ly offensive" speech. It does not. Rather, Board Policy 504.13-R seeks to "ensure a safe, affirming, and healthy school environment" where every student, including those of all gender identities, "can learn effectively." The District may have used language that is insufficiently tailored to its effort to achieve this goal. But the goal itself is not only appropriately inclusive and well within the scope of the District's educational mission. See, e.g., Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 528 (3d Cir. 2018) cert. denied sub nom. Doe v. Boyertown Area Sch. Dist., —— U.S. ——, 139 S. Ct. 2636, 204 L.Ed.2d 300 (2019) ("When transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening."); Iowa Code § 280.28(2)(b)(2) (banning harassment and bullying that creates an objectively hostile school environment that has a substantially detrimental effect on the student's physical or mental health). It is mandated by law.

UNITED STATES of America, Plaintiff - Appellee

v.

Warren Lee MACKEY, Defendant - Appellant

No. 22-1590

United States Court of Appeals, Eighth Circuit.

Submitted: November 16, 2022

Filed: October 2, 2023

Background: Defendant was convicted in the United States District Court for the District of Nebraska, Joseph F. Bataillon, Senior District Judge, of aggravated sexual abuse of a minor and abusive sexual contact. Defendant appealed.

Holdings: The Court of Appeals, Kelly, Circuit Judge, held that:

(1) testimony explaining the origins of investigation into sexual abuse was properly admitted;

(2) testimony relating to minor victim and her mother's reactions to sexual abuse was improperly admitted;

(3) admission of improper testimony was cumulative of other admissible testimony, and thus was not reversible error;

(4) defendant failed to demonstrate prejudice resulting from government's failure to give notice of FBI agent's expert testimony; and

(5) remand was required for the district court to make findings resolving defendant's objections to restitution award.

Affirmed.

1. Criminal Law ⚿1153.1

The Court of Appeals reviews a district court's evidentiary rulings for clear abuse of discretion.

2. Criminal Law ⚿1153.1, 1168(1)

Reversal is warranted only if a district court's evidentiary rulings constitute a clear and prejudicial abuse of discretion or when the ruling affected substantial rights or had more than a slight influence on the verdict.

3. Criminal Law ⚿419(3)

Testimony explaining the origins of investigation into sexual abuse, elicited from minor victim's friends, victim's school counselor, and victim's principal, was properly admitted in trial for aggravated sexual abuse of a minor and abusive sexual con-

tact, where witnesses testified about how and when they learned about the alleged abuse and the steps that they took in response, and none of the witnesses described any details about the abuse itself. 18 U.S.C.A. §§ 1153, 2241(c), 2244(a)(5).

4. Witnesses ⚿1467(4)

Testimony relating to minor victim and her mother's reactions to sexual abuse, elicited from victim's friends, school counselor, and principal worked only to bolster victim's credibility and rebut an allegation of recent fabrication, and thus such testimony was improperly admitted in trial for aggravated sexual abuse of a minor and abusive sexual contact, where friend testified that victim told her about the alleged abuse because "it was bothering her and she needed somebody to talk to," counselor testified that victim was "tearful" and "broke down completely," counselor described mother's demeanor, and principal testified that victim "crying and shaking" in principal's office. 18 U.S.C.A. §§ 1153, 2241(c), 2244(a)(5).

5. Criminal Law ⚿1169.2(6)

Admission of improper testimony regarding minor victim and her mother's reactions to sexual abuse, elicited from victim's friends, school counselor, and principal, was cumulative of other admissible testimony, and thus had little or no influence on the verdict, and thus was not reversible error, in trial for aggravated sexual abuse of a minor and abusive sexual contact; the improper testimony merely repeated what victim and mother had told the jury, in that victim herself had testified that she was "upset" and "crying" when in the school counselor's office, and that she had engaged in self-harm as a means of coping, and mother herself had testified that she "started crying" when she learned of the abuse. 18 U.S.C.A. §§ 1153, 2241(c), 2244(a)(5).

6. Criminal Law ⚿1153.12(3)

The Court of Appeals reviews a district court's decision to admit expert testimony for abuse of discretion.

7. Criminal Law ⚿1166(10.10)

To show reversible error from a violation of the notice requirements of the rule governing pretrial disclosure of expert testimony, a defendant must demonstrate prejudice resulting from the district court's decision to admit the contested testimony. Fed. R. Crim. P. 16(a)(1)(G).

8. Criminal Law ⚿1166(10.10)

Defendant's conclusory argument that, given proper notice, he would likely have been able to exclude FBI agent's allegedly expert testimony regarding female anatomy was insufficient to demonstrate prejudice resulting from government's failure to offer notice of such testimony, in trial for aggravated sexual abuse of a minor and abusive sexual contact, despite defendant's assertion that being an FBI agent who investigated sexual assault cases did not make agent an expert in the field of female anatomy; defendant did not engage with agent's professional experience by cross-examining him about his qualifications, credentials, his experience investigating over 100 child sexual abuse cases, or his anatomical knowledge from applying statutes that took into account how a victim was touched. 18 U.S.C.A. §§ 1153, 2241(c), 2244(a)(5); Fed. R. Crim. P. 16(a)(1)(G).

9. Criminal Law ⚿1166(10.10)

Defendant failed to show how earlier notice of FBI agent's alleged expert testimony regarding female anatomy would have enabled him to present a more effective defense, and thus defendant failed to show that he was prejudiced by admission of such testimony without proper notice,

and thus admission of such testimony was not reversible error, in trial for aggravated sexual abuse of a minor and abusive sexual contact; defendant never cross-examined agent as to his definition of "vulva," or requested a continuance to respond to agent's testimony, there was no suggestion that defendant would have presented evidence of a different definition, and defendant never asserted, at trial or on appeal, that agent's description of the vulva was inaccurate. 18 U.S.C.A. §§ 1153, 2241(c), 2244(a)(5); Fed. R. Crim. P. 16(a)(1)(G).

10. Criminal Law ⚿1181.5(8)

Remand was required for the district court to make findings resolving defendant's objections to restitution award of $2,727.80, reflecting wages lost by mother of sexual abuse victim as result of taking victim to mental health therapy sessions, to enable the Court of Appeals to review whether the government met its burden of establishing such restitution by a preponderance of the evidence, on appeal from defendant's conviction for aggravated sexual abuse of a minor and abusive sexual contact, where defendant had argued that neither victim nor mother was a victim for purposes of restitution, and that underlying documentation was insufficient to support the amount requested, but the district court had found, without a hearing, that the requested restitution was unrebutted by any evidence. 18 U.S.C.A. §§ 1153, 2241(c), 2244(a)(5).

11. Criminal Law ⚿1156.9

The Court of Appeals reviews a district court's decision to award restitution for abuse of discretion.

12. Criminal Law ⚿1158.34

The Court of Appeals reviews for clear error any fact findings as to the amount of restitution.

13. Sentencing and Punishment ⚿2185

The burden lies with the government to demonstrate the amount of the loss sustained by a victim as a result of the offense, for purposes of determining a restitution award. 18 U.S.C.A. § 3664(e).

Appeal from United States District Court for the District of Nebraska - Omaha

Counsel who presented argument on behalf of the appellant and appeared on the brief was Richard Haile McWilliams, AFPD, of Omaha, NE.

Counsel who presented argument on behalf of the appellee and appeared on the brief was Lecia E. Wright, AUSA, of Omaha, NE.

Before BENTON, KELLY, and ERICKSON, Circuit Judges.

KELLY, Circuit Judge.

A jury convicted Warren Mackey of one count of aggravated sexual abuse of a child under the age of 12 and one count of abusive sexual contact. He appeals, challenging two evidentiary rulings at trial and the restitution order.

I.

In early August 2019, E.M., then 11 years old, was staying with Mackey, her father, at his house in Niobrara, Nebraska. On August 4, they went out to eat, stopping at several bars over the course of the evening. By the time they returned home at about 11:30 p.m., E.M believed that Mackey was intoxicated.

Once home, they both went to Mackey's room, where they ate, talked, and watched television, before falling asleep on Mackey's bed. At some point, E.M. woke up, because she felt Mackey behind her, "kind of spooning [her]," with his "hand grasping

[her] breast," "[k]ind of like squeezing" it. E.M. "thought it was weird." While E.M. was still awake, Mackey went to use the bathroom, then he got back in bed, and she "went back to sleep." E.M. woke up again when she felt Mackey's "hand ... sliding down [her] pants." Mackey "continued to put his hand in [her] pants ... and into [her] underwear." At first E.M. "just laid there" because she was "shocked and scared. But after a few moments, [she] grabbed his hand, pulled it out, and ran to [her] room." Mackey did not say or do anything in response.

The following morning at breakfast, Mackey asked E.M., "Did I touch you last night?" E.M. told him, "[y]es." Mackey then instructed E.M. not to tell her mother. E.M. and Mackey did not speak about the incident again, and E.M. did not tell her mother or her siblings what happened.

In September 2019, E.M. told her friends K.K. and M.P. about the incident with her father. K.K. then told the school counselor, Kayla Baker, who called E.M. to her office a day or so later. At that point, E.M. "came out with everything." Baker then contacted the school's principal, Angie Guenther, and contacted E.M.'s mother, who came to the office to meet with E.M., Baker, and Principal Guenther. Principal Guenther then contacted FBI Agent Jeffery Howard, who arranged for E.M. to be interviewed by a forensic examiner at the Child Advocacy Center. Agent Howard also interviewed Mackey. When Agent Howard told Mackey what E.M. had alleged, Mackey said he did not remember what happened that night because he was sleeping, although he did have a dream about grabbing a breast and rubbing the outside of someone's leg. He admitted that he asked E.M. the following morning, "Did I touch you?"

Mackey was indicted on one count of aggravated sexual abuse of a minor, in violation of 18 U.S.C. §§ 2241(c) and 1153 (Count 1), and one count of abusive sexual contact, in violation of 18 U.S.C. §§ 2244(a)(5) and 1153 (Count 2). He pleaded not guilty. After a three-day trial, a jury found Mackey guilty on both counts. The district court imposed a 360 month sentence on Count 1 and a concurrent 120 month sentence on Count 2, concurrent 5-year terms of supervised release, and $2,727.80 in restitution. Mackey appeals.

II.

[1, 2] First, Mackey argues that the district court erred when it allowed K.K., M.P., Baker, and Principal Guenther to testify. "We review the district court's evidentiary rulings for clear abuse of discretion." United States v. Williams, 41 F.4th 979, 984 (8th Cir. 2022) (quoting United States v. Pirani, 406 F.3d 543, 555 (8th Cir. 2005) (en banc)). "Reversal is warranted only if the district court's evidentiary rulings constitute a clear and prejudicial abuse of discretion or when the ruling affected substantial rights or had more than a slight influence on the verdict." United States v. Oldrock, 867 F.3d 934, 938 (8th Cir. 2017) (cleaned up).

[3] To the extent the government offered the testimony of these witnesses to explain "the origins of the investigation," the evidence was properly admitted. See United States v. Earth, 984 F.3d 1289, 1294 (8th Cir. 2021); United States v. Running Horse, 175 F.3d 635, 638 (8th Cir. 1999) ("Preliminary information concerning the origin of an investigation, admitted only for that purpose, is [relevant and admissible]." (citing United States v. Cruz, 993 F.2d 164 (8th Cir. 1993))). These four witnesses testified about how and when they learned about the incident between E.M. and Mackey and the steps they took in response. None of these witnesses de-

scribed any details about the incident itself.

