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### Unrecognized Right of Criminal Defendants to Admit Their Own Pretrial Statements, The

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## THE UNRECOGNIZED RIGHT OF CRIMINAL DEFENDANTS TO ADMIT THEIR OWN PRETRIAL STATEMENTS

STEPHEN A. SALTZBURG\*

DANIEL J. CAPRA\*\*

*In Agard v. Portuondo, the United States Supreme Court held that a prosecutor did not violate a testifying defendant's constitutional rights by inviting the jury to infer from the defendant's presence at trial that the defendant altered his own version of events to accord with other witnesses' testimony. Justice Scalia's opinion for the Court emphasized that jurors might well draw the inference even without a prosecutor asking them to do so. Although Agard is viewed as giving an advantage in a criminal trial to the government, this Article considers how Agard might be used to allow defense counsel to introduce the prior consistent statements of defendants that ordinarily could not be admitted under the rules of evidence. The Article discusses some procedural implications of admitting a defendant's pretrial statements—in response to the prosecution's Agard argument, or simply in an effort to negate the possibility that the jury will draw an inference on its own even if the prosecutor makes no Agard argument. It concludes by examining the potential effect that admission of prior consistent statements could have on defense strategy at trial, and illustrates with some examples of what defense counsel could do post-Agard to demonstrate that the defendant's testimony was not the product of hearing the testimony of government witnesses.*

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## INTRODUCTION

On March 6, 2000, the United States Supreme Court decided *Portuondo v. Agard*.<sup>1</sup> The case did not receive much fanfare when it was handed down, and it has largely been ignored by commentators, prosecutors, and defense counsel.<sup>2</sup> When the case has been considered, the issue generally has been whether a state court should permit the same type of prosecutorial argument that the Supreme Court permitted.<sup>3</sup> Yet, we believe that the result in *Agard* has important—and positive—implications for criminal defendants and their counsel. This Article considers how *Agard* might be used to allow the defense to introduce prior consistent statements of the defendant—statements that ordinarily cannot be admitted under the rules of evidence.

The Court in *Agard* held that the prosecutor did not violate the testifying defendant's constitutional rights by inviting the jury to draw an adverse inference from the defendant's presence at trial.<sup>4</sup> Specifically, it was permissible for the prosecutor to point out that, unlike all the other witnesses, the defendant was not sequestered during trial. Consequently, the defendant had the opportunity to hear all the trial testimony, and thereby to tailor his own testimony to that of the witnesses who preceded him.

Although the defendant lost in *Agard*, this Article argues that the Court's opinion opened a door for criminal defendants to introduce evidence that had heretofore been excluded. The Court's rationale, fairly applied, should allow a defendant, attacked with an *Agard* argument, to introduce his own pretrial hearsay statements that are consistent with his trial testimony. The Court allowed the

1. 529 U.S. 61 (2000).

2. The sparse commentary on the case includes William E. Hellerstein, "Shakin' and Bakin'": *The Supreme Court's Remarkable Criminal Law Rulings of the 1999 Term*, 17 *TOURO L. REV.* 163 (2000); John Owens, Comment, *Portuondo v. Agard: Distinguishing Impeachment of Credibility from the Act of Burdening a Defendant's Constitutional Rights*, 78 *DENV. U. L. REV.* 173 (2000); and Thomas Lundy, *Jury Instruction Corner: Agard Agony*, *CHAMPION*, July 2004, at 36.

3. Compare, e.g., *State v. Alexander*, 755 A.2d 868, 874 (Conn. 2000) (following the Supreme Court), with *State v. Daniels*, 861 A.2d 808, 819 (N.J. 2004) (finding the prosecutor's arguments improper and rejecting the Supreme Court's approach).

4. *Agard*, 529 U.S. at 73.

prosecutor to ask the jury to infer that the defendant had altered his own version of events to accord with other witness testimony at trial. It stands to reason that the defendant should be allowed to rebut this inference by introducing statements he made before trial that are consistent with his trial testimony.<sup>5</sup>

This Article discusses the opportunities for criminal defendants presented by the Court's opinion in *Agard*. Part I reviews the factual background of *Agard* and the rationale of the Supreme Court's decision. Once it is clear how the Supreme Court views the normal reactions of juries in criminal cases, the potential significance of the Court's decision for defendants is evident. Part II argues for admission of a particular type of statement that a defendant could make pretrial and then offer at trial to blunt the impact of the adverse inference raised by the prosecutor in *Agard*. Part III considers some procedural implications of admitting defendants' pretrial statements in response to the prosecution's *Agard* argument. Part IV discusses the potential effect of admission on defense strategy, and on the scope and timing of pretrial discovery. Part V sets forth some trial examples that may arise in light of *Agard*.

## I. *PORTUONDO V. AGARD*: FACTUAL BACKGROUND AND SUPREME COURT DECISION

### A. *Factual Background*

Ray Agard met Nessa Winder and Breda Keegan on Friday, April 27, 1990, at a bar and night club in lower Manhattan.<sup>6</sup> Both women were then twenty-three years old.<sup>7</sup> After socializing for some time, Agard invited Winder back to his Queens apartment.<sup>8</sup> She accepted, and a consensual sexual relationship between Agard and Winder

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5. See, e.g., FED. R. EVID. 801(d)(1)(B) (exempting prior consistent statements from the hearsay rule when offered to rebut an express or implied charge against a declarant of recent fabrication or improper motive); *infra* Part II.

6. *Agard v. Portuondo*, 117 F.3d 696, 698 (2d Cir. 1997), *rev'd*, 529 U.S. 61 (2000). Citations in this section are to the Second Circuit's opinion in *Agard v. Portuondo*, which presents the factual background of the case most fully.

7. *Id.*

8. *Id.* at 699.

began early the next morning.<sup>9</sup> The extent, but not the existence, of that relationship was contested at trial.<sup>10</sup>

Agard, Winder, and Keegan reconvened the following weekend at the same bar and night club.<sup>11</sup> They were joined later that night by two of Agard's friends—Freddy and Kiah.<sup>12</sup> The group drank and talked, and there was some use of cocaine, including use by Winder.<sup>13</sup> Sometime between 4:00 and 4:30 a.m., at Agard's suggestion, they returned to his apartment.<sup>14</sup> Kiah and Freddy left to buy beer, while Agard, Keegan, and Winder retired to Agard's bedroom.<sup>15</sup>

At trial, these facts were largely, though not entirely, uncontested. What occurred over the course of approximately the next eight hours, however, was substantially in dispute. According to Agard, upon returning to the apartment, Keegan became "loud" and "agitated" about her desire to go home.<sup>16</sup> He eventually escorted her out to Kiah's car, returned, and fell asleep next to Winder.<sup>17</sup> Agard and Winder awoke several hours later and had consensual vaginal intercourse before falling back to sleep and reawakening around 1:00 p.m.<sup>18</sup> At that time, according to Agard, Winder was upset—her boyfriend was arriving from England and would be furious if he discovered the relationship.<sup>19</sup> Agard attempted to calm her down and an altercation ensued, during which she scratched his face and he reflexively pushed her away.<sup>20</sup> Agard then called a cab, gave Winder \$25, and sent her on her way.<sup>21</sup>

Keegan and Winder told a different story. Keegan testified that Agard responded to her requests to leave his apartment by pressing

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9. *Id.*

10. *Id.* at 698.

11. *Id.* at 699.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 701.

17. *Id.*

18. *Id.*

19. *See id.* at 699, 701.

20. *Id.* at 701-02.

21. *Id.* at 702.

a loaded gun against her head.<sup>22</sup> Agard assertedly warned Keegan to be quiet and continued to threaten her as he vacillated between ordering her out and demanding that she stay.<sup>23</sup> Agard eventually allowed Keegan to leave with Kiah.<sup>24</sup>

Winder testified that she awoke at 9:30 a.m. on Sunday, May 6, wearing only her "vest" and without any recollection of the previous night's events.<sup>25</sup> According to Winder, Agard expressed an interest in sexual intercourse.<sup>26</sup> She declined, however, indicating that she was expecting her boyfriend from England.<sup>27</sup> Agard became angry, approached her from the back and slapped her in the face.<sup>28</sup> He continued to physically attack her before forcing her, at gunpoint, to engage in oral sodomy.<sup>29</sup> She screamed and struggled, but eventually submitted—in the face of death threats—to repeated acts of sodomy and rape.<sup>30</sup> Finally, when for the second time Agard's landlady phoned the apartment, Winder had an opportunity to dress.<sup>31</sup> Agard then called a taxi to take her back to Brooklyn.<sup>32</sup> He escorted her downstairs, warning, "[D]on't dare call the police."<sup>33</sup> Because Winder was short on money, the cab driver dropped her off down the street from Agard's apartment where she was eventually able to phone Keegan.<sup>34</sup> Winder hid until Keegan came for her, and the two women went to the police station.<sup>35</sup> Winder was examined later that day by Doctor Ardeshir Karimi at Elmhurst Hospital.<sup>36</sup> Dr. Karimi did not see signs of abnormality or trauma in Winder's vagina or anus.<sup>37</sup>

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22. *Id.* at 700.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *See id.*

28. *Id.*

29. *Id.*

30. *Id.* at 700-01.

