparage the defendant's credibility. *Id.* The *Quercia* Court found that the judge's impropriety prevented the jury from reaching a fair decision. *Id.*

35. *Id.* at 469. The *Quercia* Court noted that a trial judge can aid jury decisionmaking by explaining evidence that is unclear, or by focusing the jury's attention on portions of the record that the judge deems important. *id.*

36. *Id.* at 470.

37. *Id.* The *Quercia* Court stressed that a judge's comments must not distort or add to the evidence produced at trial. *Id.* The Supreme Court also emphasized that a judge's commentary cannot be so hostile to the defendant as to negate the defendant's right to testify in his own behalf. *Id.*

38. *See* 707 F.2d at 88-90; *infra* notes 39-49 and accompanying text (discussing Fourth Circuit's application of *Quercia* standard to facts in *Tello*).

39. *See* 707 F.2d at 88-89. The defendant in *Tello* argued that the trial judge committed reversible error by not including in the commentary important defense evidence such as the expert testimony on the "mule" system and the defendant's good character evidence. *Id.* at 88. The defendant maintained that the judge's comments were prejudicial because the judge failed to discuss both sides of the evidence during the commentary. *Id.; see* Boatright v. United States, 105 F.2d 737, 740 (8th Cir. 1939) (judge should analyze both sides of evidence during commentary).

40. *See* 707 F.2d at 89; *infra* notes 41-49 and accompanying text (trial judge's limited commentary in *Tello* did not prejudice defendant because comments were meant to assist jury in resolving sole disputed issue in case).

41. *See* 707 F.2d at 88-89. In *Tello*, no dispute existed regarding the defendant's physical possession of the contraband and transportation of the drugs across international borders. *Id.* at 87. Conviction of the defendant depended entirely upon the government proving beyond a

and intent existed,[42] the *Tello* court noted that the defendant's testimony provided the only direct evidence of his mental state when he committed the alleged crimes.[43] The Fourth Circuit therefore reasoned that the trial judge limited his comments to the defendant's testimony in an attempt to clarify for the jury the critical issue of the defendant's mental state.[44] The Fourth Circuit further stated that the defendant was not prejudiced by the fact that the judge did not comment on the defendant's good character evidence or the expert testimony concerning the "mule" system.[45] The *Tello* court pointed out that a trial judge's commentary need not address all the evidence introduced at trial.[46] The Fourth Circuit explained that a judge has discretion to select the portions of the record that are crucial to the issue of guilt, and therefore worthy of judicial comment.[47] Since the defendant's mental state was the principle contested issue in *Tello*,[48] the Fourth Circuit concluded that the trial judge did not err by restricting his remarks to evidence highly probative of the accused's mental state.[49]

After determining that the trial judge's limited comments did not prejudice the defendant, the *Tello* court examined whether the judge's commentary on the evidence usurped the jury's factfinding function.[50] The Fourth Circuit found that the trial judge's remarks on the defendant's testimony did not interfere with the jury's ability to independently evaluate the accused's guilt.[51] The *Tello* court stated that the trial judge did not, as the defendant claimed,[52] effectively direct a verdict by expressing an opinion on the defen-

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reasonable doubt that the defendant knowingly and intentionally committed the illegal acts. *See supra* note 17 (discussing mental state requirements of offenses defendant allegedly committed).

42. *See* 707 F.2d at 89. The *Tello* court noted that the manner in which the defendant carried the cocaine into the country was strong circumstantial evidence of an intent to transport the contraband across international borders. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 88; *see* United States v. Bentvena, 319 F.2d 916, 940 n.14 (2d Cir. 1963) (judge's commentary need not refer to all evidence adduced at trial).

47. *See* 707 F.2d at 88-89; Quercia v. United States, 289 U.S. 466, 469 (1933) (judge's commentary may properly focus jury's attention on portions of trial record judge considers important). Because a trial record usually is filled with conflicting evidence, the judge must direct his commentary toward the evidence having the greatest probative value on the issue of guilt. *See* United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970) (judge's comments should assist jury in finding truth in contradictory evidence presented at trial), *cert. denied,* 400 U.S. 1020 (1971); *cf.* United States v. Butera, 677 F.2d 1376, 1382 (11th Cir. 1982) (judge properly may use commentary to curtail pursuit of irrelevant matters during trial), *cert. denied,* 103 S. Ct. 735 (1983).