[4] However, the testimony elicited from these witnesses went beyond explaining "the origins" of the investigation. K.K., for example, also testified that E.M. told her about the incident because "it was bothering her and she needed somebody to talk to." She also explained that she went to Baker "[b]ecause it was the right thing to do." When Baker testified, she described E.M. as "tearful" and said E.M. "broke down pretty quickly." Baker also told the jury that she learned E.M. was self-harming, which is what prompted her to call E.M. into her office. Principal Guenther, too, testified that E.M. was "crying and shaking" when she was in her office. Baker also described the demeanor of E.M.'s mother. This additional testimony said nothing about how the investigation got started. It worked only to bolster E.M.'s credibility and to help rebut an allegation of recent fabrication.

[5] Nevertheless, the additional testimony was cumulative of other admissible testimony. See United States v. DeMarce, 564 F.3d 989, 997 (8th Cir. 2009). E.M. herself testified that she was "upset" and "crying" when she was in Baker's office, and she said she engaged in self-harm as a means of coping. E.M.'s mother herself testified that she "started crying" when she learned what happened. We have recognized that it is possible that an "extra helping of evidence can be so prejudicial as to warrant a new trial." DeMarce, 564 F.3d at 998 (quoting United States v. Bercier, 506 F.3d 625, 633 (8th Cir. 2007)). But we do not find such prejudice here. Because the improper testimony repeated what E.M. and her mother themselves told the jury, we conclude that "it had little or no influence on the verdict," see United States v. McPike, 512 F.3d 1052, 1055 (8th Cir. 2008), and it is not grounds for reversal.

III.

[6] Next, Mackey argues that the district court erred in allowing Agent Howard to offer expert testimony about the female anatomy, because the government did not provide proper notice as required by Federal Rule of Criminal Procedure 16(a)(1)(G). "We review the court's decision to admit expert testimony for abuse of discretion." United States v. Kenyon, 481 F.3d 1054, 1061 (8th Cir. 2007).

Count I of the indictment charged Mackey with aggravated sexual abuse, specifically, that he engaged in a sexual act with E.M. by "digitally penetrat[ing] [her] vulva with his finger." At trial, E.M. testified about Mackey's conduct, stating that his hand was "touching" the "top" of her "vagina," which she clarified was her "clitoris." She also said that Mackey was "moving" his finger around her clitoris. At issue here is Agent Howard's later, more detailed testimony about female genitalia. Specifically, he testified that, "The vulva is the genital area of the female consisting of the outer portion which is the labia ... majora, the inside lips of the labia minora, the vaginal cavity or entrance, the urethra, and the clitoris." Mackey lodged a timely objection, arguing that a proper foundation had not been, and could not be, laid for Agent Howard to discuss female anatomy.

[7] We assume, without deciding, that Mackey is right that Agent Howard's testimony about female anatomy qualified as expert testimony. And we observe that there is no dispute that the government failed to offer notice and a summary of Agent Howard's testimony as required by Rule 16(a)(1)(G). But to show reversible error from a violation of the notice requirements of Rule 16(a)(1)(G), as Mackey recognizes, he "must demonstrate preju-

dice resulting from the district court's decision to admit the contested testimony." United States v. Camacho, 555 F.3d 695, 704 (8th Cir. 2009) (quoting Kenyon, 481 F.3d at 1062).

[8] Mackey's argument on this point is brief. But he says that given proper notice, he would have sought to exclude the disputed testimony, asserting there was a "substantial probability that this evidence would not have come in." Despite this general assertion, in the context of the facts of this case and the testimony given by Agent Howard, Mackey has failed to sufficiently demonstrate prejudice caused by the lack of notice.

In support of his contention that the contested testimony would have been excluded, Mackey says that "being an FBI agent who investigated sexual assault cases does not make one an expert in the field of female anatomy." Mackey is correct that every FBI agent does not have the same set of expert credentials or experiences. But Mackey did not cross examine Agent Howard about his professional qualifications, or challenge his potentially relevant credentials or his more than two decades of experience—his participation in over one hundred child sexual abuse cases, how he had to develop a knowledge of female anatomy while investigating sex abuse crimes because federal statutes differ in their applicability depending on where and how a victim was touched, and his work with rape kits—to show how they might be lacking. See United States v. Anderson, 446 F.3d 870, 875 (8th Cir. 2006) ("Rule 702 does not rank academic training over demonstrated practical experience."). Mackey's conclusory argument, which fails to engage with this particular witness' professional experience, is insufficient to show how, with earlier notice, he could have been able to force this testimony's exclusion. See Kenyon, 481 F.3d at 1062.

[9] Similarly, Mackey never cross examined Agent Howard's definition of vulva, nor requested a continuance to respond to the testimony. Mackey does not explain how he would have responded differently had he received timely notice because he has not asserted, at trial or on appeal, that Agent Howard's description of the vulva was inaccurate. See United States v. Waln, 916 F.3d 1113, 1115 (8th Cir. 2019) (finding no reversable error where district court admitted FBI agent's testimony despite lack of Rule 16(a)(1)(G) notice, because defendant had not overcome "high hurdle" of proving substantial prejudice where the substance of the agent's testimony was not disputed by defendant and indeed was beyond dispute as a factual matter). There is no suggestion that Mackey would have presented evidence of a definition of vulva that was different than Agent Howard's definition—that is, that the clitoris is not part of the vulva—if only he had been given proper notice under Rule 16(a). See id. at 1116 (observing that when a defendant moves to exclude evidence due to a Rule 16(a)(1)(G) violation, "prejudice ... requires more than that the evidence could have been excluded[; i]t requires that the error 'was prejudicial to the substantial rights of the defendant.' " (quoting United States v. Pelton, 578 F.2d 701, 707 (8th Cir. 1978))). Because Mackey has not shown how "if had he received earlier notice of this evidence, then he would have been able to ... present a more effective defense[, he] ... has not established prejudice, and the admission of the testimony was not reversible error." Kenyon, 481 F.3d at 1062.

IV.

Finally, Mackey argues that the district court erred by awarding restitution without resolving his objections. After the incident giving rise to Mackey's prosecution,

E.M. attended mental health therapy sessions for more than a year. At sentencing, the government requested restitution in the amount of $2,727.80, which reflected the wages E.M.'s mother lost by taking E.M. to her therapy sessions. Mackey objected. The district court deferred ruling on the matter of restitution to allow for supplemental briefing.

[10] In its supplemental brief, the government argued that restitution for lost wages was mandatory under 18 U.S.C. § 2248, and that the amount was supported by documentation submitted in advance of sentencing. The government also requested a hearing should Mackey continue to dispute the restitution amount. In response, Mackey argued that neither E.M. nor her mother was a "victim" for purposes of restitution, and that the underlying documentation cited in the presentence report was insufficient to support the amount requested. Mackey also asked for a hearing.

The district court did not hold a hearing. Instead, it entered an order that stated that it had "reviewed the presentence report concerning restitution" and the parties' briefs, and found that "the government's requested restitution is authorized by law and is unrebutted by any evidence." The court awarded E.M. $2,727.80 for her mother's lost wages.

[11–13] "We review the district court's decision to award restitution for abuse of discretion, but any fact findings as to the amount are reviewed for clear error." United States v. Carpenter, 841 F.3d 1057, 1060 (8th Cir. 2016) (quoting United States v. Chalupnik, 514 F.3d 748, 752 (8th Cir. 2008)). Here, although Mackey objected to the relevant paragraphs in the presentence report, the district court did not resolve those objections prior to ordering restitution. See United States v. Young, 272 F.3d 1052, 1056 (8th Cir. 2001) (stating that a district court must resolve any disputes regarding "the amount or type of restitution by the preponderance of the evidence"). The burden lies with the government to "demonstrate[e] the amount of the loss sustained by a victim as a result of the offense." Id. (citing 18 U.S.C. § 3664(e)). Without any findings from the district court to resolve Mackey's objections, we are unable to review whether the government met its burden of establishing restitution by a preponderance of the evidence.

V.

We affirm Mackey's conviction. We remand to the district court for further proceedings to resolve the parties' disputes about the amount, if any, of restitution owing. We affirm the sentence in all other respects.

UNITED STATES of America, Plaintiff - Appellee

v.

Paul Peter SWEHLA, Defendant - Appellant

No. 22-3443

United States Court of Appeals, Eighth Circuit.

Submitted: June 12, 2023

Filed: October 2, 2023

Background: The United States District Court for the Northern District of Iowa, Linda R. Reade, Senior District Judge, revoked defendant's supervised release, and defendant appealed.

court must find "that the plaintiff's action was frivolous, unreasonable, or without foundation" to award a defendant fees under the ADA (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978)), *with* Fed. R. Civ. P. 11 (permitting sanctions when a party's legal arguments are frivolous or its factual contentions lack evidentiary support).

Because we reverse the district court's award of attorneys' fees for lack of jurisdiction, we do not decide whether Mr. Fernandez's claim was frivolous.

REVERSED and **VACATED**.

UNITED STATES of America, Plaintiff - Appellee,

v.

Jeffery Arch JONES, Defendant - Appellant.

No. 21-5079

United States Court of Appeals, Tenth Circuit.

FILED June 26, 2023

Background: Defendant was convicted in the United States District Court for the Northern District of Oklahoma, Gregory K. Frizzell, J., of aggravated sexual abuse and abusive sexual contact, and he appealed.

Holdings: The Court of Appeals, Ebel, Circuit Judge, held that:

(1) district court committed plain error when it permitted victims' mother to vouch for their truthfulness, and

(2) it was not clearly erroneous for district court to permit FBI forensic interviewer's testimony.

Reversed and remanded.

1. Criminal Law ⚿1030(1)

Under plain error standard, Court of Appeals will reverse decision below only when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects fairness, integrity, or public reputation of judicial proceedings.

2. Criminal Law ⚿1036.6

District court committed plain error in child sex abuse prosecution when it permitted victims' mother to vouch for victims' truthfulness on direct examination, even though there was no binding caselaw establishing that witnesses could not testify about another witness's truthfulness on specific occasion, where victims had not yet testified, defense counsel did not attack their character for truthfulness during opening statements, mother spoke directly to whether victims were truthful on specific prior occasions, rather than to their character for truthfulness, rules of evidence plainly barred mother's testimony, and, since victims were only witnesses of defendant's alleged crime, there was reasonable probability that mother's improper vouching testimony affected outcome. Fed. R. Evid. 608(a).

3. Criminal Law ⚿1030(1)

In general, error is "plain" only when there is Supreme Court or controlling circuit authority resolving issue, but even without controlling caselaw, error can be plain when plain language of rule or statute clearly settles question.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⚿449.1

FBI forensic interviewer's testimony in child sexual abuse prosecution that victim was "forthcoming" in her forensic interview and "appropriate with her knowledge" did not speak to victim's truthfulness, and thus it was not clearly erroneous for district court to permit interviewer's testimony; it was likely that interviewer meant that victim disclosed information with little to no resistance—not that she was being honest. Fed. R. Evid. 702.

5. Criminal Law ⚿1030(1)

Requirement of plain error analysis that error must have affected appellant's substantial rights requires reasonable probability that, but for error, proceeding's outcome would have been different.