31. *Id.* at 701.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

On Monday, Winder and Keegan found the following message on their apartment's answering machine: "You will know who this message is for. After careful consideration of this entire situation, it was my fault. I was a golden asshole. The only thing I can do is say I'm sorry and that's it. I'll never bother you again. Live safely and peacefully. Goodbye."<sup>38</sup> Both women identified Agard's voice.<sup>39</sup> The following day, a detective executed a search warrant at Agard's home and recovered a .45 caliber automatic handgun and two magazines containing shells.<sup>40</sup> Agard was arrested and charged with nineteen sodomy and sexual assault counts and three unlawful firearms counts.<sup>41</sup>

Agard's story was largely consistent with the complainants' account about the first weekend after they met. He contended, however, that he had consensual anal intercourse with Winder on their first night together, as well as consensual intercourse on Saturday night.<sup>42</sup> Agard also testified that Winder found his gun in the closet and tried on the holster.<sup>43</sup>

Agard's account of the second weekend, however, was markedly different from that of the complainants. He testified that Winder was awake and kissing and fondling him on the drive to the second nightclub, and that she did not object to returning to his home in Queens.<sup>44</sup> As to Keegan, Agard stated that she was "loud" about her desire to go home when they arrived at his apartment in Queens.<sup>45</sup> Agard asserted that he complied with Keegan's demands and that, as he brought her to Kiah's car, they passed his landlady who was "upset" about the noise Keegan was making.<sup>46</sup> After sending Keegan off, Agard returned to his room and went to sleep on his bed next to Winder.<sup>47</sup> He testified that at this point it was about 6:00 a.m.<sup>48</sup>

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38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.* at 702.

42. *Id.* at 701.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*



Agard testified that he and Winder awoke around 9:00 a.m. and had consensual vaginal sex before falling asleep again; that they woke again sometime between noon and 1:00 p.m., and at that point Winder was "upset," "kind of hyper," and worried about the possibility that her boyfriend would find out about her having sex with Agard and would react violently.<sup>49</sup> He also testified that he tried to calm her down, approaching her from behind and taking hold of her shoulders; that Winder reacted to his sincere attempt by hitting him, taking hold of his lower lip and scratching him on the inside of his mouth; that he reacted reflexively by using the palm of his open hand to push her away, "mushing" her in the eye; and that when the cab he had already called arrived, he gave Winder \$25 and sent her on her way.<sup>50</sup> Agard admitted that he was "annoyed" about the trouble the women had caused him with his landlady, but denied that he was "angry."<sup>51</sup> The following day he called to apologize to Winder for mushing her in the face.<sup>52</sup>

Kiah also testified for the defense, contradicting Keegan on several points. He corroborated Agard's account that Winder embraced and kissed Agard during the drive to the second club.<sup>53</sup> He also testified that Winder was talking and drinking at the last bar, not asleep as Keegan recollected.<sup>54</sup> Finally, he disputed Keegan's assertion that she had told him that Agard threatened her with a gun.<sup>55</sup>

### *B. Road to the Supreme Court*

Agard was convicted at trial on two sexual assault counts, and on two counts of third degree weapons possession.<sup>56</sup> The trial judge

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49. *Id.* at 701.

50. *Id.* at 701-02.

51. *Id.* at 702.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 702.

dismissed one of the assault convictions<sup>57</sup> as repugnant to the jury's finding that no rape had occurred.<sup>58</sup>

Defense counsel moved for a mistrial, claiming that the prosecutor's summation violated Agard's constitutional rights. The contested part of the summation was the following:

You know, ladies and gentlemen, unlike all the other witnesses ... the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.

[objection overruled]

That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?

[objection overruled]

He's a smart man. I never said he was stupid.... He used everything to his advantage.<sup>59</sup>

The prosecutor's point was apparently that Agard was able to explain things such as the voicemail he left, and his apparently violent actions toward Winder, which he could not have done as easily had he not heard the detailed accounts of the prosecution witnesses. The prosecutor, however, did not specifically address which of Agard's statements might have been tailored. The prosecutor's argument was essentially a generic invitation to draw a negative inference against Agard because he heard the prosecution witnesses before he testified.

The trial judge denied the motion for mistrial, ruling that the prosecutor's comments—inviting the jury to infer that Agard had the unique opportunity to, and did in fact, tailor his testimony to fit that of the witnesses who preceded him—did not unduly burden Agard's constitutional right to be present at trial.<sup>60</sup>

On direct appeal, the Appellate Division affirmed the sodomy conviction and one of the weapons convictions, but reversed the

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57. The dismissed conviction was for felony assault in which rape was the underlying felony.

58. *Agard*, 117 F.3d at 702.

59. *Id.* at 707.

60. *See id.*

second weapons conviction, because both charges were for the same offense.<sup>61</sup> The court did not address Agard's constitutional claim. The New York Court of Appeals denied review without opinion.<sup>62</sup> Agard sought habeas corpus relief in the United States District Court for the Eastern District of New York, but was denied in an unpublished opinion.<sup>63</sup>

On appeal from denial of the habeas petition, a divided panel of the Second Circuit reversed.<sup>64</sup> The court held that the prosecutor's comments during summation violated the defendant's Fifth, Sixth, and Fourteenth Amendment rights.<sup>65</sup> According to the court, it was

constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence. Such comments violate a criminal defendant's right to confrontation, his right to testify on his own behalf, and his right to receive due process and a fair trial.<sup>66</sup>

Judge Winter, writing in concurrence, noted the power of the inference suggested by the prosecutor in a case that turned on witness credibility. He observed that the case "turned on detailed and conflicting versions of several events given by prosecution witnesses and by the defendant."<sup>67</sup> Thus, the prosecution's suggestion to derive a negative inference from the defendant's presence at trial amounted to a "powerful argument."<sup>68</sup> Judge Winter also called particular attention to the unfairness of the prosecutor's comments given the defendant's inability to anticipate or rebut them:

Under New York law, absent a claim of recent fabrication, appellant could not have introduced evidence of prior consistent statements—that is, evidence that he had told the same story even before witnessing the prosecution's case. So long as New

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61. *People v. Agard*, 606 N.Y.S.2d 239, 240-41 (N.Y. App. Div. 1993).

62. *People v. Agard*, 635 N.E.2d 298, 298 (N.Y. 1994).

63. *Portuondo v. Agard*, 529 U.S. 61, 64-65 (2000).

64. *Agard*, 117 F.3d at 698.

65. *Id.*

66. *Id.* at 709.

67. *Id.* at 715 (Winter, J., concurring).

68. *Id.* at 715-16.

York prohibits criminal defendants from introducing prior consistent statements to demonstrate that their version of evidence was not fabricated after learning of the prosecution's evidence, its prosecutors may not, in my view, argue that such fabrication occurred.<sup>69</sup>

### *C. Supreme Court Decision*

The Supreme Court granted certiorari<sup>70</sup> to address specifically whether it was constitutional for the prosecutor, during summation, "to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly."<sup>71</sup> In an opinion written by Justice Scalia, the Court reversed the Second Circuit.<sup>72</sup> Two Justices concurred in the result; two Justices dissented.<sup>73</sup>

#### *1. The Majority Opinion*

##### *a. Distinguishing Griffin v. California*

Justice Scalia agreed with the Second Circuit that credibility was key at Agard's trial. He pointed out that the prosecutor attacked Agard's credibility in several ways: "She stressed respondent's interest in the outcome of the trial, his prior felony conviction, and his prior bad acts. She argued that respondent was a 'smooth slick character ... who had an answer for everything,' and that part of his testimony 'sounded rehearsed.'"<sup>74</sup>

Agard argued that the prosecutor's suggestion to draw a negative inference from his presence at trial was analytically the same as a prosecutor's suggestion to draw an inference from the defendant's refusal to testify at trial.<sup>75</sup> He reasoned that the Court had barred the latter inference in *Griffin v. California*,<sup>76</sup> as a violation of the

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69. *Id.* at 715 (internal citations omitted).

70. *Portuondo v. Agard*, 526 U.S. 1016 (1999).

71. *Portuondo v. Agard*, 529 U.S. 61, 63 (2000).

72. *See id.* at 63, 75.

73. *See id.* at 62.

74. *Id.* at 63-64 (internal citation omitted).

75. *Id.* at 65.

76. 380 U.S. 609 (1965).

Fifth Amendment; therefore the Court should bar the former inference, in this case as a violation of the defendant's constitutional right to be present at trial. He argued that he was being penalized for exercising that right in the same way that Griffin was punished for exercising his right to remain silent.<sup>77</sup> Justice Scalia, however, found that the *Griffin* analogy was unpersuasive. He noted that, although the Fifth Amendment prohibits the jury from drawing an inference from the defendant's silence, there is no such bar to drawing an inference from the defendant's presence at trial.<sup>78</sup> He explained as follows:

What we prohibited the prosecutor from urging the jury to do in *Griffin* was something *the jury is not permitted to do*. The defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him—and upon request the court must instruct the jury to that effect. It is reasonable enough to expect a jury to comply with that instruction since, as we observed in *Griffin*, the inference of guilt from silence is not always “natural or irresistible.” A defendant might refuse to testify simply out of fear that he will be made to look bad by clever counsel, or fear “that his prior convictions will prejudice the jury.” By contrast, it is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him. It is one thing (as *Griffin* requires) for the jury to evaluate all the *other* evidence in the case without giving any effect to the defendant's refusal to testify; it is something else (and quite impossible) for the jury to evaluate the credibility of the defendant's testimony while blotting out from its mind the fact that before giving the testimony the defendant had been sitting there listening to the other witnesses. Thus, the principle respondent asks us to adopt here differs from what we adopted in *Griffin* in one or the other of the following respects: It either prohibits inviting the jury to do what the jury is perfectly entitled to do; or it requires the jury to do what is practically impossible.<sup>79</sup>

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77. *Agard*, 529 U.S. at 65-68.

78. *Id.*

79. *Id.* at 67-68 (internal citations omitted).

*b. The Reasonable Jury*

In a footnote accompanying the above quote, Justice Scalia reiterates “that inferring *opportunity to tailor* from presence is inevitable, and prohibiting that inference (while simultaneously asking the jury to evaluate the veracity of the defendant’s testimony) is demanding the impossible.”<sup>80</sup> In the same footnote, Justice Scalia rejected the distinction between pointing out the opportunity to tailor and actually making an accusation of tailoring, and concluded that “[d]rawing the line between pointing out the availability of the inference and inviting the inference would be neither useful nor practicable.”<sup>81</sup>

*c. Generic Versus Specific Comments*

For the majority, it made no difference that the prosecutor’s argument was “generic” rather than based upon any specific indication of tailoring.<sup>82</sup> Justice Scalia dredged up the old case of *Reagan v. United States*<sup>83</sup> as support for the proposition that generic arguments are acceptable. In *Reagan*, the trial judge instructed the jury that “the deep personal interest which [the defendant] may have in the result of the suit should be considered ... in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.”<sup>84</sup> Comparing *Reagan* to the facts of *Agard*, Justice Scalia found that in both cases the jury was simply given “a consideration [it] was to have in mind when assessing the defendant’s credibility.”<sup>85</sup>

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80. *Id.* at 68 n.1.