48. *See supra* note 41 and accompanying text (defendant's mental state at time he committed illegal acts was only disputed issue remaining for jury consideration).

49. *See* 707 F.2d at 89.

50. *See id.* at 89-90; *see infra* notes 51-60 and accompanying text (*Tello* majority's discussion of whether trial judge's comments usurped the jury's factfinding role).

51. *See* 707 F.2d at 90.

52. *Id.* at 88. The defendant in *Tello* urged that during the commentary the trial judge had effectively advised the jury that the defendant was guilty. *Id.*

dant's culpability.[53] The Fourth Circuit acknowledged that the jury may have interpreted the judge's comments as the judge's opinion on the credibility of the defendants testimony.[54] The *Tello* court, however, stressed that a federal trial judge is allowed to express an opinion on the evidence if the judge also instructs the jury that they are the sole arbiters of fact.[55] In *Tello*, the Fourth Circuit noted that during the commentary the trial judge did not instruct the jury that they could disregard his remarks on the evidence.[56] The *Tello* court observed, however, that the judge concluded his commentary by referring to a limiting instruction the judge gave the previous day.[57] Although the Fourth Circuit considered the timing of the instruction deficient,[58] the *Tello* court concluded that the jury nevertheless understood their responsibility as the ultimate triers of fact.[59] Because the trial judge's comments did not usurp the jury's factfinding role, the Fourth Circuit held that the judge's remarks did not deprive the defendant of a fair trial.[60]

While the majority in *Tello* found that the trial judge did not exceed the permissible scope of judicial commentary, the dissent concluded that the judge's commentary had prejudiced the defendant's right to a fair trial.[61] The *Tello* dissent acknowledged the difficulty appellate courts encounter when making post-hoc evaluations of the prejudicial effect of a judge's conduct in a criminal trial.[62] Nevertheless, the dissent maintained that the trial judge in *Tello* com-

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53. *Id.* at 89. The Fourth Circuit reasoned that the trial judge's comments did not amount to a directed verdict because the judge never expressed an opinion on the defendant's guilt or credibility. *Id.; see also* Mims v. United States, 375 F.2d 135, 148 (5th Cir. 1967) (trial just must not direct verdict of guilty by commentary that decides material issue of fact for jury); Malaga v. United States, 57 F.2d 822, 828 (1st Cir. 1932) (judge must not directly or indirectly instruct jury that defendant is guilty).

54. *See* 707 F.2d at 89.

55. *Id.; see* Bursten v. United States, 395 F.2d 976, 982 (5th Cir. 1968) (federal judge may express opinions on evidence in criminal trial but judge has strict duty to clearly instruct jury that they are sole arbiters of fact and are not bound by judge's comments), *cert. denied*, 409 U.S. 843 (1972).

56. *See* 707 F.2d at 89.

57. *Id.* The *Tello* court pointed out that the trial judge concluded the commentary on the evidence by adding, "While I told you before that I wasn't going to summarize the evidence and comment on it, I am doing so simply because I think it might help you out." *Id.* The Fourth Circuit explained that the judge's statement directed the jury's attention to an instruction given the previous day at the close of the evidence. *Id.* The earlier charge had advised the jury that they could disregard any comments by the judge in reaching a verdict. *Id.*

58. *See id.* The *Tello* court stated that the trial judge should have reinstructed the jury that they were the sole triers of fact at the same time that the judge commented on the evidence. *Id.* at 89-90.

59. *See* 707 F.2d at 89. The *Tello* court pointed out that although an entire day had passed since the trial judge gave the detailed instructions to the jury, only three and one-half hours of jury time had elapsed between the instruction and the judge's comments on the evidence. *Id.* The Fourth Circuit therefore reasoned that the jury still fully understood that they could disregard the judge's remarks in reaching a verdict. *See id.*

60. *See id.* at 90.

61. *See id.* at 90-91 (Murnaghan, J., dissenting); *infra* notes 63-67 and accompanying text (discussing dissent's reasoning in *Tello*).