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:21-CR-00023-GKF-1)

Dean Sanderford, Assistant Federal Public Defender, (Virginia L. Grady, Federal Public Defender, also on the briefs), Office of the Federal Public Defender, Denver, Colorado, appearing for Defendant-Appellant.

Leena Alam, Assistant United States Attorney (Leah D. Paisner, Assistant United States Attorney, and Clinton J. Johnson, United States Attorney, on the brief), Northern District of Oklahoma, Tulsa, Oklahoma, appearing for Plaintiff-Appellee.

Before MORITZ, SEYMOUR, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Jeffery Jones was convicted of sexually abusing his stepdaughters, K.B. and C.B., which resulted in three concurrent life sentences. On appeal, he challenges the testimony of two witnesses. The first witness was Crystal Jones,[1] the mother of K.B. and C.B., who repeatedly testified as to her belief in the truthfulness of her daughters' accusations about Mr. Jones's actions, which she herself did not directly observe. The second government witness was an FBI forensic interviewer, Janetta Michaels, who testified that C.B. was "forthcoming" in her forensic interview and "appropriate with her knowledge."

Before this Court, Mr. Jones argues that the district court plainly erred by allowing both witnesses' testimony about the credibility of K.B. and C.B. Mr. Jones's central argument is that both witnesses impermissibly vouched for the credibility of K.B. and C.B. in violation of the Federal Rules of Evidence 608 and 702. Because Mr. Jones did not object for these reasons below, we review for plain error. We reject Mr. Jones's contention that the district court plainly erred by admitting Ms. Michaels's challenged testimony under Rule 702, but agree that the district court plainly erred in admitting Crystal's challenged testimony under Rule 608. Exercising jurisdiction under 28 U.S.C § 1291, we REVERSE and REMAND with instructions to VACATE Jeffery Jones's conviction and sentence.

I. BACKGROUND

Mr. Jones and Crystal were married from 2014 to 2017, during which time they lived with K.B and C.B. in Broken Arrow, Oklahoma. When Mr. Jones married Crys-

1. To avoid confusion between the names Mr. Jones and Ms. Jones, we will refer to Ms. Jones as "Crystal" and to Mr. Jones as either "the Defendant" or "Mr. Jones," as the parties did in their briefing.

tal, K.B. was six years old and C.B. was ten years old. In early 2017, when K.B. was eight, she disclosed to her teacher that Mr. Jones had been sexually abusing her. K.B.'s teacher immediately brought the matter to the school counselor. This led to a criminal investigation initiated by the Broken Arrow Police Department. As part of this investigation, forensic interviews were scheduled with both K.B. and C.B. During her interview, K.B. stated that Mr. Jones had, on multiple occasions, engaged in sexual conduct with her—including by trying to force her to touch his genitals and by attempting to force his genitals into her mouth. At C.B.'s interview, she said that Mr. Jones had repeatedly bear-hugged her and fondled her breasts above her clothes.

Mr. Jones was subsequently arrested and convicted of four counts of sexual abuse of a child under twelve by a state jury. These convictions were vacated in 2021 due to the Supreme Court's ruling in McGirt v. Oklahoma, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), which deprived the state of jurisdiction over the matter. After these convictions were vacated, a federal grand jury indicted Mr. Jones on one count of aggravated sexual abuse (in violation of 18 U.S.C. § 2241(c)) and one count of abusive sexual contact (in violation of 18 U.S.C. § 2244(a)(5)).

Following this indictment, C.B. (sixteen years old at the time) was interviewed for a second time by a different FBI forensic interviewer (Ms. Michaels). In this interview, C.B. provided more details about the abuse than she had previously disclosed at her former interview, including that Mr. Jones had touched her breasts and genitals underneath her clothes. When asked why she did not reveal this at her earlier interview, C.B. stated that she did not feel comfortable before, but later felt more comfortable talking about the abuse.

The case eventually proceeded to trial, at which the jury heard from nine witnesses: C.B., K.B., K.B.'s teacher, K.B.'s counselor, a Broken Arrow police officer, an expert pediatrician, Crystal, Ms. Michaels, and the defendant Mr. Jones.

Crystal was the first to testify, and she spoke to a range of topics. Her relevant testimony for the purposes of this appeal pertained to her belief that K.B. and C.B. were telling the truth about the allegations against Mr. Jones. There are five specific portions of this testimony that Mr. Jones challenges on appeal:

- After Crystal testified that she used to trust Mr. Jones, she was asked whether she still trusts him, to which she replied that she did not.
- Crystal testified that she was called to the school after K.B. told her teacher about Mr. Jones, which prompted the Government to ask—without defense objection—whether she believed her daughters. Crystal replied: "Yes. I believed them[.]"
- The Government later asked Crystal, without relevant defense objection, why she believed her daughters, to which she responded "I don't believe they would lie about anything like this. Why would a seven-year-old come to you and tell you someone is touching her[?]"
- Crystal further testified: "I believe they would tell the truth on something like this. They wouldn't lie."
- Finally, after Crystal testified that she used to think her daughters were "protected" when they lived with Mr. Jones, she was asked whether she still believed this, to which she replied that she did not.

R. vol. II, at 60–70.

After Crystal testified, K.B. and C.B. both provided testimony about the inci-

dents they described in their forensic interviews. In addition, K.B.'s teacher and K.B.'s counselor both testified about their discussions with K.B. concerning the abuse and the subsequent investigation. The Broken Arrow officer provided more in-depth details about the investigation. The pediatrician provided information about K.B.'s medical examination. In rebuttal, Mr. Jones testified about his interactions with K.B. and C.B., denying that their accusations were true.

When Ms. Michaels testified, she spoke about C.B.'s second forensic interview. Her testimony began by explaining the purpose of forensic interviews and explained how such interviews are tailored to the age and development of each child. She also explained the various factors that go into a child's willingness to disclose information. For the purposes of this appeal, her relevant testimony came when she was asked about the interview with C.B., at which time she had agreed that C.B. appeared to be "forthcoming with information" and was "appropriate with her knowledge." Id. at 289.

The jury found Mr. Jones guilty on all counts and he was sentenced to three concurrent life sentences. This appeal followed, challenging the court's admission of Crystal's testimony as to the truthfulness of her daughters and Ms. Michaels's testimony as to the forthcoming nature of C.B. during her forensic interview.

II. STANDARD OF REVIEW

[1] Because Mr. Jones did not object to the testimony at issue here on the theory that it constituted improper credibility vouching, he concedes that this Court reviews the decision to permit this testimony for plain error. Under this standard, we will reverse the decision below "only when there is '(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.' " United States v. Archuleta, 865 F.3d 1280, 1290 (10th Cir. 2017) (quoting United States v. Wireman, 849 F.3d 956, 962 (10th Cir. 2017)).

III. DISCUSSION

A. Plain Error

The first issue we address is whether the district court plainly erred by permitting the testimony of Crystal and Ms. Michaels which, according to Mr. Jones, impermissibly vouched for the credibility of K.B. and C.B. Under Rule 608(a) of the Federal Rules of Evidence, a lay witness may only support another witness's credibility "by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character ... after the witness's character for truthfulness has been attacked." FED. R. EVID. 608(a). In contrast, an expert witness can never "vouch for the credibility" of another witness because this would impermissibly "encroach[ ] upon the jury's vital and exclusive function to make credibility determinations" and fail to " 'assist the trier of fact' as required by Rule 702." United States v. Charley, 189 F.3d 1251, 1267 (10th Cir. 1999) (en banc).

Applying these rules, we agree that Crystal impermissibly vouched for K.B. and C.B., and that this error under Fed. R. Evid. 608(a) was plain. But we disagree with Mr. Jones's contention that Ms. Michaels's testimony violated Fed. R. Evid. 702.

1. Crystal's testimony

[2] Crystal's testimony violated Rule 608(a) in two ways. First, because Rule 608(a) only permits testimony about a witness's character for truthfulness after that

witness's character for truthfulness has been attacked, it is critical here that neither K.B.'s nor C.B.'s character for truthfulness had been attacked when Crystal testified. Indeed, Crystal was the very first witness, and her testimony about K.B.'s and C.B.'s truthfulness came in on direct examination, so no other witness even had a chance to attack the girls' character for truthfulness. Nor did defense counsel attack the girls' character for truthfulness during opening statements. Because the girls' character for truthfulness had never been attacked, the door had never been opened for testimony vouching for their truthfulness, and thus Crystal's testimony was improper. And since our caselaw has clearly established that this type of testimony is impermissible before a witness's character for truthfulness has been attacked, this error was plain. See United States v. Martinez, 923 F.3d 806, 819 (10th Cir. 2019) (concluding that testimony was impermissible under Rule 608(a) because defendant's character for truthfulness had not been attacked).

Even if the door had been opened by an earlier challenge to the credibility of K.B. and C.B. (which we have ruled did not occur), Crystal's vouching testimony was impermissible under Rule 608(a) because she spoke directly to whether K.B. and C.B. were truthful on specific prior occasions, rather than to their character for truthfulness. In Charley, we noted that many courts have held that Rule 608(a) prohibits testimony about truthfulness on a specific occasion. 189 F.3d at 1267 n.21. This is because Rule 608 says that witnesses may only speak to another witness's "character for truthfulness or untruthfulness." FED. R. EVID. 608(a) (emphasis added). Because of this limitation, the testifying witness cannot speak to whether "another witness was truthful or not on a specific occasion." United States v. Schmitz, 634 F.3d 1247, 1268 (11th Cir. 2011) (emphasis added); see also 1 MCCORMICK ON EVID. § 43 (8th ed.) (" . . . the opinion must relate to the prior witness's character trait for untruthfulness, not the question of whether the witness's specific trial testimony was truthful.").

Crystal's testimony did just that. For example, Crystal testified that she "believed" K.B. and C.B when she was informed of their allegations at the school, thereby implying that the girls were truthful on this occasion. R. vol. II, at 61. She also testified that she believed their allegations because they wouldn't "lie about anything like this," further bolstering their truthfulness on that specific occasion. Id. at 69. This sort of testimony spoke to K.B. and C.B.'s truthfulness on "specific occasion[s]" specifically relating to Mr. Jones's charged conduct and therefore it violated Rule 608(a)'s requirement that testimony only speak to a "general character" for truthfulness. See Schmitz, 634 F.3d at 1268.

[3] This error was also plain. In general, an error is plain only when there is Supreme Court or controlling circuit authority resolving the issue. United States v. Marshall, 307 F.3d 1267, 1270 (10th Cir. 2002). This general principle, however, is most applicable "where the explicit language of a statute or rule does not specifically resolve an issue[.]" United States v. Edgar, 348 F.3d 867, 871 (10th Cir. 2003) (quoting United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003)). For this reason, we have found plain error when the Federal Rules of Criminal Procedure plainly rendered the decision below erroneous, even when there was no binding case on point. Id. Similarly, we have made clear that an error can be plain when statutory language is sufficiently clear, even when there is "no case exactly on point." United States v. Courtney, 816

F.3d 681, 686 (10th Cir. 2016). Thus, even without controlling caselaw, an error can be plain when the plain language of a rule or statute clearly settles the question.