81. *Id.*

82. *See id.* at 70-71.

83. 157 U.S. 301 (1895).

84. *Agard*, 529 U.S. at 71 (quoting *Reagan*, 157 U.S. at 304) (internal quotation marks omitted).

85. *Id.*

*d. Cross-examination Versus Summation*

The defendant in *Agard* tried to raise a distinction between an argument made during cross-examination and one made in closing: If the prosecutor had raised the tailoring argument on cross-examination, the defense would have had an opportunity to address and rebut it.<sup>86</sup> According to *Agard*, it smacked of unfairness to comment on the defendant's right to attend the trial without the defendant having any right of reply.<sup>87</sup> The *Agard* majority found it irrelevant, however, that the prosecutor's comments were made during summation rather than cross-examination.<sup>88</sup> Justice Scalia noted that the defense often must predict what the prosecution will say in closing argument, and accordingly must plan in advance for the possibility of the prosecution raising an argument without a right of reply.<sup>89</sup>

Equally irrelevant for the majority was the fact that New York law may have required the defendant to be present at trial.<sup>90</sup> Justice Scalia wrote that "[t]here is ... no authority whatever for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial violates due process."<sup>91</sup>

*2. Justice Stevens's Concurring Opinion*

Justice Stevens, with whom Justice Breyer joined, concurred only in the judgment.<sup>92</sup> Justice Stevens concluded that the prosecutor's argument demeaned the truth-seeking function of the adversary process, violated the respect for the defendant's individual dignity, and ignored the presumption of innocence.<sup>93</sup> He was not persuaded,

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86. *See id.* at 71-72.

87. *See id.*

88. *Id.* at 72.

89. *See id.* at 72-73.

90. Justice Scalia cited *People v. Aiken*, 380 N.E.2d 272, 274 (N.Y. 1978), for the proposition that a defendant may waive his right to be present at every stage of the proceeding. *See Agard*, 529 U.S. at 75.

91. *Agard*, 529 U.S. at 75.

92. *See id.* at 76 (Stevens, J., concurring).

93. *See id.*

however, that the error created the kind of fundamental unfairness required in habeas corpus cases to set aside state convictions.<sup>94</sup>

### 3. *Justice Ginsburg's Dissent*

Justice Ginsburg, joined by Justice Souter, dissented.<sup>95</sup> She maintained generally that “[t]he Court today transforms a defendant’s presence at trial from a Sixth Amendment right into an automatic burden on his credibility,”<sup>96</sup> and specifically that “[i]t is no more possible to know whether Agard used his presence at trial to figure out how to tell potent lies from the witness stand than it is to know whether an accused who remains silent had no exculpatory story to tell.”<sup>97</sup> Justice Ginsburg found the Court of Appeals’ approach to be “restrained and moderate,”<sup>98</sup> and emphasized the unfairness of prosecutorial comment on an accused’s presence when there was no evidence of tailoring and the defendant had no fair chance to respond to the comment as he might have were he cross-examined about an allegation of tailoring.<sup>99</sup>

Justice Ginsburg did not dispute that a jury would be aware of a defendant’s presence at trial and of the opportunity of a defendant to tailor testimony.<sup>100</sup> She concluded, however, that a jury was likely in many or most cases to draw a natural or irresistible inference of guilt from a defendant’s failure to testify, and that a jury might not be as likely to draw an inference of wrongful tailoring from presence at trial as the majority suggested.<sup>101</sup> Justice Ginsburg also disputed the contention that a jury is entitled to draw an inference of tailoring from presence, and thus that a prosecutor could ask a jury to draw such an inference.<sup>102</sup> She argued that even if a jury could draw such an inference on its own, it

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94. *See id.*

95. *Id.* (Ginsburg, J., dissenting).

96. *Id.*

97. *Id.* at 77.

98. *Id.* at 78.

99. *See id.* at 78-80.

100. *See id.* at 86 & n.7.

101. *See id.* at 84-86.

102. *See id.* at 86.



would not follow that prosecutors could urge juries to draw the inference.<sup>103</sup>

## II. ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS OF AN ACCUSED AFTER *AGARD*

According to the *Agard* majority, during summation, a prosecutor is free to call the jury's attention to the defendant's unique opportunity to hear the testimony of all the witnesses who preceded him and to adapt his testimony accordingly.<sup>104</sup> A prosecutor is similarly permitted to directly accuse the defendant of tailoring.<sup>105</sup> In neither case do such comments unduly burden the exercise of a defendant's federal constitutional rights notwithstanding a lack of any evidence in the record that the defendant, in fact, changed his story.<sup>106</sup> The Court's decision, as explained above,<sup>107</sup> rests on the premise that criminal juries have a "natural and irresistible" tendency in assessing a defendant's credibility to infer that he took advantage of being the last witness to testify, even absent comment by the prosecutor to that effect.<sup>108</sup> Finally, and importantly, the Court stresses that it is up to the defendant to anticipate the prosecutor's closing argument and attempt to address it during the trial.<sup>109</sup> Although *Agard* precludes criminal defendants from successfully invoking the federal Constitution to block attacks of this nature, the Court left open the logical next question: Should defendants be permitted to respond? Under appropriate circumstances and with proper evidence, we believe the answer is "yes"—especially given the *Agard* majority's reliance on the well-established premise that the accused will often have to act preemptorily in anticipation of the prosecutor's closing argument. The proper evidence would be

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103. *See id.* at 86-87.

104. *See id.* at 73 (majority opinion).

105. *See id.*

106. It is important to note that the Supreme Court's ruling does not preclude state courts from prohibiting prosecutorial commentary of the sort at issue in *Agard* through a more expansive interpretation of state constitutional protections. *See, e.g., State v. Daniels*, 861 A.2d 808, 819 (N.J. 2006) (rejecting the Supreme Court's approach and finding the prosecutor's comments improper).

107. *See supra* note 79 and accompanying text.

108. *See Agard*, 529 U.S. at 67-68.

109. *See id.* at 72-73.

statements made by the defendant consistent with his in-court testimony and made before his exposure to any statements or testimony of the government's witnesses. This Article proceeds to discuss the proper circumstances for use of prior consistent statements to address the prosecutor's tailoring argument.

Suppose that Ray Agard had provided a pretrial statement in which his version of the events at issue was spelled out in detail and consistent with his trial testimony. Suppose as well that he gave this statement before he ever heard the prosecution witnesses testify and before he had any access to the statements given to the police or the prosecutor by prosecution witnesses. Finally, suppose that the statement was made to a lawyer and recorded in writing or through other media, such as audio or video tape. The existence of such a pretrial statement would not prove that Ray Agard was innocent or that he was not lying both in the pretrial statement and at trial. It would, however, totally negate the inference that he had tailored his testimony as a result of being present when government witnesses testified.

If the inference of tailoring is as powerful and inevitable as the Court in *Agard* presumed, then defendants must have a right to introduce, for purposes of rebuttal, pretrial statements of the sort just described. When a prosecutor calls upon the jury to infer either that the defendant tailored his testimony, or that the defendant had the enticing opportunity to do so, Federal Rule of Evidence 801(d)(1)(B)<sup>110</sup>—fairly applied—should allow for admission of these prior consistent statements.<sup>111</sup> However, when the prosecutor makes no such accusation, express or implied, the Federal Rules of Evidence might prove unduly narrow to accommodate what we believe is a defendant's right, in making a defense, to offer evidence to counter a damaging inference that criminal juries can apparently be expected to draw. A defendant should also be allowed to anticipate the possibility that the prosecutor might make the tailoring argument, even if it turns out that no such argument is made.

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110. Throughout this Article, comments regarding the Federal Rules of Evidence are applicable to the many state rules that are substantively identical.

111. For the procedural implications of permitting introduction of rebuttal evidence at summation, see *infra* Part III.

*A. Admission of Defendants' Pretrial Statements Following an Attack: Federal Rule of Evidence 801(d)(1)(B)*

A defendant who has made a pretrial statement that later proves consistent with his in-court testimony cannot benefit from having done so absent a vehicle for introducing his statement to the jury. The pretrial statement would be hearsay, even though the declarant is a witness at the trial.<sup>112</sup> In cases, however, where the prosecutor points to the defendant's courtroom presence to raise an inference of tailoring, Federal Rule of Evidence 801(d)(1)(B) can and should serve as that vehicle.

Rule 801(d)(1)(B) admits for their truth prior statements of a testifying witness that would otherwise be excluded as hearsay when those statements are consistent with the witness's in-court testimony and "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."<sup>113</sup> To qualify a prior consistent statement as nonhearsay under Rule 801(d)(1)(B), four criteria must be satisfied.<sup>114</sup> First, the proponent of the statement must testify at trial and be subject to cross-examination.<sup>115</sup> Second, the declarant must be impeached by a charge that his testimony was a recent fabrication or was infected by improper influence or motive.<sup>116</sup> The impeaching attack can take the form of either an express charge<sup>117</sup> (e.g., directly accusing the witness of lying), or an implied charge<sup>118</sup> (e.g., relying on innuendo

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112. See 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* § 801.02[1][d] (9th ed. 2006) ("[S]tatements that are recounted on the witness stand by the declarant who made them, i.e., prior statements of testifying witnesses, are also within the definition of hearsay.").

113. FED. R. EVID. 801(d)(1)(B) (stating that a statement is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive").

114. See, e.g., *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996).

115. FED. R. EVID. 801(d)(1)(B).

116. *Id.*

117. See *Arizona v. Johnson*, 351 F.3d 988, 998 (9th Cir. 2003) (upholding admission under Rule 802(d)(1)(B) of a victim's pretrial statements—recounted by testifying witness—that sex with the defendant was not consensual, offered to rebut the defendant's charge that the victim lied to avoid deportation).