62. *See* 707 F.2d at 90 (Murnaghan, J., dissenting).

mitted reversible error because he breached his judicial duty of impartiality.[63] The dissent argued that the judge's comments conveyed to the jury his belief in the defendant's guilt.[64] The *Tello* dissent explained that the trial judge used his commentary essentially to recount and dismiss the defendant's case as unworthy of serious consideration.[65] Since the defendant's credibility was central to his defense, the dissent reasoned that the judge's sarcastic remarks concerning the accused's testimony amounted to an opinion on the defendant's culpability.[66] The dissent therefore concluded that the defendant in *Tello* was denied a fair and impartial trial because the judge had conveyed to the jury his belief in the defendant's guilt.[67]

Although the majority in *Tello* determined that the judge's comments properly assisted the jury in their factfinding task,[68] the dissent argued that the judge's remarks prejudiced the defendant by impinging on the jury's ability to independently decide the case.[69] The *Tello* majority correctly pointed out that the federal practice permitting judicial commentary on the evidence assumes that a judge's remarks will have an impact on the jury's decisionmaking.[70] As the Supreme Court noted in *Quercia*, the primary purpose of judicial commentary is to promote the just resolution of factual issues by providing the jury access to the judge's knowledge and experience.[71] A judge's comments on the evidence are improper if the remarks usurp rather than assist the jury's factfinding task.[72] An appellate court therefore must

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63. *Id.; see* Quercia v. United States, 289 U.S. 466, 470 (1933) (judges must remain impartial since slightest intimation of bias could influence jury verdict); *supra* note 5 and accompanying text (trial judge's display of bias may have unduly influenced jury's decision). The dissent in *Tello* claimed that the trial judge had displayed his belief that the defendant was guilty by sarcastically reiterating the defendant's story. *See* 707 F.2d at 90 (Murnaghan, J., dissenting).

64. *See* 707 F.2d at 90 (Murnaghan, J., dissenting).

65. *Id.* The *Tello* dissent contended that the trial judge's use of the adjective "faceless" to describe the woman who allegedly sold the suitcase to the defendant betrayed the judge's disbelief in the woman's existence. *Id.* The dissent also noted that the judge revealed his distrust in the defendant's story by asking, "...who had the opportunity to do anything in the way of almost rebuilding the bag to get cocaine in it...?" *Id.* The dissent finally argued that the judge's disbelief in the accused's defense was evident in the phrase, "So, you can think to yourself..." *Id.* The dissent interpreted the remark as being equivalent to saying, "How could anything so improbable ever have happened?" *Id.*

66. *Id.*

67. *Id.*

68. *See supra* notes 40-49 and accompanying text (majority's reasoning that trial judge in *Tello* properly designed commentary to aid jury in reaching just decision).

69. *See supra* notes 63-67 and accompanying text (dissent's reasoning that trial judge's commentary denied defendant fair trial because judge improperly influenced jury's verdict).

70. *See* 707 F.2d at 90; United States v. Bernstein, 533 F.2d 775, 796 (2d Cir. 1976) (federal judge must use commentary to promote jury's understanding of evidence); United States v. Tomlin, 380 F.2d 373, 374 (3d Cir. 1967) (federal judge should use commentary to make facts and circumstances of case clear to jury).

71. *See* Quercia v. United States, 289 U.S. 466, 469 (1933) (trial judges should comment on evidence when necessary to aid jury in reaching a just decision); *see also* Billeci v. United States, 184 F.2d 394, 402 (D.C. Cir. 1950) (purpose of federal practice of judicial commentary is to provide jury benefit of judge's expertise).

72. *See, e.g.*, United States v. Cisneros, 491 F.2d 1068, 1074 (5th Cir. 1974) (prejudice to defendant is inevitable when judge infringes on jury's exclusive function as ultimate trier of

carefully weigh the facts and circumstances of the trial to determine whether comments ostensibly offered to aid the jury actually deprived the jury of their exclusive factfinding role.[73] In *Tello*, the majority and dissent disagreed as to whether the trial judge's commentary assisted or usurped the jury's decisionmaking role.[74]