In the case before us, although there is no binding caselaw which establishes that witnesses may not testify about another witness's truthfulness on a specific occasion, Rule 608(a) clearly speaks to the error below. As explained, Rule 608(a) plainly states that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." There is no dispute that K.B.'s and C.B.'s character for truthfulness had not yet been attacked by the defense when Crystal testified. And, as further explained above, Rule 608(a) says that testimony may only vouch for a witness's "character for truthfulness," thereby plainly precluding the use of testimony to vouch for the truth of a witness on a "specific occasion." Schmitz, 634 F.3d at 1268. Crystal undoubtedly vouched for her daughters' truthfulness concerning a specific incident. Thus, for two separate reasons, Rule 608 plainly barred the erroneously admitted testimony below.[2]

In response, the Government argues that Crystal's testimony was permissibly based on her "personal knowledge or perceptions" as the girls' mother, relying on the Eighth Circuit's decision in In re Air Crash at Little Rock Ark., 291 F.3d 503, 515 (8th Cir. 2002). Aple. Br. 19. There, the Eighth Circuit concluded that Rule 701 did not bar a witness from testifying about one of the plaintiff's career prospects, given that the witness had personal knowledge of the plaintiff. In re Air Crash, 291 F.3d at 515–16. In re Air Crash thus concerns the requirement that lay witness testimony must be "rationally based on perception and helpful to a determination of a fact in issue" under Rule 701. Id. at 515. It does not pertain to Rule 608's bar on testimony about whether a witness was truthful in his or her testimony on a specific occasion. Even assuming Crystal's testimony was based on her personal knowledge and perceptions under In re Air Crash, this would not cure the Rule 608 defect. That case is therefore unpersuasive on the issues before us.

The Government also cites United States v. Chiquito, 106 F.3d 311, 314 (10th Cir. 1997), to establish that the error here could not be plain. There, we considered whether it was improper for a lay witness to say "no" when asked whether she saw any indication that the victim was lying. Id. at 313. Critically, we did not actually determine whether this testimony was permissible, but instead held that if there was any error, it would have been harmless. Id. at 314. In other words, Chiquito does not speak to error; it speaks to harmlessness. And as we will discuss below, the error here was not harmless. Chiquito therefore does not bolster the Government's position.

2. Ms. Michaels's testimony

[4] We next address Ms. Michaels's testimony, in which Ms. Michaels referred to C.B. as "forthcoming" during her foren-

2. Mr. Jones separately argues that Crystal's testimony also violated Rule 701. We disagree. We have previously held that expert testimony which bears on the truthfulness of another witness violates Rule 702, since testimony of this sort would not "assist the trier of fact." See Charley, 189 F.3d at 1267. We do not extend Charley to Rule 701(b), which requires that lay witness testimony be "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Unlike expert testimony under Rule 702, we do not believe that lay witness testimony which speaks to the truthfulness of a witness could never be "helpful" under Rule 701(b). We therefore hold only that this testimony runs afoul of Rule 608(a).

sic interview and said that C.B. was "appropriate with her knowledge" during the interview. R. vol. II, at 289. Unlike Crystal, Ms. Michaels testified as an expert witness, so her testimony was subject to the strictures of our decision in Charley, which prohibits experts from "vouch[ing] for the credibility" of a witness, as this "encroaches upon the jury's vital and exclusive function to make credibility determinations" and fails to " 'assist the trier of fact' as required by Rule 702." 189 F.3d at 1267. Even so, it was not clearly erroneous for the district court to permit Ms. Michaels's testimony at issue here because her testimony did not speak to C.B.'s truthfulness.

The most common definition of "forthcoming" concerns an individual's willingness to divulge information. See, e.g., Forthcoming, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993) ("readily available" and "affable, approachable, sociable"); Forthcoming, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) ("being about to appear or to be produced or made available" or "responsive, outgoing"); Forthcoming, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[R]eady to make or meet advances. Also, informative, responsive."). See also Heagney v. Wong, 915 F.3d 805, 814 (1st Cir. 2019) (applying the ordinary construction of "forthcoming" as "willing to divulge information").[3] To say that someone is "forthcoming" therefore means that he or she is willing to speak, not that he or she is being truthful. Indeed, if "forthcoming" meant "truthful," then to say that someone is "not forthcoming" would mean that they are not truthful. But it is perfectly sensible to refer to someone who refuses to speak as "not forthcoming," and this would not mean that the silent individual is a liar. To the contrary, it simply means that they are not willing to talk. Hence, when Ms. Michaels described C.B. as "forthcoming with information," it is highly likely that she meant that C.B. disclosed information with little to no resistance—not that C.B. was being honest in everything she said. It was therefore not erroneous—and certainly not plainly erroneous—for the district court to permit this testimony.

As for Ms. Michaels's statement that C.B. was "appropriate with her knowledge of what happened to her," Mr. Jones concedes that it is "somewhat unclear" what Ms. Michaels meant by this phrase. Aplt. Br. 13. Nonetheless, Mr. Jones argues that, because the phrase came after the term "forthcoming," it was intended to vouch for C.B.'s truthfulness. Id. However, we believe that the phrase "appropriate with her knowledge" should be read in connection with the term "forthcoming," and thus should not be read to comment on C.B.'s truthfulness, but instead to refer to her willingness to divulge information. But, even if it were erroneous to allow this testimony, this error could not be plain because the meaning of the phrase is unclear (as Mr. Jones recognizes). See In Re Sealed Case No. 98-3116, 199 F.3d 488, 491 (D.C. Cir. 1999) ("To hold . . . that a record at worst ambiguous supports reversal is hardly consistent with plain error review.").

B. Substantial Rights

[5] The next requirement of the plain error analysis is that the error must have affected the appellant's substantial rights.

3. Mr. Jones has identified a single definition of "forthcoming" which includes "candidness." Aplt. Br. 12–13 (citing Forthcoming, MERRIAM-WEBSTER'S DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/forthcoming). But a single reference to truth in just one of multiple definitions in a single dictionary is not enough to capture the ordinary usage of the word, let alone to establish plain error.

Archuleta, 865 F.3d at 1290. This requires a " 'reasonable probability that, but for the error,' the outcome of the proceeding would have been different." United States v. Benford, 875 F.3d 1007, 1017 (10th Cir. 2017) (quoting Molina-Martinez v. United States, 578 U.S. 189, 194, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016)). We conclude that Crystal's testimony affected Mr. Jones's substantial rights.

It is undisputed that K.B. and C.B. are the only witnesses to Mr. Jones's alleged crime. In this case there was no forensic evidence of the crimes charged nor any third-party witnesses. In such a case, where the outcome "boil[s] down to a believability contest" between the victims and the defendant, testimony vouching for the credibility of the victim is often prejudicial. United States v. Whitted, 11 F.3d 782, 787 (8th Cir. 1993). Indeed, the Government seemed to recognize as much at trial, since the prosecution told the jury: "[i]f you believe [K.B.] and [C.B.], the defendant is guilty." R. vol. II, at 321. Thus, given the importance of K.B.'s and C.B.'s credibility to a finding of guilt, amplified by the jury hearing the girls' mother vouch for them, there is a reasonable probability that Crystal's improper vouching testimony affected the outcome. Cf. United States v. Hill, 749 F.3d 1250, 1266 (10th Cir. 2014) (defendant's substantial rights were affected when expert impermissibly testified as to the defendant's credibility).

The Government's two arguments to the contrary are unavailing. First, the Government contends that the district court cured any issue by instructing the jury that they "are the sole judges of [ ] credibility." R. vol. I, at 193. This does not cure this issue because there was still no indication in these instructions that the jurors should disregard Crystal's vouching for her daughters' credibility. So, even if the jurors understood that they were the final arbiters of credibility, they also could have believed that they were permitted to rely on Crystal's testimony in evaluating credibility. As such, this jury instruction does not eliminate the prejudice to Mr. Jones.

Second, the Government argues that there was "ample evidence" beyond Crystal's testimony that the jury could use to evaluate K.B.'s and C.B.'s credibility. Aple. Br. 22. But the only evidence that the Government cites here is the testimony of K.B. and C.B., and as we have discussed, this "case boil[s] down to a believability contest" between K.B., C.B., and Mr. Jones. See Whitted, 11 F.3d at 787.[4] In other words, the only other evidence cited by the Government here is testimony that Crystal vouched for, meaning that this evidence was also tainted by the erroneous vouching. And the Government ignores the testimony which arguably undermined the girls' credibility, which could have had more weight absent Crystal's impermissible testimony. See, e.g., R. vol. II, at 270, 272–73 (testimony establishing that Crystal had said that K.B. lies and that she had doubts whether Mr. Jones had assaulted K.B.). Although it is possible that the jury could have believed the girls even without Crystal's testimony, reversal does not require us to conclude with certainty that her testimony affected the outcome; there need only be a "reasonable probability" that it did. Benford, 875 F.3d at 1017. This standard has been met.

C. Fairness, Integrity, or Public Reputation of Judicial Proceedings

The final requirement of the plain error standard is that the error must have "seri-

4. In this way, the case is different from Charley, where we held that it was harmless error to admit the inadmissible testimony because there was overwhelming evidence implicating the defendant. 189 F.3d at 1271. Here, the case came down to the girls' word versus Mr. Jones's.

ously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Archuleta, 865 F.3d at 1290. Mr. Jones has satisfied this requirement. Crystal's testimony—which vouched for the truthfulness of her daughters on specific occasions—is "intolerable under our system of jurisprudence, which has long recognized jurors' ability and sole responsibility to determine credibility." Hill, 749 F.3d at 1267. The admission of her testimony thus undercut Mr. Jones's ability to present his defense to the fullest. And, because there is a reasonable probability that Mr. Jones would not have been convicted absent the error here, "ignoring it would offend core notions of justice and seriously affect the fairness, integrity, and public reputation of judicial proceedings." Id. We thus conclude that Mr. Jones has met all four factors of the plain error standard and is entitled to relief.

IV. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND with instructions to VACATE Jeffery Jones's conviction and sentence so that a new trial or other proceedings can occur expeditiously.

UNITED STATES of America, Plaintiff - Appellee,

v.

Arturo Arnulfo GARCIA, a/k/a Shotgun, Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Billy Garcia, a/k/a "Wild Bill" Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Edward Troup, a/k/a Huero Troup, Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Andrew Gallegos, Defendant - Appellant.

United States of America, Plaintiff - Appellee,

v.

Joe Lawrence Gallegos, Defendant - Appellant.

No. 19-2148, No. 19-2152, No. 19-2188, No. 20-2056, No. 20-2058

United States Court of Appeals, Tenth Circuit.

FILED July 5, 2023

Background: Defendants were convicted in the United States District Court for the District of New Mexico, James O. Browning, J., 2017 WL 3054511, 2018 WL 1388462, 2018 WL 2323236, and 2020 WL 353856, of murder under Violent Crimes in Aid of Racketeering (VICAR) Act. Defendants appealed.

Holdings: On rehearing the Court of Appeals held that:

(1) VICAR Act was facially constitutional and constitutional as applied;

(2) pre-indictment delay did not violate due process;

the full rate constitutes a carrier's liquidated damages for its collection effort." 49 C.F.R. § 1320.2(g)(1)(ii) (1994); see 49 U.S.C. § 10743(b)(1) (Act authorizes the extension of credit—and therefore any liquidated damages resulting from the extension of credit—only pursuant to ICC regulations). The regulation is entitled to deference as an interpretation of the Act. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, the ICC is not seeking to enforce a secret, unfiled rate in place of a filed rate, but is seeking to enforce the rate for shipping over the rate for shipping plus collection efforts. See *Hewitt–Robins Inc. v. Eastern Freight–Ways, Inc.*, 371 U.S., at 88, 83 S.Ct., at 159–160 (enforcing lower of two filed rates in no manner "hampers the efficient administration of the Act").