118. See, e.g., *United States v. Stoeker*, 215 F.3d 788, 791 (7th Cir. 2000) (finding that cross-examination concerning a witness's plea agreement suggested an incentive to testify

to suggest that the witness's testimony was improperly motivated). Third, the prior statement must be consistent with the declarant's challenged in-court testimony.<sup>119</sup> Fourth, the statement must have been made before the alleged motive to falsify arose.<sup>120</sup>

The first and third criteria would necessarily be satisfied in any case where a defendant records his version of events pretrial and then seeks to admit that statement to rebut an eleventh-hour charge that he changed his story to fit the testimony of witnesses who came before him. Only if the defendant testifies can he be attacked by the prosecution for tailoring his testimony or for having had the alluring opportunity to do so. Additionally, only if the prior statement is consistent with the defendant's in-court testimony would it have any advantageous probative value (i.e., by negating the inference of tailoring and thereby bolstering the defendant's veracity).

The second criterion can be met by a range of prosecutorial conduct, though that range is delimited by the text of the rule. Only certain forms of impeachment—express or implied charges of recent fabrication, improper influence, or motive—trigger the exception.<sup>121</sup> A direct accusation that the defendant changed his testimony after hearing that of other witnesses is clearly an express charge of recent fabrication and—no matter when it was made—should open the door to admission by the defendant of any qualifying prior consistent statements. So too, in light of *Agard*, should a prosecutor's express comment that the defendant *had an opportunity* to tailor his testimony. The prosecutor's closing arguments in *State v. Hart* provide a helpful example: "After all, the defendant is the only

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falsely and constituted an implied charge under Rule 801(d)(1)(B) that the witness altered his testimony to curry favor with the government for sentencing purposes).

119. See, e.g., *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988) (noting that Rule 801(d)(1)(B) does not require the prior statement to be identical in every detail to trial testimony). However, the closer a defendant's pretrial statement tracks his in-court testimony, the more persuasive his rebuttal to a charge that he changed his story.

120. See *Tome v. United States*, 513 U.S. 150, 158 (1995) (holding that only a consistent statement that "predates the motive [to falsify] is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive").

121. A prior consistent statement offered simply to bolster the general veracity of a witness is inadmissible under Rule 801(d)(1)(B). See, e.g., *United States v. Bishop*, 264 F.3d 535, 548 (5th Cir. 2001) ("Rule 801(d)(1)(B) cannot be construed to allow the admission of what would otherwise be hearsay every time a law enforcement officer's credibility or memory is challenged ....").

one who was allowed to sit through the testimony of every other witness before he got up to testify and, I suggest, had an opportunity to fabricate his testimony based on what the other witnesses said.”<sup>122</sup> In *Hart*, the prosecutor did not directly accuse the defendant of changing his story to fit the testimony of the government’s witnesses. However, according to Justice Scalia in *Agard*, explicitly pointing out the opportunity to tailor rather than charging tailoring in fact is a distinction without a difference.<sup>123</sup> Indeed, if drawing the line between these two modes of impeachment is “neither useful nor practicable” in assessing the constitutional implications of a prosecutor’s comments,<sup>124</sup> both modes should qualify as express charges of recent fabrication for purposes of determining whether defendants can take advantage of Rule 801(d)(1)(B).

The Rule’s impeachment requirement is equally satisfied by an implied charge of recent fabrication, improper influence, or improper motive—one that relies on suggestion or innuendo.<sup>125</sup> The prosecutor’s comments at summation in *Agard* provide a good example of such a charge. By saying that the defendant craftily “used everything to his advantage” and got to sit at trial and “think what I am going to say and how am I going to say it?,”<sup>126</sup> the prosecutor clearly intended to imply that the defendant changed his version of events during the trial to align with the story told by the government’s witnesses. That the prosecutor avoided directly accusing the defendant of tailoring is of no moment—Rule 801(d)(1)(B) treats this kind of commentary as an attack and permits admission of prior consistent statements that satisfy the Rule’s remaining criteria.

Finally, for a defendant’s pretrial statement to qualify as admissible nonhearsay, the statement must be made before the

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122. 15 P.3d 917, 924 ¶ 46 (Mont. 2000); see also *State v. Daniels*, 861 A.2d 808, 812 (N.J. 2004) (“[T]he defendant sits with counsel, listens to the entire case and he listens to each one of the State’s witness[es], he knows what facts he can’t get past .... [H]e can choose to craft his version to accommodate those facts.” (emphasis omitted)).

123. See *Portuondo v. Agard*, 529 U.S. 61, 68 n.1 (2000) (“Drawing the line between pointing out the availability of the inference and inviting the inference would be neither useful or practicable.”).

124. *Id.*

125. See, e.g., *United States v. Arias-Santana*, 964 F.2d 1262 (1st Cir. 1992) (holding that the prior consistent statement was admissible to rebut an implied charge of recent fabrication).

126. *Agard v. Portuondo*, 117 F.3d 696, 707 (2d Cir. 1997).

alleged motive to falsify arose.<sup>127</sup> The logic behind this criterion is most easily demonstrated through a simple hypothetical: Suppose an uncharged co-conspirator testifying in a criminal trial is impeached by a defense attorney's claim that the witness is lying to curry favor with the government. A statement that the witness made before trial, but *after* his own arrest and decision to cooperate with the prosecution, is infected by the same source of potential bias as his trial testimony and is equally likely to be a fabrication.<sup>128</sup> The statement therefore is of no value in refuting the defense attorney's charge because it does not tend to prove that the alleged motive to fabricate had no effect. By contrast, a statement made by the witness to a trusted friend before the witness's arrest—and consistent with his subsequent testimony—might demonstrate forcefully that the witness is telling the truth at trial. It shows that the witness made the same statement before the motive to falsify arose, and therefore the motive to falsify did not affect the trial testimony.

When a defendant is accused of adapting his version of events to fit that of the witnesses who preceded him, the source of the alleged fabrication is exposure to the statements of those other witnesses. After all, a defendant cannot tailor his testimony until he has something to tailor it to. A statement by a defendant before trial—and before he has access to any statements of prosecution witnesses that might be compelled through discovery or disclosed to the defendant in some other manner—is necessarily made before either the motive or the opportunity to falsify comes to pass.

For defendants who, before they have access to witness testimony, make a pretrial statement that tracks their subsequent trial testimony, Rule 801(d)(1)(B) should be construed to allow them to admit that statement into evidence to rebut a last minute charge of tailoring.<sup>129</sup> However, even so construed, the Rule remains

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127. See *Tome v. United States*, 513 U.S. 150, 158 (1995).

128. See, e.g., *United States v. Awon*, 135 F.3d 96 (1st Cir. 1998) (holding that it was error to admit consistent statements of prosecution witnesses under Rule 801(d)(1)(B), where the witnesses were impeached on the ground that they were seeking leniency, and consistent statements were made only after the witnesses were informed that the police were aware of their criminal activity and informed that they could benefit from cooperating).

129. See *infra* Part III for a discussion about the procedure under which such statements should be admitted.

underinclusive given the force and scope of the inference as described by Justice Scalia in *Agard*.<sup>130</sup>

*B. Admission of Defendants' Pretrial Statements Absent an Attack*

Rule 801(d)(1)(B) conditions admission of a defendant's prior consistent statement on his opponent opening the door through an attempt to impeach. Thus, a defendant who has not been so attacked, but nonetheless fears that the jury will draw an adverse inference from his courtroom presence, is not able to invoke the Rule to admit the consistent statement. Indeed, a narrow interpretation of the admissibility of relevant evidence under the Federal Rules of Evidence would leave such a defendant without effective recourse.<sup>131</sup> If, however, as Justice Scalia argued in *Agard*, criminal juries can and will infer that a defendant used his courtroom presence to tailor his testimony notwithstanding the content of the prosecutor's summation, we believe that courts should be open to permitting defendants to introduce prior consistent statements of the sort discussed here even absent an attack. The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."<sup>132</sup> Whether that right emanates from the Due Process Clause of the Fourteenth Amendment or from the Compulsory Process or Confrontation Clauses of the Sixth Amendment, it requires that criminal defendants be afforded "a fair opportunity to defend against the State's accusations" through the presentation of relevant, probative evidence.<sup>133</sup> Surely that right is

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130. See discussion *supra* Part I.

131. Prior consistent statements are also generally inadmissible for rehabilitation purposes absent at least some impeaching attack. See FED. R. EVID. 608(a)(2) ("[E]vidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."); see also *United States v. Bolick*, 917 F.2d 135, 138 (4th Cir. 1990) ("[T]he requirement that impeachment must precede rehabilitation should surprise no one. For how can one rehabilitate what has not yet been discredited?").

132. *California v. Trombetta*, 467 U.S. 479, 485 (1984) (affirming a defendant's due process right to be afforded meaningful opportunity to present a full and fair defense); see also *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (holding that the petitioner was deprived of the fundamental right to fair opportunity to present a defense where the court excluded testimony concerning circumstances of the petitioner's confession).

133. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (holding that the denial of defendant's motion to treat a witness—who had confessed to the murder for which the

broad enough to permit a defendant—with relevant, probative evidence—to negate an inference that a jury otherwise would be permitted to draw, especially when the inference is as powerful as Justice Scalia describes it in *Agard*.<sup>134</sup> Both a fair construction of the relevancy rules, as well as equal application of Justice Scalia's reasoning in *Agard*, support that very proposition.