The Fourth Circuit in *Tello* properly found that the trial judge did not prejudice the defendant by limiting the commentary to the defendant's testimony.[75] At the *Tello* trial, the defendant's testimony provided the only direct evidence of the defendant's mental state at the time he committed the alleged crimes.[76] After several hours of deliberation, the jury was unable to agree on the truthfulness of the defendant's testimony that he did not know his suitcase contained cocaine.[77] The trial judge's commentary primarily focused on the weaknesses in the defendant's testimony that he had been used as a "mule" to transport the contraband into the United States.[78] As the majority in *Tello* pointed out, a judge may limit his commentary to evidence presented at trial that is crucial to the question of guilt.[79] Since the issue of the defendant's guilt in *Tello* depended on the jury's decision concerning the defendant's credibility, the trial judge acted properly in focusing his comments on the defendant's testimony.[80] Moreover, the trial judge's decision to limit the comments to the defendant's mental state comported with the *Quercia* requirement that a judge's commentary be designed to aid the jury in reaching a just decision.[81] The *Tello* majority therefore was correct in holding that the

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fact); United States v. Stephens, 486 F.2d 915, 917 (9th Cir. 1973) (judge's comments must assist jury in factfinding duties and not usurp jury's function); *see supra* note 3 and accompanying text (trial judge cannot use discretionary power of commentary to usurp jury's factfinding duty).

73. *See* United States v. Fischer, 531 F.2d 783, 786 (5th Cir. 1976) (appellate court must determine prejudicial effect of trial judge's commentary by considering remark in context of entire prosecution); *see also Judicial Intervention, supra* note 3, at 378 (listing factors that reviewing courts generally consider in assessing impact of judge's comments on jury).

74. *See supra* notes 51-67 and accompanying text (majority and dissent in *Tello* disagreed on effect of trial judge's comments on jury's deliberations).

75. *See infra* notes 76-82 and accompanying text (*Tello* court correctly determined that trial judge did not prejudice defendant by limiting comments to defendant's testimony).

76. *See* 707 F.2d at 89.

77. *Id.* at 87; *see* Brief for Appellee at 26, United States v. Tello, 707 F.2d 85 (4th Cir. 1983). At one point during deliberations, the jury sent a note to the judge requesting a description of the total contents of the defendant's suitcase. *See* Brief for Appellee at 21, United States v. Tello, 707 F.2d 85 (4th Cir. 1983). The defendant had testified that the suitcase contained gifts he had brought from Peru for friends in the United States. *Id.* at 13. The jury's request indicates they were unable to agree on whether the defendant knew his suitcase contained cocaine.

78. *See* 707 F.2d at 88-89; *supra* note 21 (description of trial judge's commentary in *Tello*).

79. *See* 707 F.2d at 88; United States v. Bernstein, 533 F.2d 775, 795-96 (2d Cir. 1976) (judge's comments were proper since judge merely sought to clarify confusing testimony and help jury understand evidence); Note, *Judicial Intervention in Trials*, 1973 WASH. U.L. Q. 843, 847 (federal trial judge has duty to insure that jury correctly performs factfinding task and should use commentary to assist jury in reaching just verdict).

80. *See supra* notes 75-78 and accompanying text (judge in *Tello* properly performed role as trial arbiter by directing jury's attention to key issue in case).

81. *See* 707 F.2d at 89; Quercia v. United States, 289 U.S. 466, 469-70 (1933); *supra* note 33 and accompanying text (discussion of *Quercia* holding).

trial judge did not commit reversible error by confining his remarks to evidence of the defendant's mental state.[82]

The Fourth Circuit's conclusion that the trial judge did not err by limiting his comments to part of the evidence, however, is not dispositive of whether the comments prejudiced the defendant's right to a fair trial.[83] A defendant is denied a fair trial if the judge's comments usurp the jury's factfinding role by removing an issue of fact from the jury.[84] Judicial usurpation results when a juror's knowledge of a judge's opinions on a factual issue causes the juror to abandon reasonable doubts about the issue's resolution.[85] Because juries accord great weight to the views of the trial judge, courts strictly require that the judge preface his commentary with an instruction that the jury may disregard any inferences of the judge's opinion on the evidence when making their final factual determination.[86] Although the trial judge in *Tello* never directly expressed an opinion on the defendant's credibility, the Fourth Circuit acknowledged that the jury may have inferred the judge's opinion from his commentary.[87] The *Tello* court concluded that the comments did not usurp the juries factfinding task because the jury fully understood that they were the sole arbiters of the defendant's credibility.[88] The particular facts and circumstances of the *Tello* trial, however, indicate that the judge's remarks may

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82. *See* 707 F.2d at 89.