III

The Act by express terms authorizes the ICC to promulgate credit regulations. It also gives the ICC "the power to seek a federal-court injunction requiring a carrier to comply with [its credit] regulations." *Commercial Metals*, 456 U.S., at 349, 102 S.Ct., at 1824 (citation omitted). The injunctive relief sought by the ICC is both necessary and appropriate to effective enforcement of its valid credit regulations, and does not "permi[t] the very price discrimination that the Act by its [149] terms seeks to prevent." *Maislin*, 497 U.S., at 130, 110 S.Ct., at 2768. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

513 U.S. 150, 130 L.Ed.2d 574

[150] **Matthew Wayne TOME, Petitioner**

v.

UNITED STATES.

No. 93–6892.

Argued Oct. 5, 1994.

Decided Jan. 10, 1995.

Defendant was convicted by the District Court for the District of New Mexico, Santiago E. Campos, J., of aggravated sexual abuse of his daughter, and he appealed. The Court of Appeals, Tacha, Circuit Judge, 3 F.3d 342, affirmed. Certiorari was granted. The Supreme Court, Justice Kennedy, held that evidence of child's prior consistent out-of-court statements regarding her father's alleged abuse was not admissible to rebut implicit charge that child's testimony was motivated by her desire to live with her mother, to the extent that out-of-court statements postdated alleged improper motive.

Reversed and remanded.

Justice Scalia concurred in part and concurred in judgment and filed opinion.

Justice Breyer dissented and filed opinion, in which Chief Justice Rehnquist, Justice O'Connor and Justice Thomas joined.

1. Witnesses ⇐414(2)

Declarant's consistent out-of-court statements may be admitted into evidence in order to rebut charge of recent fabrication or improper influence or motive only if those out-of-court statements were made prior to the charged recent fabrication or improper influence or motive. Fed.Rules Evid.Rule 801(d)(1)(B), 28 U.S.C.A.

2. Witnesses ⇐414(2)

Evidence of child's prior consistent out-of-court statements regarding her father's alleged sexual abuse was not admissible, in criminal prosecution of father, in order to rebut implicit charge that child's testimony was motivated by her desire to live with her mother following her parents' divorce; child's out-of-court statements postdated her alleged

improper motive. Fed.Rules Evid.Rule 801(d)(1)(B), 28 U.S.C.A.

3. Witnesses ⇐414(2)

Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster witness merely because he or she has been discredited, but only to rebut charge of recent fabrication or improper influence or motive. Fed.Rules Evid.Rule 801(d)(1)(B), 28 U.S.C.A.

4. Courts ⇐85(3)

Advisory Committee's commentary is particularly relevant in determining meaning of Federal Rule of Evidence, where Congress has not amended Advisory Committee's draft in any way. (Per Justice Kennedy, with three Justices concurring and one Justice concurring in result.)

5. Courts ⇐85(2)

Where Federal Rules of Evidence have departed from their common-law antecedents, Advisory Committee has generally said so. (Per Justice Kennedy, with three Justices concurring and one Justice concurring in result.)

6. Statutes ⇐222

Party contending that legislative action has changed settled law has burden of showing that legislature intended such a change. (Per Justice Kennedy, with three Justices concurring and one Justice concurring in result.)

7. Witnesses ⇐414(2)

Mere fact that prior consistent statements may have some indirect relevance in rebutting charge of recent fabrication or of improper influence or motive, even though statements postdate alleged fabrication or improper influence or motive, is not sufficient basis for admitting these out-of-court statements over hearsay objection; relevance is not sole criterion of admissibility of evidence. Fed.Rules Evid.Rule 801(d)(1)(B), 28 U.S.C.A.

8. Witnesses ⇐414(2)

Courts must be sensitive to difficulties attendant upon prosecution of alleged child abusers, but cannot alter evidentiary rules merely because litigants might prefer different rules in particular class of cases.

Syllabus *

Petitioner Tome was charged with sexually abusing his daughter A.T. when she was four years old. The Government theorized that he committed the assault while A.T. was in his custody and that the crime was disclosed while she was spending vacation time with her mother. The defense countered that the allegations were concocted so A.T. would not be returned to her father, who had primary physical custody. A.T. testified at the trial, and, in order to rebut the implicit charge that her testimony was motivated by a desire to live with her mother, the Government presented six witnesses who recounted out-of-court statements that A.T. made about the alleged assault while she was living with her mother. The District Court admitted the statements under, *inter alia*, Federal Rule of Evidence 801(d)(1)(B), which provides that prior statements of a witness are not hearsay if they are consistent with the witness' testimony and offered to rebut a charge against the witness of "recent fabrication or improper influence or motive." Tome was convicted, and the Court of Appeals affirmed, adopting the Government's argument that A.T.'s statements were admissible even though they had been made after her alleged motive to fabricate arose. Reasoning that the premotive requirement is a function of relevancy, not the hearsay rules, the court balanced A.T.'s motive to lie against the probative value of one of the statements and determined that the District Court had not erred in admitting the statements.

Held: The judgment is reversed, and the case is remanded.

3 F.3d 342 (CA 10 1993) reversed and remanded.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Justice KENNEDY delivered the opinion of the Court, except as to Part II–B, concluding:

1. Rule 801(d)(1)(B) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged fabrication, influence, or motive, conditions that were not established here. Pp. 700–702, 704–705.

(a) Rule 801(d)(1)(B) embodies the prevailing common-law rule in existence for more than a century before the Federal Rules of Evidence were adopted: A prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if |151the statement had been made before the alleged fabrication, influence, or motive came into being but was inadmissible if made afterwards. The Rule's language speaks of rebutting charges of recent fabrication and improper influence and motive to the exclusion of other forms of impeachment, and it bears close similarity to the language used in many of the common-law premotive requirement cases. Pp. 700–702.

(b) The Government's argument that the common-law rule is inconsistent with the Federal Rules' liberal approach to relevancy misconceives the design of the Rules' hearsay provisions. Hearsay evidence is often relevant. But if relevance were the sole criterion of admissibility, it would be difficult to account for the Rules' general proscription of hearsay testimony or the traditional analysis of hearsay that the Rules, for the most part, reflect. The Government's reliance on academic commentators critical of excluding a witness' out-of-court statements is also misplaced. The Advisory Committee rejected the balancing approach such commentators proposed when the Rules were adopted. The approach used by the Court of Appeals here creates the precise dangers the Advisory Committee sought to avoid: It involves considerable judicial discretion, reduces predictability, and enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted. Pp. 704–705.

(c) The instant case illustrates some of the important considerations supporting the foregoing interpretation. Permitting the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive would shift the trial's whole emphasis to the out-of-court, rather than the in-court, statements. It may be difficult to ascertain when a particular fabrication, influence, or motive arose in some cases. However, a majority of common-law courts were performing this task for over a century, and the Government has presented no evidence that those courts or the courts that adhere to the rule today have been unable to make the determination. P. 705.

2. The admissibility of A.T.'s statements under Rule 803(24) or any other evidentiary principle is left for the Court of Appeals to decide in the first instance. P. 705.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–C, and III, in which STEVENS, SCALIA, SOUTER, and GINSBURG, JJ., joined, and an opinion with respect to Part II–B, in which STEVENS, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 706. BREYER, J., filed a dissenting opinion, in |152which REHNQUIST, C.J., and O'CONNOR and THOMAS, JJ., joined, *post,* p. 706.

Joseph W. Gandert, Albuquerque, NM, for petitioner.

Lawrence G. Wallace, Washington, DC, for respondent.

For U.S. Supreme Court briefs, see:

1994 WL 192034 (Pet.Brief) 1994 WL 178129

1994 WL 262340 (Resp.Brief)

1994 WL 385638 (Reply.Brief)

1994 WL 714086 (Pet.Supp.Brief)

Justice KENNEDY delivered the opinion of the Court, except as to Part IIB.

Various Federal Courts of Appeals are divided over the evidence question presented by this case. At issue is the interpretation of a provision in the Federal Rules of Evidence bearing upon the admissibility of statements, made by a declarant who testifies as a witness, that are consistent with the testimony and are offered to rebut a charge of a "recent fabrication or improper influence or motive." Fed.Rule Evid. 801(d)(1)(B). The question is whether out-of-court consistent statements made after the alleged fabrication, or after the alleged improper influence or motive arose, are admissible under the Rule.

I

Petitioner Tome was charged in a one-count indictment with the felony of sexual abuse of a child, his own daughter, |153 aged four at the time of the alleged crime. The case having arisen on the Navajo Indian Reservation, Tome was tried by a jury in the United States District Court for the District of New Mexico, where he was found guilty of violating 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A) and (B).

Tome and the child's mother had been divorced in 1988. A tribal court awarded joint custody of the daughter, A.T., to both parents, but Tome had primary physical custody. In 1989 the mother was unsuccessful in petitioning the tribal court for primary custody of A.T., but was awarded custody for the summer of 1990. Neither parent attended a further custody hearing in August 1990. On August 27, 1990, the mother contacted Colorado authorities with allegations that Tome had committed sexual abuse against A.T.

The prosecution's theory was that Tome committed sexual assaults upon the child while she was in his custody and that the crime was disclosed when the child was spending vacation time with her mother. The defense argued that the allegations were concocted so the child would not be returned to her father. At trial A.T., then 6½ years old, was the Government's first witness. For the most part, her direct testimony consisted of one- and two-word answers to a series of leading questions. Cross-examination took place over two trial days. The defense asked A.T. 348 questions. On the first day A.T. answered all the questions posed to her on general, background subjects.

The next day there was no testimony, and the prosecutor met with A.T. When cross-examination of A.T. resumed, she was questioned about those conversations but was reluctant to discuss them. Defense counsel then began questioning her about the allegations of abuse, and it appears she was reluctant at many points to answer. As the trial judge noted, however, some of the defense questions were imprecise or unclear. The judge expressed his concerns with the examination of A.T., observing there were lapses of as much as 40–55 seconds between some questions and the answers |154 and that on the second day of examination the witness seemed to be losing concentration. The trial judge stated, "We have a very difficult situation here."

After A.T. testified, the Government produced six witnesses who testified about a total of seven statements made by A.T. describing the alleged sexual assaults: A.T.'s babysitter recited A.T.'s statement to her on August 22, 1990, that she did not want to return to her father because he "gets drunk and he thinks I'm his wife"; the babysitter related further details given by A.T. on August 27, 1990, while A.T.'s mother stood outside the room and listened after the mother had been unsuccessful in questioning A.T. herself; the mother recounted what she had heard A.T. tell the babysitter; a social worker recounted details A.T. told her on August 29, 1990, about the assaults; and three pediatricians, Drs. Kuper, Reich, and Spiegel, related A.T.'s statements to them describing how and where she had been touched by Tome. All but A.T.'s statement to Dr. Spiegel implicated Tome. (The physicians also testified that their clinical examinations of the child indicated that she had been subjected to vaginal penetrations. That part of the testimony is not at issue here.)