Relevant evidence is that which tends to make any fact of consequence to the determination of an action more or less likely.<sup>135</sup> In cases that turn on witness credibility, a defendant's pretrial statement demonstrating his testimonial consistency is therefore highly relevant to rebut the jury's negative inference from the defendant's presence throughout the trial. Pursuant to Rule 402, all relevant evidence is admissible unless otherwise proscribed.<sup>136</sup> Although Rule 801(d)(1)(B) and the common law rules on rehabilitation generally require impeachment before permitting introduction of a witness's prior consistent statements, there is no applicable rule or statute that explicitly bars rebuttal evidence of the type discussed here.<sup>137</sup> The logic behind the impeachment requirement is that, in the absence of an attack, the defendant's credibility has not been challenged and therefore does not need rehabilitating. However, if, as Justice Scalia argues, criminal juries inevitably draw the powerful adverse inference that defendants might have used their courtroom presence to tailor their testimony,<sup>138</sup> then no attack is required to impugn those defendants' credibility. In turn, allowing defendants to offer prior consistent statements to rebut that inference (i.e., to repair their credibility) is consistent with the spirit and purpose of the rehabilitation rules.

Of course, prior consistent statements offered to address a negative inference in the absence of impeachment by the adversary

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defendant was on trial—as adverse, and the exclusion of testimony of three other witnesses to whom former witness had repeated confession, deprived defendant of his constitutional right to an effective defense); see also *Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding that arbitrary exclusion of critical exculpatory evidence violates the accused's constitutional right to an effective defense).

134. See *supra* notes 78-80 and accompanying text.

135. See FED. R. EVID. 401.

136. FED. R. EVID. 402.

137. See FED. R. EVID. 807 (stating a residual exception to hearsay rules, allowing introduction of evidence with "circumstantial guarantees of trustworthiness").

138. See *supra* notes 78-80 and accompanying text.



cannot be admitted for their truth, unless they fit a hearsay exception. The hearsay exception provided under Rule 801(d)(1)(B) would be inapplicable for reasons just discussed. However, if the consistent statement is admitted simply to repair the defendant's credibility in response to a negative inference, the hearsay rule is inapplicable because such a statement is not admitted for its truth. As the court stated in *United States v. Harris*, the admissibility requirements of Rule 801(d)(1)(B) "need not be met to admit into evidence consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."<sup>139</sup> If the consistent statement is offered only to rehabilitate the defendant's credibility, the prosecution could ask that the jury be so instructed. Substantive admissibility, however, should not be of particular concern to defendants who are really after demonstrating testimonial consistency.<sup>140</sup>

As the hearsay rule is no bar to consistent statements offered to repair the damage to credibility from a negative inference drawn even in the absence of a tailoring argument, we are left with relevance. Justice Scalia's analysis in *Agard* essentially closes out any argument that the defendant's consistent statements are

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139. 761 F.2d 394, 399 (7th Cir. 1985); see also *United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986) ("[P]rior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)."). The end result under our analysis is that if the prosecutor makes a tailoring argument, the prior consistent statement is admissible both to rehabilitate the defendant's credibility and as substantive evidence; if no tailoring argument is made, the prior consistent statement is admissible only for rehabilitating credibility.

140. For an argument that the distinction between substantive and rehabilitative use of prior consistent statements is meaningless, see Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 FLA. ST. U. L. REV. 509, 540 (1997) (noting these are distinctions "without practical meaning"). See also *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("[T]he line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors.").

Although the distinction between substantive and rehabilitative use of prior consistent statements is probably meaningless as a practical matter, it is a distinction made necessary by the limitations (in the nature of admissibility requirements) of Rule 801(d)(1)(B). Thus, our analysis is in response to the structure and limitations of that Rule.

If, in the absence of a tailoring charge, defense counsel thought it critical to have his client's pretrial statement admitted for its truth, he might argue that a statement that proves inadmissible under Rule 801(d)(1)(B) solely for lack of impeachment ought to be admitted as a near miss to that Rule under the residual exception. See FED. R. EVID. 807.

irrelevant in this context.<sup>141</sup> If the inference that criminal defendants use their courtroom presence to tailor their testimony is as commonplace as Justice Scalia contends, then a consistent statement made before access to any statements of the trial witness is obviously relevant because it rebuts the inference by showing that the defendant's presence at trial did not affect his testimony. In fact, no evidence is more probative on the question of tailoring than a defendant's pretrial statement—made before access to witness statements—that aligns closely with his subsequent trial testimony. Thus, defendants should not be barred from negating the negative inference by a prosecutor's decision to forego reminding jurors of that which they will consider regardless.

The Court's analysis in *Old Chief v. United States*<sup>142</sup> lends strong support to our argument that the defendant should be allowed to rebut a negative inference that could be drawn by the jury even in the absence of prosecutorial argument on the point. In *Old Chief*, the defendant was charged with possessing a firearm after having previously been convicted of a felony.<sup>143</sup> The Court required the prosecution to accept the defendant's stipulation to the prior felony conviction in lieu of allowing the prosecution to prove the same to the jury by introducing the nature of and circumstances surrounding the conviction through presentation of the indictment.<sup>144</sup> The Court reasoned that in light of a less prejudicial evidentiary alternative (i.e., the stipulation), Rule 403 forbade the government from explaining to the jury the defendant's prior bad acts, which the jury might have used unfairly as propensity evidence to convict the defendant for crimes other than those charged.<sup>145</sup> Up to this point, *Old Chief* says little about the defendant's options in response to negative inferences drawn by the jury in the absence of prosecuto-

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141. See discussion *supra* Part I.C.1.

142. 519 U.S. 172 (1997).

143. *Id.* at 174.

144. *Id.* at 178.

145. *Id.* at 180 ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). Rule 403 allows for the exclusion of relevant evidence when the probative value of that evidence is substantially outweighed by its prejudicial effect (i.e., the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence). FED. R. EVID. 403.

rial argument. The Court went further in *Old Chief*,<sup>146</sup> however, and took pains to characterize and develop the more general rule as one that permits the prosecution to make its case with the evidence of its choice, in order to counter possible negative inferences that the jury might draw from a stipulation:

But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. "If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Calif. L. Rev. 1011, 1019 (1978) (footnotes omitted). Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party

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146. The Court found that it was an abuse of discretion under Rule 403 for a district judge to refuse the defendant's offer to stipulate to the fact of a prior conviction, and to allow the prosecution to admit the full record of that judgment, "when the purpose of the evidence is solely to prove the element of prior conviction." *Old Chief*, 519 U.S. at 174. *Old Chief* has been read to require the prosecution to accept a defense stipulation in lieu of presenting relevant, probative evidence only in cases involving a predicate conviction and where the stipulation is to the fact of that conviction (e.g., cases brought under 18 U.S.C. § 922(g) (2006)). See *United States v. Crowder*, 141 F.3d 1202, 1207 (D.C. Cir. 1998) (en banc) (noting that *Old Chief* distinguished between "stipulations to the status element of a crime, which can be forced upon the prosecution, and stipulations to other elements of a crime, which the prosecution should remain free to reject" (quoting 1 STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* 385 (7th ed. 1998))).

seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.<sup>147</sup>

The Court's conclusion—that evidence offered to counter jury inferences is relevant even if those inferences are not raised by the adversary—has regularly held sway where a party has sought to stipulate its way around the introduction of evidence that bears on witness credibility. Even when defense counsel provides assurances *ex ante* that she will refrain entirely from attempting to impeach a testifying witness, courts have nonetheless permitted the prosecution to introduce credibility evidence that paints a clearer and more compelling picture for the jury—a picture that addresses negative inferences that could be drawn by the jury even in the absence of an attack by the adversary.

The leading example is *United States v. Universal Rehabilitation Services, Inc.*, in which the government, on the direct examination of a cooperating witness, sought to introduce the guilty plea agreement of that witness.<sup>148</sup> It is well established that the guilty plea of a cooperating witness cannot be offered to prove that the defendant himself is guilty.<sup>149</sup> Prosecutors generally argue that the guilty plea should be admissible on direct not to prove the guilt of the defendant, but because the defendant will introduce the witness's guilty plea on cross-examination, and the government will suffer a negative inference if it does not anticipate that cross-examination by introducing the agreement on direct. This argument has been accepted by the courts because the prosecution does indeed suffer the risk that the jury will think it is hiding something that is critical to the credibility of its witness, unless it is brought out on direct.<sup>150</sup>

In *Universal Rehabilitation*, however, the defendant sought to counter this typical prosecutorial argument by promising the pros-

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147. *Old Chief*, 519 U.S. at 188-89.

148. 205 F.3d 657, 662 (3d Cir. 2000) (en banc).

149. See, e.g., *Gov't of the Virgin Islands v. Mujahid*, 990 F.2d 111 (3d Cir. 1993) (holding that the guilty plea of a cooperating witness must be excluded under Rule 403 if it is offered only to prove that the defendant is guilty).

150. For a discussion on the need to "remove the sting" of anticipated impeachment, see *Wilson v. Williams*, 182 F.3d 562, 574 (7th Cir. 1999) (en banc).

ecution that defense counsel would not use the guilty pleas of two cooperating witnesses to challenge the credibility of those witnesses.<sup>151</sup> The defendant claimed that his promise to refrain from impeachment of the witnesses rendered the introduction of their guilty pleas irrelevant to anticipate any impeachment.<sup>152</sup> But the court disagreed. It noted that the jury could draw negative inferences about the prosecution if neither side brought out the guilty plea agreements.<sup>153</sup> The plea agreements remained probative “to eliminate any concern that the jury may harbor concerning whether the government has selectively prosecuted the defendant.”<sup>154</sup> The court explained concern over jurors drawing inferences in the following passage:

When a co-conspirator testifies he took part in the crime with which the defendant is charged, his credibility will automatically be implicated. Questions will arise in the minds of the jurors whether the co-conspirator is being prosecuted, why he is testifying, and what he may be getting in return. If jurors know the terms of the plea agreement, these questions will be set to rest and they will be able to evaluate the declarant’s motives and credibility.... [A]n attack is not always necessary.<sup>155</sup>

Thus, as in *Old Chief*, the *Universal Rehabilitation* court reasoned that Rule 403 permits a party to introduce evidence that will counter a negative inference that may be drawn by a jury even though the adversary never raises such an inference. Both courts recognized what Justice Scalia emphasized in *Agard*—that juries will draw inferences other than those specifically raised by the proffered evidence. Both courts recognized that in light of this reality, the evidence rules must be construed to permit the parties to counter the predictable inferences drawn by jurors by introducing evidence that is probative to counter those inferences.