83. *See infra* notes 84-85 and accompanying text (judge's comments may prejudice defendant's right to jury trial by unduly influencing jury's decision).

84. *See, e.g.*, United States v. Jacobo-Gil, 474 F.2d 1213, 1216 (9th Cir. 1973) (judge held to have improperly removed issue of defendant's mental state from jury's consideration when judge remarked that defendant knew he had committed illegal act); United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970) (trial judge must not use commentary to impose own opinions on issues of fact upon jury), *cert. denied*, 400 U.S. 1020 (1971); Bursten v. United States, 395 F.2d 976, 982-83 (5th Cir. 1968) (trial judge's antagonistic and partisan comments prejudiced defendant by influencing jury's resolution of key factual issues); United States v. Chibbaro, 361 F.2d 365, 378 (3d Cir. 1966) (reversal of conviction on ground that trial judge's remark regarding identification of defendant was prejudicial).

85. *See supra* note 3 (discussion of judicial usurpation of jury's factfinding function).

86. *See, e.g.*, United States v. Anton, 597 F.2d 371, 375 (3d Cir. 1979) (if trial judge chooses to comment on evidence, judge must clearly inform jury that they are not bound by comments); United States v. Diaz-Rodriquez, 478 F.2d 1005, 1006 (9th Cir.) (federal judge has wide discretion to offer observations on evidence provided it is clearly demonstrated that jury made final factual determination), *cert. dismissed*, 412 U.S. 964 (1973); United States v. Musgrave, 444 F.2d 755, 762 (5th Cir. 1971) (trial judge commits reversible error if judge comments on evidence without instructing jury that they are not bound by the comments), *appeal after remand*, 483 F.2d 327 (5th Cir.), *cert. denied*, 414 U.S. 1023 (1973). Although a trial judge's comments are proper if the judge instructs the jury that they are not bound by the comments, an instruction may not be sufficient to cure highly prejudicial remarks. *See, e.g.*, United States v. Dopf, 434 F.2d 205, 208 (5th Cir. 1970) (constant and emphatic statements by judge that evidence was ample for conviction deprived jury of factfinding role despite instruction that jury was sole arbiter of fact); Wheatley v. United States, 159 F.2d 599, 602-03 (4th Cir. 1946) (limiting instruction insufficient to cure prejudice when judge gave jury strong impression that judge did not believe defendant's testimony).

87. *See* 707 F.2d at 89 (majority in *Tello* acknowledged that jury may have interpreted judge's comments as judge's opinion on sufficiency of evidence).

88. *See id.*

have undermined the jury's ability to independently assess the truthfulness of the defendant's testimony.[89]

Several factors in *Tello* support the conclusion that the trial judge's comments on the defendant's testimony usurped the jury's task of determining the defendants credibility.[90] The jury's verdict in *Tello* depended on whether the jury believed the defendant's testimony.[91] The trial judge therefore commented on the pivotal issue in the case.[92] Furthermore, the judge commented on the issue of the defendant's credibility to a jury that was deadlocked on the issue's resolution.[93] The fact that the jury returned a guilty verdict shortly after the judge's commentary strongly suggests that the judge's remarks may have caused the jurors to abandon any reasonable doubt regarding the credibility of the defendant's testimony.[94]

Another factor indicating that the trial judge in *Tello* may have usurped the jury's factfinding role is that the judge commented on the defendant's credibility without at the same time instructing the jury that they could disregard the comments when reaching a verdict.[95] Although the Fourth Circuit correctly noted the deficiency in the timing of the judge's instructions to the jury, the *Tello* court nevertheless concluded that the instructions were sufficient to cure any prejudice to the defendant resulting from the judge's comments.[96] An examination of the facts in *Tello*, however, indicates the deficiency in the timing of the instructions was prejudicial to the defendant.[97] In determining whether limiting instructions sufficiently preserved a jury's factfinding role, reviewing courts consider the amount of time that elapsed between the instruction and the judge's commentary on the evidence.[98] The effectiveness of the instruc-

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89. *See* notes 91-104 and accompanying text (judge's commentary to jury in *Tello* may have interfered with jury's ability to independently determine defendant's credibility).