A.T.'s out-of-court statements, recounted by the six witnesses, were offered by the

Government under Rule 801(d)(1)(B). The trial court admitted all of the statements over defense counsel's objection, accepting the Government's argument that they rebutted the implicit charge that A.T.'s testimony was motivated by a desire to live with her mother. The court also admitted A.T.'s August 22d statement to her babysitter under Rule 803(24), and the statements to Dr. Kuper (and apparently also to Dr. Reich) under Rule 803(4) (statements for purposes of medical diagnosis). The Government offered the testimony of the social worker under both Rules 801(d)(1)(B) and 803(24), but the record does not indicate whether the court ruled on the latter ground. No [155]objection was made to Dr. Spiegel's testimony. Following trial, Tome was convicted and sentenced to 12 years' imprisonment.

On appeal, the Court of Appeals for the Tenth Circuit affirmed, adopting the Government's argument that all of A.T.'s out-of-court statements were admissible under Rule 801(d)(1)(B) even though they had been made after A.T.'s alleged motive to fabricate arose. The court reasoned that "the pre-motive requirement is a function of the relevancy rules, not the hearsay rules" and that as a "function of relevance, the pre-motive rule is clearly too broad . . . because it is simply not true that an individual with a motive to lie always will do so." 3 F.3d 342, 350 (1993). "Rather, the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." *Ibid.* The court recognized that some Circuits require that the consistent statements, to be admissible under the Rule, must be made before the motive or influence arose, see, *e.g., United States v. Guevara*, 598 F.2d 1094, 1100 (CA7 1979); *United States v. Quinto*, 582 F.2d 224, 234 (CA2 1978), but cited the Ninth Circuit's decision in *United States v. Miller*, 874 F.2d 1255, 1272 (CA9 1989), in support of its balancing approach. Applying this balancing test to A.T.'s first statement to her babysitter, the Court of Appeals determined that although A.T. might have had "some motive to lie, we do not believe that it is a particularly strong one." 3 F.3d, at 351. The court held that the District Judge had not abused his discretion in admitting A.T.'s out-of-court statements. It did not analyze the probative quality of A.T.'s six other out-of-court statements, nor did it reach the admissibility of the statements under any other rule of evidence.

We granted certiorari, 510 U.S. 1109, 114 S.Ct. 1048, 127 L.Ed.2d 370 (1994), and now reverse.

[156]II

[1, 2] The prevailing common-law rule for more than a century before adoption of the Federal Rules of Evidence was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards. As Justice Story explained: "[W]here the testimony is assailed as a fabrication of a recent date, . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted." *Ellicott v. Pearl*, 35 U.S. (10 Pet.) 412, 439, 9 L.Ed. 475 (1836) (emphasis added). See also *People v. Singer*, 300 N.Y. 120, 124–125, 89 N.E.2d 710, 712 (1949).

McCormick and Wigmore stated the rule in a more categorical manner: "[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated." E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972) (hereafter McCormick). See also 4 J. Wigmore, Evidence § 1128, p. 268 (J. Chadbourn rev. 1972) (hereafter Wigmore) ("A consistent statement, at a *time prior* to the existence of a fact said to indicate bias . . . will effectively explain away the force of the impeaching evidence" (emphasis in original)). The question is whether Rule 801(d)(1)(B) embodies this temporal requirement. We hold that it does.

A

Rule 801 provides:

"(d) Statements which are not hearsay.—A statement is not hearsay if—

"(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .

[157]"(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

Rule 801 defines prior consistent statements as nonhearsay only if they are offered to rebut a charge of "recent fabrication or improper influence or motive." Fed.Rule Evid. 801(d)(1)(B). Noting the "troublesome" logic of treating a witness' prior consistent statements as hearsay at all (because the declarant is present in court and subject to cross-examination), the Advisory Committee decided to treat those consistent statements, once the preconditions of the Rule were satisfied, as nonhearsay and admissible as substantive evidence, not just to rebut an attack on the witness' credibility. See Advisory Committee's Notes on Fed.Rule Evid. 801(d)(1), 28 U.S.C.App., p. 773. A consistent statement meeting the requirements of the Rule is thus placed in the same category as a declarant's inconsistent statement made under oath in another proceeding, or prior identification testimony, or admissions by a party opponent. See Fed.Rule Evid. 801.

[3] The Rules do not accord this weighty, nonhearsay status to all prior consistent statements. To the contrary, admissibility under the Rules is confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive," the same phrase used by the Advisory Committee in its description of the "traditiona[l]" common law of evidence, which was the background against which the Rules were drafted. See Advisory Committee's Notes, *supra*, at 773. Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. In the present context, the question is whether A.T.'s out-of-court statements rebutted the alleged link between her desire to be with her mother and her testimony, not whether they suggested that A.T.'s in-court testimony was true. The Rule [158]speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.

This limitation is instructive, not only to establish the preconditions of admissibility but also to reinforce the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate, arose. That is to say, the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense. Impeachment by charging that the testimony is a recent fabrication or results from an improper influence or motive is, as a general matter, capable of direct and forceful refutation through introduction of out-of-court consistent statements that predate the alleged fabrication, influence, or motive. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. By contrast, prior consistent statements carry little rebuttal force when most other types of impeachment are involved. McCormick § 49, p. 105 ("When the attack takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements. The defense does not meet the assault" (footnote omitted)); see also 4 Wigmore § 1131, p. 293 ("The broad rule obtains in a few courts that consistent statements may be admitted *after* impeachment of any sort—in particular after any impeachment by *cross-examination.* But there is no reason for such a loose rule" (footnote omitted)).

There may arise instances when out-of-court statements that postdate the alleged fabrication have some probative force in rebutting a charge of fabrication or improper influence or motive, but those statements refute the charged fabrication in a less direct and forceful way. Evidence that a witness made consistent statements after the alleged motive to fabricate arose may suggest in some degree [159]that the in-court testimony is

truthful, and thus suggest in some degree that that testimony did not result from some improper influence; but if the drafters of Rule 801(d)(1)(B) intended to countenance rebuttal along that indirect inferential chain, the purpose of confining the types of impeachment that open the door to rebuttal by introducing consistent statements becomes unclear. If consistent statements are admissible without reference to the timeframe we find imbedded in the Rule, there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well. Whatever objections can be leveled against limiting the Rule to this designated form of impeachment and confining the rebuttal to those statements made before the fabrication or improper influence or motive arose, it is clear to us that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement.

The underlying theory of the Government's position is that an out-of-court consistent statement, whenever it was made, tends to bolster the testimony of a witness and so tends also to rebut an express or implied charge that the testimony has been the product of an improper influence. Congress could have adopted that rule with ease, providing, for instance, that "a witness' prior consistent statements are admissible whenever relevant to assess the witness' truthfulness or accuracy." The theory would be that, in a broad sense, any prior statement by a witness concerning the disputed issues at trial would have some relevance in assessing the accuracy or truthfulness of the witness' in-court testimony on the same subject. The narrow Rule enacted by Congress, however, cannot be understood to incorporate the Government's theory.

Our analysis is strengthened by the observation that the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common-law cases that describe the premotive requirement. "Rule 801(d)(1)(B) employs the precise language—'rebut[ting] . . . charge[s] . . . of recent fabrication or improper influence or motive'—consistently[160] used in the panoply of pre–1975 decisions." Ohlbaum, The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal, 1987 B.Y.U.L.Rev. 231, 245. See, *e.g., Ellicott v. Pearl,* 35 U.S. (10 Pet.) at 439; *Hanger v. United States,* 398 F.2d 91, 104 (CA8 1968); *People v. Singer,* 300 N.Y. 120, 89 N.E.2d 710 (1949).

The language of the Rule, in its concentration on rebutting charges of recent fabrication or improper influence or motive to the exclusion of other forms of impeachment, as well as in its use of wording that follows the language of the common-law cases, suggests that it was intended to carry over the common-law premotive rule.

B

[4] Our conclusion that Rule 801(d)(1)(B) embodies the common-law premotive requirement is confirmed by an examination of the Advisory Committee's Notes to the Federal Rules of Evidence. We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules. See, *e.g., Huddleston v. United States,* 485 U.S. 681, 688, 108 S.Ct. 1496, 1500, 99 L.Ed.2d 771 (1988); *United States v. Owens,* 484 U.S. 554, 562, 108 S.Ct. 838, 844, 98 L.Ed.2d 951 (1988). Where, as with Rule 801(d)(1)(B), "Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 165–166, n. 9, 109 S.Ct. 439, 447–448, n. 9, 102 L.Ed.2d 445 (1988). The Notes are also a respected source of scholarly commentary. Professor Cleary was a distinguished commentator on the law of evidence, and he and members of the Committee consulted and considered the views, criticisms, and suggestions of the academic community in preparing the Notes.

[5] The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary. Where the Rules did depart from their common-law antecedents, in general the Committee[161] said so. See, *e.g.,* Notes on Rule 804(b)(4), 28 U.S.C.App.,

p. 790 ("The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility"); Rule 804(b)(2), *id.*, at 789 ("The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits"); Rule 804(b)(3), *ibid.* ("The exception discards the common law limitation and expands to the full logical limit"). The Notes give no indication, however, that Rule 801(d)(1)(B) abandoned the premotive requirement. The entire discussion of Rule 801(d)(1)(B) is limited to the following comment:

> "Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." Notes on Rule 801(d)(1)(B), *id.*, at 773.

Throughout their discussion of the Rules, the Advisory Committee's Notes rely on Wigmore and McCormick as authority for the common-law approach. In light of the categorical manner in which those authors state the premotive requirement, see *supra*, at 702, it is difficult to imagine that the drafters, who noted the new substantive use of prior consistent statements, would have remained silent if they intended to modify the premotive requirement. As we observed with respect to another provision of the Rules, "[w]ith this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]." *United States v. Abel*, 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984). Here, we do not think the drafters of the Rule intended to scuttle the [162]whole premotive requirement and rationale without so much as a whisper of explanation.

Observing that Edward Cleary was the Reporter of the Advisory Committee that drafted the Rules, the Court has relied upon his writings as persuasive authority on the meaning of the Rules. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Abel*, *supra*, at 51–52, 105 S.Ct. at 468–69. Cleary also was responsible for the 1972 revision of McCormick's treatise, which included an examination of the changes introduced by the proposed federal rules to the common-law practice of impeachment and rehabilitation. The discussion, which occurs only three paragraphs after the treatise's categorical description of the common-law premotive rule, also lacks any indication that the proposed rules were abandoning that temporal limitation. See McCormick § 50, p. 107.

Our conclusion is bolstered by the Advisory Committee's stated "unwillingness to countenance the general use of prior prepared statements as substantive evidence." See Notes on Rule 801(d)(1), 28 U.S.C.App., p. 773. Rule 801(d), which "enumerates three situations in which the statement is excepted from the category of hearsay," *ibid.*, was expressly contrasted by the Committee with Uniform Rule of Evidence 63(1) (1953), "which allows *any* out-of-court statement of a declarant who is present at the trial and available for cross-examination." Notes on Rule 801(d)(1), *supra*, at 773 (emphasis added). When a witness presents important testimony damaging to a party, the party will often counter with at least an implicit charge that the witness has been under some influence or motive to fabricate. If Rule 801 were read so that the charge opened the floodgates to any prior consistent statement that satisfied Rule 403, as the Tenth Circuit concluded, the distinction between rejected Uniform Rule 63(1) and Rule 801(d)(1)(B) would all but disappear.