Fairly applied, both *Old Chief* and *Universal Rehabilitation* support the right of a criminal defendant to introduce a prior statement that demonstrates his testimonial consistency even

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151. *Universal Rehab.*, 205 F.3d at 662 & n.6.

152. *Id.* at 666.

153. *Id.* at 667.

154. *Id.* at 665.

155. *Id.* at 666 (quoting *United States v. Gaev*, 24 F.3d 473, 477 (3d Cir. 1994)).

absent a charge of tailoring by the prosecution. Those cases stand for the proposition that a party may not be deprived of the opportunity to counter probable inference-drawing by the jury simply because the adversary chose not to raise the inference. Although *Old Chief* and *Universal Rehabilitation* both concerned the ability of the prosecution to fully present its case, the proposition must apply equally to defendants. Both parties should have the right to counter inferences drawn by the jury, regardless of whether those inferences are raised by the jury. If anything, the defendant should have a greater right to counter those inferences, as it is the defendant who has a constitutional right to an effective defense. Moreover, although the prosecution carries the burden of proof, the defendant has a fundamental right to be afforded a meaningful opportunity to present a complete defense.<sup>156</sup>

A prosecutor's decision not to draw an inference of tailoring at summation is the functional equivalent of a stipulation to that effect *ex ante* and looks very much like defense counsel's attempt in *Universal Rehabilitation* to avoid introduction of the witnesses' guilty pleas by promising to forego impeachment. Yet the prosecution in *Universal Rehabilitation* was permitted to introduce the witnesses' guilty pleas, defense counsel's offer notwithstanding, because the probative value of the plea agreements to forestall juror speculation was not substantially outweighed by the risk that the jury would use the agreements as proof of the defendants' guilt.<sup>157</sup> Just as "[q]uestions will arise in the minds of jurors" when apparently uncharged co-conspirators testify to their participation in the crime with which a defendant is charged,<sup>158</sup> so too, according to Justice Scalia in *Agard*, will uninvited questions about tailoring arise in the minds of jurors who know that a defendant has been present in the courtroom throughout the testimony of prior witnesses.<sup>159</sup> In the former case, introduction of the terms of the witnesses' plea agreements puts those questions to rest.<sup>160</sup> In the

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156. See *supra* notes 132-34 and accompanying text.

157. *Universal Rehab.*, 205 F.3d at 669.

158. See *id.* at 666 (quoting *Gaev*, 24 F.3d at 477).

159. See *supra* notes 78-80 and accompanying text.

160. *Universal Rehab.*, 205 F.3d at 666 ("If jurors know the terms of the plea agreement, these questions will be set to rest and they will be able to evaluate the declarant's motives and credibility." (quoting *Gaev*, 24 F.3d at 477)).

latter, a defendant's pretrial statement demonstrating his testimonial consistency does the same. In both cases, the "evidentiary account" of what a witness "has thought and done" provides jurors with the information necessary to reach an "honest" and "morally reasonable" verdict.<sup>161</sup> In neither case should the admission of relevant, probative evidence depend upon a preceding attack.

The Court's opinions on drawing inferences from pre-*Miranda* silence lend further support to the notion that defendants should be permitted to rebut an inference about tailoring through the use of consistent statements made before trial. In *Jenkins v. Anderson*, the Court held that a defendant who testifies at trial can be questioned about his failure to come forward with an explanation of innocence prior to being arrested.<sup>162</sup> Additionally, in *Fletcher v. Weir*, the Court held that a negative inference could be drawn permissibly from the defendant's silence after he was arrested but before he received *Miranda* warnings.<sup>163</sup> These cases strongly support the notion that whether a defendant made a pretrial statement has probative value for a jury determining the credibility of the defendant's trial testimony. The Court's holding in *Doyle v. Ohio*—that a defendant's silence after receiving *Miranda* warnings cannot be used as impeachment evidence<sup>164</sup>—is entirely consistent with the reasoning of *Jenkins* and *Fletcher*. The *Doyle* Court concluded that it would be unfair to warn a defendant of a right to remain silent and then use silence against the defendant, not that silence might be without probative value.

Just as a defendant's silence might be probative of trial testimony, a defendant's pretrial statement laying out a scenario that is consistent with trial testimony might be powerful evidence that the government's witnesses had no impact on the defendant's

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161. See Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 480, 507 (2001) ("Is only the Government entitled to have the probative weight of its evidence enhanced (and the likelihood of admission thus increased) due to its capacity to establish a moral proposition, or may a defendant similarly demand that the probative value of her evidence be accorded a moral enhancement? ... [O]ne commentator has asserted that it is a 'perfectly natural implication of *Old Chief's* logic' to conclude that moral enhancements must be distributed even-handedly." (citing James J. Duane, *Screw Your Courage to the Sticking-Place: The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463, 468-69 (1998))).

162. 447 U.S. 231, 240-41 (1980).

163. 455 U.S. 603, 603 (1982).

164. 426 U.S. 610, 619 (1976).

testimony and that the defendant's knowledge was unaffected by being present at trial.<sup>165</sup>

### C. *The Instruction Alternative*

An alternative that might be considered to permitting a defendant to offer a pretrial statement is to have the judge instruct the jury that it may not use the defendant's presence at trial to draw an inference that the defendant tailored testimony to meet that of government witnesses. Instructions similar in nature—for example, that the defendant's silence at trial may not be counted against him—are routinely provided at a defendant's request. There are three problems with the instruction alternative as applied to cases like *Agard*: First, according to the *Agard* majority, criminal juries are “perfectly entitled,” when assessing the defendant's credibility, “to have in mind and weigh in the balance the fact that [the defendant] heard the testimony of all those who preceded him.”<sup>166</sup> Thus, an instruction not to draw the inference of tailoring is unjustified, as the jury is permitted to draw it—unlike an inference from silence at trial, which the jury is forbidden to draw.

Second, an instruction may do more harm than good. It calls attention to the defendant's opportunity to tailor which, notwithstanding the characterization of criminal jury reactions in *Agard*, might go unnoticed by jurors in at least some cases.<sup>167</sup> It fails to

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165. As Justice Scalia noted, colonial-era defendants were routinely asked to make pretrial statements to a justice of the peace (so-called “accused speaks” trials). See *Portuondo v. Agard*, 529 U.S. 61, 66 (2000). He further pointed out that defendants typically spoke and conducted a defense personally, without counsel, and that if a defendant's statements at trial varied from his pretrial statement, the contradiction could be noted. *Id.* The Justices' manuals, which set out the colonial-era criminal procedure followed by justices of the peace, also admonished that evidence favorable to the defendant elicited during pretrial examination be received (and preserved for use at trial). See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)*, at 633 (1944). Presumably, if the defendant told the same story both during pretrial examination and at trial, his consistency could also be noted.

166. *Agard*, 529 U.S. at 67-68.

167. See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POLY & L. 622, 666-67 (2001) (finding that cautionary instructions may emphasize the very matter that the instruction asks the jury to discount). Defense counsel are well aware of the possibility that a limiting instruction can serve as an invitation, and for that reason may ask that a judge not instruct a jury on matters such as the defendant's right not to testify. Although it is not constitutional error



explain to the jury why it is barred from drawing the inference. It denies the defendant the opportunity to demonstrate that no tailoring, in fact, occurred. Indeed, an instruction on tailoring might be perceived by jurors as an arbitrary mechanism for protecting the defendant and lead any number of them to draw the very inference against which the instruction is intended to protect.

Third, although some argue that a jury instruction is deemed sufficient to safeguard a defendant's constitutional rights, particularly his decision not to testify at trial, that argument fails to recognize its context-specificity. There are no adequate alternatives for protecting the defendant's Fifth Amendment privilege against self-incrimination. In cases like *Agard*, courts are not similarly hamstrung. If whether to draw an inference of tailoring from presence is the prerogative of jurors themselves, then evidence on that point is critical, and a pretrial statement may be the most powerful form of evidence to negate that inference.<sup>168</sup>

We note that in *Universal Rehabilitation*, the majority rejected the argument of the dissenting judges that a limiting instruction was sufficient to remedy the prosecution's concern that the jury would draw a negative inference about selective prosecution if they were not informed of the guilty pleas.<sup>169</sup> The majority did not even consider the alternative of an instruction worthy of argument. Similarly, courts have rejected the argument that evidence of the defendant's uncharged misconduct, when probative of intent, is admissible over the defendant's offer to have the jury instructed that he intended the crime. Again, the courts do not see an instruction as an effective alternative to the presentation of evidence.<sup>170</sup> If

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for a trial judge to give an instruction over a defendant's objection, the Supreme Court has recognized that the better practice may be for judges to bow to the defendant's preference. See *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978) ("It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law.").

168. See *supra* notes 147-55 and accompanying text.

169. *United States v. Universal Rehab. Svcs., Inc.*, 205 F.3d 657, 685 (3d Cir. 2000) (Becker, J., dissenting) ("The District Court could have instructed the jury that it should not concern itself with selective prosecution or what the co-conspirators were promised in return for their testimony.").

170. See, e.g., *United States v. Crowder*, 141 F.3d 1202, 1210-11 (D.C. Cir. 1998) (en banc) (rejecting the suggestion of Judge Tatel, in dissent, that an instruction on intent was a proper alternative to the presentation of evidence of intent).

the prosecution needs evidence instead of an instruction, the defendant does as well.

### III. PROCEDURAL IMPLICATIONS OF ADMITTING DEFENDANTS' PRETRIAL STATEMENTS AT SUMMATION

This Article has just made the case for allowing the accused to admit prior consistent statements to address the jury's inference about tailoring, even though the prosecution raises no such inference. Under our proposal, these prior consistent statements would be admissible either during or after the accused's testimony. Some defendants and their counsel, however, may wish to forego the opportunity to admit prior consistent statements to address the inference of tailoring. They may see a risk in addressing an inference that the jury may not in fact draw under the particular circumstances—the same kind of risk presented with an instruction not to draw an inference.