90. *See infra* notes 91-104 and accompanying text (discussion of factors indicating that judge in *Tello* usurped jury's factfinding role).

91. *See supra* notes 40-41 and accompanying text (jury's decision in *Tello* depended on whether jury believed defendant's testimony that he did not know suitcase contained cocaine).

92. *See supra* note 40 (judge in *Tello* commented on only issue remaining for jury consideration since defendant did not contest fact of illegal possession and transportation of contraband).

93. *See* 707 F.2d at 87.

94. *See* Brief for Appellee at 29, United States v. Tello, 707 F.2d 85 (4th Cir. 1983) (jury returned guilty verdict approximately two hours after trial judge's commentary).

95. *See* 707 F.2d at 89; *supra* text accompanying note 56 (trial judge in *Tello* did not instruct jury after commentary that jury could disregard judge's comments on evidence).

96. *See* 707 F.2d at 89-91; *supra* notes 56-59 and accompanying text (Fourth Circuit in *Tello* determined that trial judge's instructions to jury were sufficient to preserve jury's factfinding role).

97. *See infra* text accompanying notes 100-104 (facts in *Tello* strongly suggest that instructions to jury were not sufficient to cure prejudice to defendant resulting from judge's comments).

98. *See, e.g.*, United States v. Natale, 526 F.2d 1160, 1169 (2d Cir. 1975) (trial judge must give limiting instructions simultaneously with comments on evidence to protect jury's independent right to evaluate entire case), *cert. denied*, 425 U.S. 950 (1976); United States v. Gaines, 450 F.2d 186, 190-91 (3d Cir. 1971) (defendant not prejudiced by judge's remarks on evidence when judge immediately instructed jury after commentary that jury was sole determiner of fact), *cert. denied*, 405 U.S. 927 (1972); Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950)

tion in limiting the impact of the judge's commentary on the jury's decision decreases as the time between the instruction and the comments increases.[99] In *Tello*, the Fourth Circuit found that although an entire day had passed since the trial judge gave the instructions to the jury, only three and one-half hours of jury time had elapsed between the instructions and the judge's commentary.[100] The *Tello* court therefore determined that the jury still fully understood that they could disregard the trial judge's comments when reaching a verdict.[101] The Fourth Circuit's conclusion is erroneous, however, because the court should have considered the actual passage of time between the judge's comments on the defendant's credibility and the limiting instructions to the jury.[102] Since more than a day had elapsed between the judge's commentary and the limiting instruction, the comments probably had a substantial impact on the jury's deliberations in *Tello*. Additionally, the jury may have inferred the trial judge's opinion on the credibility of the defendant's testimony from the tone of the judge's commentary.[103] The judge's comments therefore may have prejudiced the defendant by impinging on the jury's ability to independently evaluate the defendant's credibility.[104] Because of the existence of numerous factors indicating that the trial judge in *Tello* usurped the jury's factfinding task, the Fourth Circuit may have erred in failing to reverse the defendant's conviction and remand the case for a new trial.

The Fourth Circuit's decision in *Tello* reflects the uncertainty of appellate review of judicial commentary on evidence presented at trial.[105] A trial judge's power of commentary is certainly a valuable and perhaps an indispensible tool in the administration of justice.[106] Nevertheless, a judge must always temper his comments with the proper degree of restraint necessary to safeguard a defendant's constitutional right to a trial by jury.[107] Unfortunately, the power

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(judge must give limiting instruction in sufficient proximity to comments to ensure that jury clearly understands their factfinding role).

99. *See* Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950) (limiting instructions given long before judge's commentary on evidence do not adequately protect jury's factfinding function).

100. *See* 707 F.2d at 89-90.

101. *See id.*

102. *See supra* notes 98-99 and accompanying text (effectiveness of limiting instruction in preserving jury's factfinding role depends on lapse of time between instruction and judge's commentary on evidence).

103. *See* 707 F.2d at 89; *supra* text accompanying note 54 (Fourth Circuit in *Tello* acknowledged that jury may have inferred judge's opinion on evidence from commentary).