That Rule 801(d)(1)(B) permits prior consistent statements to be used for substantive purposes after the statements are admitted to rebut the existence of an improper influence or [163]motive makes it all the more important to observe the preconditions for admitting the evidence in the first place. The position taken by the Rules reflects a compromise between the views expressed by the "bulk of the case law . . . against allowing

prior statements of witnesses to be used generally as substantive evidence" and the views of the majority of "writers ... [who] ha[d] taken the opposite position." *Ibid.* That compromise was one that the Committee candidly admitted was a "judgment ... more of experience than of logic." *Ibid.*

[6] "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521, 109 S.Ct. 1981, 1990, 104 L.Ed.2d 557 (1989) (applying that presumption in interpreting Federal Rule of Evidence 609). Nothing in the Advisory Committee's Notes suggests that it intended to alter the common-law premotive requirement.

C

[7] The Government's final argument in favor of affirmance is that the common-law premotive rule advocated by petitioner is inconsistent with the Federal Rules' liberal approach to relevancy and with strong academic criticism, beginning in the 1940's, directed at the exclusion of out-of-court statements made by a declarant who is present in court and subject to cross-examination. This argument misconceives the design of the Rules' hearsay provisions.

Hearsay evidence is often relevant. "The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility." Advisory Committee's Introduction to Article VIII, 28 U.S.C.App., p. 771. That does not resolve the matter, however. Relevance is not the sole criterion of admissibility. Otherwise, it would be difficult to account for the Rules' general proscription of hearsay testimony (absent a specific [164] exception), see Fed.Rule Evid. 802, let alone the traditional analysis of hearsay that the Rules, for the most part, reflect. *Ibid.* ("The approach to hearsay in these rules is that of the common law.... The traditional hearsay exceptions are drawn upon for the exceptions ..."). That certain out-of-court statements may be relevant does not dispose of the question whether they are admissible.

The Government's reliance on academic commentators critical of excluding out-of-court statements by a witness, see Brief for United States 40, is subject to like criticism. To be sure, certain commentators in the years preceding the adoption of the Rules had been critical of the common-law approach to hearsay, particularly its categorical exclusion of out-of-court statements offered for substantive purposes. See, *e.g.*, Weinstein, The Probative Force of Hearsay, 46 Iowa L.Rev. 331, 344–345 (1961) (gathering sources). General criticism was directed to the exclusion of a declarant's out-of-court statements where the declarant testified at trial. See, *e.g., id.*, at 333 ("[T]reating the out of court statement of the witness himself as hearsay" is a "practical absurdity in many instances"); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177, 192–196 (1948). As an alternative, they suggested moving away from the categorical exclusion of hearsay and toward a case-by-case balancing of the probative value of particular statements against their likely prejudicial effect. See Weinstein, *supra*, at 338; Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn.L.Rev. 506 (1934). The Advisory Committee, however, was explicit in rejecting this balancing approach to hearsay:

> "The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of preparation for trial." Advisory Committee's Introduction, *supra*, at 771.

[165] Given the Advisory Committee's rejection of both the general balancing approach to hearsay and of Uniform Rule 63(1), see *supra*, at 703, the Government's reliance on the views of those who advocated these positions is misplaced.

The statement-by-statement balancing approach advocated by the Government and adopted by the Tenth Circuit creates the precise dangers the Advisory Committee noted and sought to avoid: It involves consider-

able judicial discretion; it reduces predictability; and it enhances the difficulties of trial preparation because parties will have difficulty knowing in advance whether or not particular out-of-court statements will be admitted. See Advisory Committee's Introduction, *supra,* at 771.

D

The case before us illustrates some of the important considerations supporting the Rule as we interpret it, especially in criminal cases. If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak charge that A.T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.'s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A.T. had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.

We are aware that in some cases it may be difficult to ascertain when a particular fabrication, influence, or motive [166] arose. Yet, as the Government concedes, a majority of common-law courts were performing this task for well over a century, see Brief for United States 39, and the Government has presented us with no evidence that those courts, or the judicial circuits that adhere to the rule today, have been unable to make the determination. Even under the Government's hypothesis, moreover, the thing to be rebutted must be identified, so the date of its origin cannot be that much more difficult to ascertain. By contrast, as the Advisory Committee commented, see *supra,* at 704, the Government's approach, which would require the trial court to weigh all of the circumstances surrounding a statement that suggest its probativeness against the court's assessment of the strength of the alleged motive, would entail more of a burden, with no guidance to attorneys in preparing a case or to appellate courts in reviewing a judgment.

III

[8] Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eyewitness. But "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States v. Salerno,* 505 U.S. 317, 322, 112 S.Ct. 2503, 2507, 120 L.Ed.2d 255 (1992). When a party seeks to introduce out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available, there is no need to distort the requirements of Rule 801(d)(1)(B). If its requirements are met, Rule 803(24) exists for that eventuality. We intimate no view, however, concerning the admissibility of any of A.T.'s out-of-court statements under that section, or any other evidentiary principle. These matters, and others, are for the Court of Appeals to decide in the first instance.

[167] Our holding is confined to the requirements for admission under Rule 801(d)(1)(B). The Rule permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive. These conditions of admissibility were not established here.

The judgment of the Court of Appeals for the Tenth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join its opinion except for Part II–B. That Part, which is devoted entirely to a discussion of the Advisory Committee's Notes pertinent to Rule 801(d)(1)(B), gives effect to those Notes not only because they are "a respected source of scholarly commentary," *ante,* at 702–703, but also because they display the "purpose," *ante,* at 702, or "inten[t]," *ante,* at 703, of the draftsmen.

I have previously acquiesced in, see, *e.g., Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), and indeed myself engaged in, see *United States v. Owens,* 484 U.S. 554, 562, 108 S.Ct. 838, 844, 98 L.Ed.2d 951 (1988), similar use of the Advisory Committee Notes. More mature consideration has persuaded me that is wrong. Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive—concerning the meaning of the Rules. But they bear no special authoritativeness as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution. It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change. See 28 U.S.C. [168]§§ 2072, 2074 (1988 ed. and Supp. IV). In my view even the adopting Justices' thoughts, unpromulgated as Rules, have no authoritative (as opposed to persuasive) effect, any more than their thoughts regarding an opinion (reflected in exchanges of memoranda before the opinion issues) authoritatively demonstrate the meaning of that opinion. And the same for the thoughts of congressional draftsmen who prepare statutory amendments to the Rules. Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters. The Notes are, to be sure, submitted to us and to the Members of Congress as the thoughts of the body initiating the recommendations, see § 2073(d); but there is no certainty that either we or they read those thoughts, nor is there any procedure by which we formally endorse or disclaim them. That being so, the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear.

In the present case, the merely persuasive force of the Advisory Committee Notes suffices. Indeed, in my view the case can be adequately resolved without resort to the Advisory Committee at all. It is well established that "'"the body of common law knowledge"'" must be "'"a source of guidance"'" in our interpretation of the Rules. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 588, 113 S.Ct. 2786, 2794, 125 L.Ed.2d 469 (1993) (quoting *United States v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (quoting Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb.L.Rev. 908, 915 (1978))). Rule 801(d)(1)(B) uses language that tracks common-law cases and prescribes a result that makes no sense except on the assumption that that language indeed adopts the common-law rule. As the Court's opinion points out, only the premotive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks.

[169]Justice BREYER, with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice THOMAS join, dissenting.

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

not "hearsay," make this clear, stating, for example, that a

> " 'prior consistent statement has no relevancy to refute [a] charge [of recent fabrication, etc.,] unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated.' " *Ante,* at 700 (quoting E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972) (hereinafter McCormick)).

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

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

I doubt the premise because, as McCormick points out, other categories of prior consistent statements (used for rehabilitation) also, on occasion, seem likely to have strong probative force. What, for example, about such statements introduced to rebut a charge of faulty memory (category (c) above)? McCormick says about such statements: "If the witness's accuracy of memory is challenged, it seems *clear common sense* that a consistent statement made shortly after the event and before he had time to forget, should be received in support." McCormick § 49, at 105, n. 88 (emphasis added). Would not such statements (received in evidence to rehabilitate) often turn out to be highly probative as well?

More important, the majority's conclusion about timing seems not to follow from its "especially probative force" premise. That is because probative force has little to do with the concerns underlying hearsay law. Hearsay law basically turns on an out-of-court declarant's reliability, as tested through cross-examination; it does not normally turn 171 on the probative force (if true) of that declarant's statement. The "timing" circumstance (the fact that a prior consistent statement was made after a motive to lie arose) may diminish probative force, but it does not diminish reliability. Thus, from a hearsay perspective, the timing of a prior consistent statement is basically beside the point.

At the same time, one can find a *hearsay*-related reason why the drafters might have decided to restrict the Rule to a particular category of prior consistent statements. Juries have trouble distinguishing between the rehabilitative and substantive use of the kind of prior consistent statements listed in Rule 801(d)(1)(B). Judges may give instructions limiting the use of such prior consistent statements to a rehabilitative purpose, but, in practice, juries nonetheless tend to consider them for their substantive value. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(1)(B)[01], p. 801–188 (1994) ("[A]s a practical matter, the jury in all probability would misunderstand or ignore a limiting instruction [with respect to the class of prior consistent statements covered by the Rule] anyway, so there is no good reason for

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

In sum, because the Rule addresses a hearsay problem and one can find a reason, unrelated to the premotive rule, for [172]why it does so, I would read the Rule's plain words to mean exactly what they say: If a trial court properly admits a statement that is "consistent with the declarant's testimony" for the purpose of "rebut[ting] an express or implied charge . . . of recent fabrication or improper influence or motive," then that statement is "not hearsay," and the jury may also consider it for the truth of what it says.

Assuming Rule 801(d)(1)(B) does not codify the absolute timing requirement, I must still answer the question whether, as a *relevance* matter, the common-law statement of the premotive rule stands as an absolute bar to a trial court's admission of a postmotive prior consistent statement for the purpose of rebutting a charge of recent fabrication or improper influence or motive. The majority points to statements of the timing rule that do suggest that, for reasons of relevance, the law of evidence *never* permits their admission. *Ante,* at 700. Yet, absolute-sounding rules often allow exceptions. And, there are sound reasons here for permitting an exception to the timing rule where circumstances warrant.

For one thing, one can find examples where the timing rule's claim of "no relevancy" is simply untrue. A postmotive statement *is* relevant to rebut, for example, a charge of recent fabrication based on improper motive, say, when the speaker made the prior statement while affected by a far more powerful motive to tell the truth. A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances *also* make clear to the speaker that only the truth will save his child's life. Or, suppose the postmotive statement was made spontaneously, or when the speaker's motive to lie was much weaker than it was at trial. In these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation; it may have been made not *because of,* but *despite,* the improper motivation. Hence, postmotive statements can, *in appropriate circumstances,* directly refute the charge of fabrication based on [173]improper motive, not because they bolster in a general way the witness' trial testimony, see *ante,* at 702, but because the circumstances indicate that the statements are not causally connected to the alleged motive to lie.