The thinking would change, however, if the prosecutor, in closing argument, raises the tailoring inference and invites the jury to draw it. At that point, the adage of letting sleeping dogs lie is no longer operable. As discussed above,<sup>171</sup> the accused should, of course, be permitted to introduce prior consistent statements to respond to a tailoring inference raised by the prosecutor. This Part discusses the procedural problem created by the need to introduce prior consistent statements *after* the prosecution's closing argument.

In the normal course of trial proceedings, a defendant's (or other witness's) prior consistent statements would be offered under Rule 801(d)(1)(B), or for rehabilitation purposes, following a prosecutor's attack launched during cross-examination.<sup>172</sup> The impeached witness would likely never leave the stand and the statement would be received, if admissible, before the close of evidence.<sup>173</sup> When a prosecutor's accusation of tailoring is leveled during *summation*, reception of rebuttal evidence presents courts with some procedural

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171. See *supra* Part II.

172. FED. R. EVID. 801(d)(1)(B).

173. This described procedure would likely be followed when a judge permits a defendant to introduce a prior consistent statement of the type discussed here *absent* an impeaching attack. See *supra* Part II.B.

abnormalities. But such abnormalities can be—and routinely are—accommodated. The Federal Rules of Evidence and relevant case law provide judges with the tools and flexibility to do so.

According to the Advisory Committee on the Federal Rules of Evidence, judges are best positioned to manage courtroom procedures and therefore bear “ultimate responsibility for the effective working of the adversary system.”<sup>174</sup> Rule 611 recognizes the value of judges’ unique “feel” for the mechanics of trial proceedings and affords them broad discretion to control and alter the order of proof and to determine how and when evidence is presented.<sup>175</sup> Judges are instructed to exercise their discretion in service of three goals: (1) the effective ascertainment of the truth; (2) avoidance of unnecessary delay; and (3) protection of witnesses from harassment or undue embarrassment.<sup>176</sup> Although the usual order of introducing evidence and witnesses is presumed to achieve those goals, at times deviation from that order is both necessary and desirable.<sup>177</sup>

Appellate courts have repeatedly upheld decisions of trial judges to allow a witness whose credibility has been attacked to retake the stand,<sup>178</sup> as well as decisions to permit a party to reopen its case to present additional evidence.<sup>179</sup> Factors often considered in review

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174. FED. R. EVID. 611(a) advisory committee’s notes.

175. See FED. R. EVID. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses ....”); see also 3 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* § 611.02[1] (9th ed. 2006) (stating that Rule 611 “permits the Trial Judge to allow or disallow changes in the order of proof, rebuttal evidence, surrebuttal evidence, recall of witnesses, reopening of a case once a party has rested, and many other requests that are made in the course of a trial”).

176. See FED. R. EVID. 611(a).

177. See, e.g., *Loinaz v. EG & G, Inc.*, 910 F.2d 1, 8-9 (1st Cir. 1990) (holding that refusing under Rule 611(a) to allow a party to present a witness out of turn was abuse of discretion where credibility was an important factor in trial: “The dynamics of a party’s presentation may be compromised when the testimony of an opposing witness is allowed to interrupt that presentation, but Rule 611 recognizes that such an alteration in order may be necessary at times.”).

178. See, e.g., *United States v. Perry*, 550 F.2d 524, 532 (9th Cir. 1997) (finding that the trial court had discretion to allow a prosecution witness to retake the stand to explain inconsistencies in testimony elicited by defense counsel on cross-examination: “The extent to which counteracting and rehabilitative evidence may be received after the credibility of a witness has been attacked is a matter in which the trial judge necessarily has broad discretion.”).

179. For reception of evidence after prosecution has rested, see, e.g., *United States v. Boone*, 437 F.3d 829 (8th Cir. 2006) (allowing the prosecution to reopen its case-in-chief immediately after resting to permit a previously unavailable alibi witness to testify). For

ing the latter category of decisions include: (1) the timeliness of a party's motion to reopen; (2) the nature of the evidence sought to be introduced; (3) the effect of granting the motion; (4) the opposing party's opportunity for rebuttal; and (5) the value to the jury of the proffered evidence in ascertaining the guilt or innocence of the accused.<sup>180</sup> Taken together, and as applied to cases like *Agard*, the balance of these factors weighs heavily in favor of allowing criminal defendants to introduce prior consistent statements when the prosecutor raises an inference of tailoring at summation.

*Timeliness of defendant's motion:* In a case where a defendant intends to offer prior consistent statements to address a tailoring charge only if one is specifically made by the prosecutor, defense counsel could prepare a motion to reopen its case in the event that the charge is made. To the extent that particulars would need to be added to the motion following the prosecutor's comments (e.g., what the prosecutor actually said), defense counsel could ask for a brief recess to do so. Some courts also require a defendant to provide a reasonable explanation for failing to make his motion earlier on at trial.<sup>181</sup> Where, as here, the need for the motion is affected by actions of the prosecution, a defendant should not be punished because a prosecutor awaited closing arguments to level his accusation.<sup>182</sup>

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reopening after close of evidence, see, e.g., *United States v. Walker*, 772 F.2d 1172 (5th Cir. 1985) (reversing trial court decision denying the defendant's request to reopen the case to testify after close of evidence).

180. See *Boone*, 437 F.3d at 836-37 ("Where the government has been allowed to reopen, the factors to be considered in reviewing that decision include whether the new evidence caused surprise to the defendant, whether the defendant was given adequate opportunity to rebut the new evidence, and whether the evidence was more detrimental to the defendant than it otherwise might have been because of the order in which it was presented."); *United States v. Rouse*, 111 F.3d 561, 573 (8th Cir. 1997) ("The relevant inquiry is whether the evidence caused surprise to the defendant, whether he was given adequate opportunity to meet the proof, and whether the evidence was more detrimental to him because of the order in which it was introduced." (internal citation and quotation marks omitted)); *Walker*, 772 F.2d at 1177 ("In exercising its discretion, the court must consider the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion." (internal citation and quotation marks omitted)).

181. *Walker*, 772 F.2d at 1177 ("The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused." (internal citation and quotation marks omitted)).

182. Prior consistent statements are obviously pertinent to the credibility of the defendant's testimony. Thus, the defendant's constitutional right to testify should buttress

*Effect of granting the motion:* Two separate inquiries might be undertaken in evaluating the effect of granting the motion: (1) How much would granting the motion disrupt trial proceedings?; and (2) What degree of prejudice would the prosecution suffer? With regard to disruption, introduction of a single statement by the defendant—even after summation has begun—should not cause significant disruption to the trial, particularly given the probative value of the statement when addressed to tailoring and the frequency with which judges exercise their Rule 611 discretion to cope with the peculiarities of individual cases. With regard to prejudice to the government, a prosecutor could hardly claim surprise or prejudice when his own comments opened the door to rebuttal evidence.

*Prosecution's opportunity for rebuttal:* The prosecution would need to be afforded an opportunity to cross-examine the defendant with regard to the statement. If the prosecutor makes his accusation during his initial closing, the defendant's statement would be introduced and the prosecutor could further comment on the statement during rebuttal closing.<sup>183</sup> If the prosecutor waits until rebuttal closing to level his charge, it would be within the court's discretion to allow the prosecutor to briefly address the jury following introduction of the statement.<sup>184</sup>

*Value of the proffered evidence:* A defendant's prior statement that aligns with his trial testimony entirely negates the inference that he tailored his testimony to meet that of the witnesses who preceded him. In cases that are likely to turn on credibility—precisely the sort discussed here—the jury's truth-finding process boils down to deciding which witnesses it believes. Providing jurors access to a defendant's pretrial statement that demonstrates his testimonial consistency greatly enhances that process and could have an enormous impact on the jury's ultimate determination of guilt or innocence.

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his right to reopen the case to offer additional evidence. *See, e.g., Flynn v. State*, 497 N.E.2d 912, 914 (Ind. 1986) (invoking a state constitutional right to testify).

183. *See* FED. R. CRIM. P. 29.1 ("Closing arguments proceed in the following order: (1) the government argues; (2) the defense argues; and (3) the government rebuts.").

184. One might also argue that if the prosecutor waits until the very last minute to draw an inference of tailoring, the court could fairly deny him an opportunity to comment—beyond cross-examination—on a then-admitted prior consistent statement.

In sum, in the ordinary case, the factors generally considered pertinent to exercising judicial discretion to reopen the case cut heavily in favor of permitting the defendant to reopen for the limited purpose of addressing the government's tailoring argument when raised in summation.

#### IV. THE EFFECTS ON DEFENSE STRATEGY OF PERMITTING ADMISSION OF DEFENDANTS' PRETRIAL STATEMENTS

Despite the fact that overwhelming percentages of criminal defendants plead guilty, defense counsel cannot know early in every case whether it is one that will plead out or will go to trial. Similarly, defense counsel cannot know with certainty whether, if there is a trial, the defendant will testify. In cases in which a defendant makes a strong protestation of innocence, defense counsel might be well advised to consider whether and how to create a pretrial statement for use at trial if the defendant does take the stand.

Consider a case like *Agard*, for example. Assume that at the time defense counsel confers with Ray Agard, he has not yet made any statements about the matter that could potentially be used as consistent statements. Defense counsel would know, however, that Agard was arrested and charged with sexual assault and illegal use of a firearm. Defense counsel would determine that because Agard admitted he was present in his apartment when the events occurred, he obviously has first-hand knowledge of the events and is capable of relating his version of those events. It would be possible for defense counsel to have Agard make a statement concerning how the events occurred. Such a statement could take many forms. It could be written and dated. It could be tape-recorded and dated. It could be video-taped and dated. Defense counsel could choose a format most likely to be impressive if the statement were used to corroborate Agard at trial and to negate the inference that presence at trial results in the tailoring of testimony.