104. *See supra* notes 90-103 and accompanying text (judge's commentary in *Tello* deprived defendant of right to jury trial by usurping jury's task of determining defendant's credibility).

105. *See infra* notes 106-112 and accompanying text (lack of specific limitations on trial judge's power of commentary hinders judicial review of cases of alleged impropriety).

106. *See* Note, United States v. Anton: *The Right of a Federal Judge to Comment to the Jury*, 9 CAP. U.L. REV. 161, 173 (1979) (federal judge's power to comment on evidence has proved important to the administration of justice) [hereinafter cited as *Judge's Right to Commentary*].

107. *See* United States v. Anton, 597 F.2d 371, 375-76 (3d Cir. 1979) (trial judge must exercise restraint in using power of commentary to protect defendant's constitutional right to fair trial).

of commentary exists in the federal system without the benefit of specific rules of limitation.[108] The trial judge therefore has no definite guidelines by which to measure the propriety of his comments on the evidence in a particular instance. The broad standard set out by the Supreme Court in *Quercia*[109] has the advantage of flexibility,[110] but also the corresponding disadvantage of imprecision. Moreover, although a federal judge may never directly express his views on the guilt of the accused,[111] no such absolute prohibition exists when a judge's commentary on the ultimate issue in the case amounts to an expression of opinion on the defendant's culpability.[112] The lack of a definite rule governing situations in which the trial judge indirectly directs a verdict by commenting on defense testimony gives rise to the kind of post-hoc rationalization evident in *Tello*. Until Congress or the Supreme Court sets more specific limitations on a federal judge's power of commentary, appellate courts and practitioners will continue to face uncertainty in cases of alleged judicial misconduct.

In *United States v. Tello*, the Fourth Circuit examined the propriety of a trial judge's comments to a deadlocked jury concerning crucial defense testimony.[113] Applying the general standard enunciated by the Supreme Court in *Quercia*, the Fourth Circuit held that the trial judge did not invade the jury's exclusive province of determining all issues of fact.[114] The *Tello* court, however, erred in reasoning that the trial judge's deficient limiting instructions were adequate to mitigate any prejudice to the defendant's right to a fair trial.[115] The judge's commentary in *Tello* probably impaired the jury's

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108. *See Judges Right of Commentary, supra* note 106, at 173 (no definite rules exist to distinguish between objectionable and fair commentary on evidence).

109. *See* 289 U.S. at 469-70; *supra* notes 34-37 and accompanying text (discussion of *Quercia* holding).

110. *See* 707 F.2d at 88 (most courts apply broad *Quercia* standard because standard is adaptable to circumstances of any trial).

111. *See supra* note 5 (trial judge commits reversible error by expressing opinion on defendant's guilt).

112. *Cf.* 1 WEINSTEIN'S EVIDENCE, *supra* note 1, ¶ 107[03], at 39 (lack of definite restrictions on judge's privilege to express opinions on evidence enables appellate courts to uphold jury verdict when judge discloses views indirectly). A trial judge may disclose his opinions on the merits of a case in a variety of subtle ways. *See generally* Note, *Judge's Non-Verbal Behavior In Jury Trials: A Threat To Judicial Impartiality*, 61 VA. L. REV. 1266, 1270-75 (1975) (discussing various ways in which judges nonverbally convey views on evidence to jury). For example, changes in the tone of voice, facial expression, or the use of gestures can convey to a jury a judge's views on the weight of the evidence or the credibility of a witness' testimony. *See* Conner, *The Trial Judge, His Facial Expression, Gestures, and General Demeanor - Their Effect on the Administration of Justice*, 1965 TRIAL LAW. GUIDE 251, ____; United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982) (judge must be careful never to convey views on defendant's guilt through demeanor), *cert. denied*, 51 U.S.L.W. 3883 (U.S. June 13, 1983) (No. 82-1464).

113. *See* 707 F.2d at 88-90.

114. *See supra* notes 27-60 and accompanying text (discussing Fourth Circuit's decision in *Tello*).

115. *See supra* notes 95-102 and accompanying text (Fourth Circuit incorrectly determined that limiting instruction given day before commentary was sufficient to cure possible prejudice from judge's comments on evidence).