For another thing, the common-law premotive rule was not as uniform as the majority suggests. Cf. *United States v. Abel,* 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984) (stating that where the common law was *unanimous,* the drafters of the Federal Rules likely intended to preserve it). A minority of courts recognized that postmotive statements could be relevant to rebut a charge of recent fabrication or improper influence or motive under the right circumstances. See, *e.g., United States v. Gandy,* 469 F.2d 1134, 1135 (CA5 1972); *Copes v. United States,* 345 F.2d 723, 726 (CADC 1964); *State v. George,* 30 N.C. 324, 328 (1848). I concede that the majority of courts took the rule of thumb as absolute. But, I have searched the cases (and the commentators) in vain for an explanation of why that should be so. See, *e.g.,* McCormick § 49, at 105, and n. 88 (citing cases).

One can imagine a possible explanation: Trial judges may find it easier to administer an absolute rule. Yet, there is no indication in any of the cases that trial judges would, or do, find it particularly difficult to administer a more flexible rule in this context. And,

there is something to be said for the greater authority that flexibility grants the trial judge to tie rulings on the admissibility of rehabilitative evidence more closely to the needs and circumstances of the particular case. 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 401[01], pp. 401–8 to 401–9 (1994) ("A flexible approach . . . is more apt to yield a sensible result than the application of a mechanical rule"). Furthermore, the majority concedes that the premotive rule, while seemingly bright line, poses its own administrative difficulties. *Ante*, at 705.

This Court has acknowledged that the Federal Rules of Evidence worked a change in common-law relevancy rules in the direction of flexibility. See *Daubert v. Merrell Dow* |174*Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Article IV of the Federal Rules, which concerns relevance, liberalizes the rules for admission of relevant evidence. See *id.*, at 587, 113 S.Ct., at 2794. The Rules direct the trial judge generally to admit all evidence having "any tendency" to make the existence of a material fact "more probable or less probable than it would be without the evidence." Fed. Rules Evid. 401, 402. The judge may reject the evidence (assuming compliance with other rules) only if the probative value of the evidence is substantially outweighed by its tendency to prejudice a party or delay a trial. Rule 403. The codification, as a general matter, relies upon the trial judge's administration of Rules 401, 402, and 403 to keep the barely relevant, the time wasting, and the prejudicial from the jury. See, *e.g.*, *Abel*, *supra*, at 54, 105 S.Ct., at 470 ("A district court is accorded a wide discretion in . . . [a]ssessing the probative value of [proffered evidence], and weighing any factors counseling against admissibility"); 1 Weinstein's Evidence, *supra*, ¶ 401[01] (discussing broad discretion accorded trial judge); 22 C. Wright & K. Graham, Federal Practice and Procedure § 5162 (1978 and 1994 Supp.).

In *Daubert*, this Court considered the rule of *Frye v. United States*, 293 F. 1013 (CADC 1923), which had excluded scientific evidence that had not gained general acceptance in the relevant field. 509 U.S., at 585–586, 113 S.Ct., at 2792–2793. Like the premotive rule here at issue, the *Frye* rule was "rigid," setting forth an "absolute prerequisite to admissibility," which the Court said was "at odds with the 'liberal thrust' of the Federal Rules." *Id.*, at 588, 113 S.Ct., at 2794. *Daubert* suggests that the liberalized relevancy provisions of the Federal Rules can supersede a pre-existing rule of relevance, at least where no compelling practical or logical support can be found for the pre-existing rule. It is difficult to find any strong practical or logical considerations for making the premotive rule an absolute condition of admissibility here. Perhaps there are other circumstances in which categorical common-law rules serve the purposes of Rules 401, 402, and 403, and should, accordingly, |175remain absolute in the law. But, for the reasons stated above, this case, like *Daubert*, does not present such a circumstance. Thus, considered purely as a matter of relevancy law (and as though Rule 801(d)(1)(B) had not been written), I would conclude that the premotive rule did not survive the adoption of the Rules.

Irrespective of these arguments, one might claim that, nonetheless, the drafters, in writing Rule 801(d)(1)(B), relied on the continued existence of the common-law relevancy rule, and that Rule 801(d)(1)(B) therefore reflects a belief that the common-law relevancy rule would survive. But, I would reject that argument. For one thing, if the drafters had wanted to insulate the common-law rule from the Rules' liberalizing effect, this would have been a remarkably indirect (and therefore odd) way of doing so—both because Rule 801(d)(1)(B) is utterly silent about the premotive rule and because Rule 801(d)(1)(B) is a rule of hearsay, not relevancy. For another thing, there is an equally plausible reason why the drafters might have wanted to write Rule 801(d)(1)(B) the way they did—namely, to allow substantive use of a particular category of prior consistent statements that, when admitted as rehabilitative evidence, was especially impervious to a limiting instruction. See *supra*, at 707.

Accordingly, I would hold that the Federal Rules authorize a district court to allow (where probative in respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication or improper influence or motive (subject of

course to, for example, Rule 403). Where such statements are admissible for this rehabilitative purpose, Rule 801(d)(1)(B), as stated above, makes them admissible as substantive evidence as well (provided, of course, that the Rule's other requirements, such as the witness' availability for cross-examination, are satisfied). In most cases, this approach will not yield a different result from a strict adherence to the premotive rule for, in most cases, postmotive statements will not be significantly probative. [176] And, even in cases where the statement is admitted as significantly probative (in respect to rehabilitation), the effect of admission on the trial will be minimal because the prior consistent statements will (by their nature) do no more than repeat in-court testimony.

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

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1590

United States of America

Appellee

v.

Warren Lee Mackey

Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:19-cr-00329-JFB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 21, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

for the
District of Nebraska

UNITED STATES OF AMERICA

v.

WARREN LEE MACKEY

JUDGMENT IN A CRIMINAL CASE

Case Number: 8:19CR329-001
USM Number: 31384-047

Richard H. McWilliams
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on counts I and II of the Indictment on October 7, 2021 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section& Nature of Offense	Offense Ended	Count
18:2241(c) and 1153 AGGRAVATED SEXUAL ABUSE OF A CHILD UNDER THE AGE OF 12	August 4, 2019	I
18:2244(a)(5) and 1153 ABUSIVE SEXUAL CONTACT	August 4, 2019	II

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

January 27, 2022
Date of Imposition of Sentence:

s/ Joseph F. Bataillon
Senior United States District Judge

March 3, 2022
Date

DEFENDANT: WARREN LEE MACKEY
CASE NUMBER: 8:19CR329-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **three hundred sixty (360) months on count I and one hundred twenty (120) months on count II, said terms to be served concurrently.**

☒The Court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be allowed to participate in the Residential Drug Treatment Program or any similar drug treatment program available.
2. That the defendant be incarcerated in a federal facility as close as possible to Niobrara, NE, the court suggests either FPC Yankton, SD or FCI Sandstone, MN.
3. Defendant should be given credit for time served.

☒The defendant is remanded to the custody of the United States Marshal.

☐The defendant shall surrender to the United States Marshal for this district:

☐ at

☐ as notified by the United States Marshal.

☐The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: WARREN LEE MACKEY
CASE NUMBER: 8:19CR329-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years on count I and five (5) years on count II, said terms to run concurrently.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10

DEFENDANT: WARREN LEE MACKEY
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days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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SPECIAL CONDITIONS OF SUPERVISION

a. You must not purchase or possess, use, distribute, or administer any alcohol, just the same as any other narcotic or controlled substance.

f. You must attend, successfully complete, and pay for any mental health diagnostic evaluations and treatment or counseling programs as directed by the probation officer.

k. You must pay restitution in the amount of $2,727.80 to the Clerk of the U.S. District Court, 111 S. 18th Plaza, Suite 1152, Omaha, Nebraska 68102-1322. Restitution shall be paid in accordance with the schedule set forth in the "Schedule of Payments" set forth in this judgment. You are responsible for providing proof of payment to the probation officer as directed.

Victim's Name	**Amount**
EM	$2,727.80

Without limiting the foregoing, and following release from prison, you must make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of $100 or 3% of your gross income, whichever is greater; (b) the first payment shall commence 30 days following your discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) you are responsible for providing proof of payment to the probation officer as directed.

m. You are prohibited from incurring new credit charges or opening additional lines of credit without prior written approval of the probation officer.

n. You must provide the probation officer with access to any requested financial information.

kk. You must have no contact with your victim(s), including correspondence, telephone, or communication through third parties, except under circumstances approved in advance and in writing by the probation officer, unless the victim consents to such contact and so advises the probation officer. You must not enter onto the premises, travel past, or loiter near the victim’s residence, school, or place of employment, or other places frequented by the victim, unless the victim consents to such contact and so advises the probation officer.

ll. You must have no contact, nor reside with children under the age of 18, including your own children, unless approved in advance by the probation officer in consultation with the treatment providers. You must report all contact with children to the probation officer and the treatment provider. Should you have contact with a child, you are required to immediately remove yourself from the situation and notify your probation officer within 24 hours of this contact.

mm. You must not loiter near schools, school yards, parks, arcades, playgrounds, amusement parks, or other places used primarily by children under the age of 18 unless approved in advance by the probation officer.

nn. You must not associate with or have any contact with convicted sex offenders unless in a therapeutic setting and with the permission of the probation officer.

oo. You are restricted from engaging in any occupation, business, or profession, including volunteer work, where you have access to children under the age of 18, without prior approval of the probation officer. Acceptable employment shall include a stable verifiable work location and the probation officer must be granted access to the work site.

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pp. You must have all residences and employment pre-approved by the probation officer ten (10) days prior to moving or changing employment. You must comply with any residency restriction ordinances in the city where you reside.

rr. You must undergo a sex offense-specific evaluation and participate in a sex offender treatment and/or mental health treatment program approved by the probation officer. You must abide by all rules, requirements, and conditions of the sex offender treatment program(s), including submission to polygraph testing. You must sign releases of information to allow all professionals involved in your treatment and monitoring to communicate and share documentation. You must pay for these services as directed by the probation officer.

ss. You must submit to an initial polygraph examination and subsequent maintenance testing, at intervals to be determined by the probation officer, to assist in treatment, planning, and case monitoring. You must pay for these services as directed by the probation officer.

zz. You must report to the Supervision Unit of the U.S. Probation Office for the District of Nebraska between the hours of 8:00 a.m. and 4:30 p.m., 111 South 18th Plaza, Suite C79, Omaha, Nebraska, (402) 661-7555, within seventy-two (72) hours of being placed on probation or release from confinement and, thereafter, as directed by the probation officer.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$2,727.80			Court finds indigency and declines to apply the additional JVTA assessment

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
EM	$2,727.80	$2,727.80	
Totals	$2,727.80	$2,727.80	

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299
**Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
Without limiting the foregoing, and following release from prison, the defendant shall make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of $100 or 3% of the defendant's gross income, whichever is greater; (b) the first payment shall commence 30 days following the defendant's discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) the defendant shall be responsible for providing proof of payment to the probation officer as directed.

The criminal monetary penalty is due in full on the date of the judgment. The defendant is obligated to pay said sum immediately if he or she has the capacity to do so. The United States may institute civil collection proceedings at any time to satisfy all or any portion of the criminal monetary penalty.

All financial penalty payments are to be made to the Clerk of the U. S. District Court, 111 S. 18th Plaza, Suite 1152, Omaha, NE 68102-1322.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s): _____

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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CLERK'S OFFICE USE ONLY:

ECF DOCUMENT

I hereby attest and certify this is a printed copy of a document which was electronically filed with the United States District Court for the District of Nebraska.

Date Filed:_____

DENISE M. LUCKS, CLERK

By _____Deputy Clerk