##### *A. To Whom Is the Statement Made?*

Defense counsel could obtain the statement in the course of interviewing the defendant, and the statement would be protected

by the attorney-client privilege until disclosed through the defendant at trial. Under Federal Rule of Criminal Procedure 26.2, the defense would not be required to produce any other statement of the defendant in the possession of the defense.<sup>185</sup> Nevertheless, there is a problem if the defendant's trial counsel takes the statement. Rule 26.2(f) defines a "statement" to cover written statements and contemporaneously recorded recitals of oral statements.<sup>186</sup> Thus, a defendant's unrecorded discussions about a case with counsel would not qualify as statements protected by Rule 26.2 and would be subject to disclosure. Moreover, the lack of a recording could mean that defense counsel would become a potential witness, possibly requiring his withdrawal from the representation.<sup>187</sup>

A preferable approach would be for defense counsel to arrange for the defendant to make a pretrial statement to another lawyer, who would advise the defendant about the potential risks and benefits of making such a statement. This second lawyer could also advise the defendant as to the most desirable format for recording the statement. If the defense chose to offer the pretrial statement at trial, trial counsel would not be disqualified and would be able to continue in the case. Even if a second lawyer is not involved, it behooves counsel to have the statement properly recorded in order to avoid a lawyer-witness problem.

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185. See FED. R. CRIM. P. 26.2(a) ("After a witness *other than the defendant* has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony." (emphasis added)).

186. FED. R. CRIM. P. 26.2(f)(1)-(3).

187. See MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2007) (providing that, with some limited exceptions, a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-102(A) (1983) (providing that, with some limited exceptions, when "a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial").

For a case raising a lawyer-witness problem when defense counsel was privy to, but did not record, a pretrial statement, see *United States v. Kliti*, 156 F.3d 150 (2d Cir. 1998) (reversing a conviction because the lawyer-witness problem resulted in a violation of the defendant's right to conflict-free counsel).

### *B. The Impact on Discovery*

Aside from proving that the defendant made a pretrial statement, the defense may want to prove that the defendant's statement was made before the prosecution shared discovery with the defense. Particularly important would be evidence that the defendant's pretrial statement was made prior to the time that either defense counsel or the defendant had been provided with statements of the government's witnesses. That timing is of course critical to the probative value of a prior consistent statement in rebutting an inference of tailoring.

There are two points that the defense will need to make in negating the inference the Supreme Court found so powerful in *Agard*. The defense will need to show that: (1) the defendant made a statement prior to trial that was consistent with trial testimony, and (2) the pretrial statement was made prior to any access to the statements of government witnesses, either informally or in discovery. The first showing tends to rebut the inference that the defendant's testimony was tailored to respond to the government witnesses' trial testimony. The second showing tends to rebut any inference that the defendant might have tailored his testimony to pretrial disclosure (formal or informal) of the government's case.

The end result might be pressure on the prosecution to provide pretrial discovery earlier and more completely than is now the case in many jurisdictions.<sup>188</sup> The decision in *Agard*, although permitting prosecutorial comment on a defendant's presence at trial, might be much more significant in opening the door to pretrial statements prepared by a defendant and to making the government pay a price for withholding or delaying discovery—i.e., the loss of the inference of tailoring.

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188. Because the Federal Rules of Criminal Procedure and all state jurisdictions impose some reciprocal discovery obligations, a defendant might reasonably be concerned that his statement would be available to the prosecution pretrial and thereby give away the defense's theory of the case. It is difficult, however, to imagine how a defendant could be compelled to disclose a pretrial statement of the type discussed here. A defendant's statements to his attorney are exempt from disclosure under Federal Rule of Criminal Procedure 16(b)(2)(B)(i), and those statements are protected by the attorney-client privilege.



## V. POST-AGARD TRIAL EXAMPLES

Several examples may help to illustrate what defense counsel might be able to do after *Agard* to neutralize prosecutorial suggestions that a defendant has manipulated his testimony to respond to the government's evidence.

*A. Tailoring in Response to Pretrial Discovery*

In *State v. Miller*, the Washington Court of Appeals affirmed a defendant's convictions on two counts of first degree murder.<sup>189</sup> In the State's rebuttal closing argument, the prosecutor argued that Miller "had the opportunity to read this discovery for 18 months, that he had the opportunity to hear what every witness said, and that he had the opportunity to tailor his story to fit the evidence after he heard it all."<sup>190</sup> Miller challenged the fairness of the argument, but the court of appeals concluded that "Miller has offered no reason for characterizing the argument as misconduct in his case except for the rationale rejected in *Portuondo*. Therefore, it is not a basis for reversal."<sup>191</sup>

The court of appeals recognized that a tailoring argument can be made with respect to access to pretrial material as well as to exposure to trial testimony.<sup>192</sup> If the prosecutor is entitled to make the argument and a jury is entitled to draw these inferences as to tailoring, then fairness requires that a defendant be permitted to offer a pretrial statement that predated discovery; admission of such a statement is necessary to rebut the inferences that the defendant tailored his testimony to information learned in either discovery or trial testimony. It is difficult to see how the prosecutor could make the argument made in *Miller* if the defendant had recorded a pretrial statement that was consistent with his trial testimony, and the recordation came before the prosecution provided the defense with discovery.

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189. 40 P.3d 692, 693 (Wash. Ct. App. 2002).

190. *Id.*

191. *Id.*

192. *Id.*

*B. Comparing the Defendant and Other Witnesses*

In *State v. Alexander*, the Connecticut Supreme Court upheld a prosecutor's argument that compared a defendant to every other witness.<sup>193</sup> The prosecutor argued as follows:

Who is best able to fabricate a complicated story designed to sway a jury? Your final decision must ultimately be based on whom you believe. The victim ... or the defendant.... Now, you may recall that all the witnesses were sequestered. And, that was so they couldn't hear what the other witnesses were saying so they couldn't tailor their testimony to each other's testimony. So that they couldn't contradict each other. But there was one witness who wasn't sequestered. There was one witness who heard everything. And, that was [the defendant], who has a built-in bias in the outcome of this case by virtue of the fact that he's the defendant.<sup>194</sup>

In rebuttal to the defendant's closing argument, the prosecutor added: "When you consider the credibility of the defendant's testimony, keep in mind that of all the witnesses here, he's the most obviously biased and interested one. He's the one who has the motive to distort the truth and fabricate the story. Think about it."<sup>195</sup>

One problem with the argument was that the witnesses were not sequestered, although the State represented to the state supreme court during oral argument that witnesses other than the defendant were not present during other testimony.<sup>196</sup> The court apparently accepted the State's representation and found the case indistinguishable from *Agard*: "We conclude that the prosecutor's comments in the present case, which are nearly indistinguishable from those in *Portuondo*, do not infringe on the defendant's fifth or sixth amendment rights."<sup>197</sup>

As in *Miller*, a recorded pretrial statement would largely negate a prosecutor's attempt to compare a defendant, who remains in the

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193. 755 A.2d 868, 872 (Conn. 2000).

194. *Id.* (footnote omitted).

195. *Id.*

196. *See id.* at 872 n.7.

197. *Id.* at 874.

courtroom at all times, with witnesses who are sequestered. The only point of such an argument is that the defendant has the unique opportunity to tailor testimony. If a pretrial statement demonstrates that the defendant's version of the facts was recorded before trial and without knowledge of what witnesses would testify to, that statement is a powerful refutation of the prosecutor's argument.

The importance of a pretrial statement may increase when a prosecutor combines two arguments: (1) the defendant has a unique opportunity to tailor testimony to fit that of other witnesses and evidence, and (2) the defendant is the only witness in a criminal case who has an interest in the outcome and is, therefore, the only witness with a clear bias. The combination of the two arguments suggests that the defendant has both motive and opportunity to tailor testimony. *Alexander* is just such a case. In these cases, the probative value of the consistent statement is even higher than in an ordinary case in which a simple tailoring argument is made; accordingly the case for admission of a prior consistent statement is even stronger under Federal Rule of Evidence 403.

### *C. Capital Cases*

In *Hooks v. State*, the Court of Criminal Appeals of Oklahoma affirmed Hooks's convictions on five counts of first degree murder and five death sentences, after the prosecutor raised a tailoring inference in closing argument.<sup>198</sup> The court cited *Agard* and simply said:

Hooks next complains the prosecutor should not have argued in closing that Hooks's presence at trial allowed him to hear the State's evidence and then create a story to fit it. The United States Supreme Court recently found this argument was not an impermissible comment on a defendant's right to testify, or an infringement on his right to confront witnesses or on the requirement he be present at trial. Given this precedent we decline to find error.<sup>199</sup>

It is clear that the tailoring inference is available to jurors in every type of trial, including capital cases. It is also clear that,

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198. 19 P.3d 294, 315 (Okla. Crim. App. 2001).

199. *Id.* (footnote omitted).

unless state law restricts prosecutors in making arguments, prosecutors are entitled to argue that a defendant in a capital case tailored testimony to fit the case. When the stakes are the highest, if the defense is contesting guilt, the preparation—and admission by the court—of a consistent pretrial statement is particularly important.

#### *D. Attacking the Defense*

In some cases the prosecutor may attack the defense rather than focus exclusively on the defendant's testimony. Thus, the prosecutor may argue that the defense had an opportunity to tailor testimony because it did not put on its evidence, including the defendant's testimony, until the completion of the prosecution's case. A good example is *Williams v. State*,<sup>200</sup> where the following exchange occurred:

Prosecutor: Now, in civil cases, a pleading is filed, a complaint, a petition. An answer is filed. And the plaintiff's attorney goes through that answer and he says, gee, I allege this, they admit it. I allege that, they admit it. I allege that, they deny it. They deny it. In criminal cases, the state finds out what the defense[s] [are] at trial....

Defense Attorney: Objection. Once again, that's a misstatement of the law.

The Court: Overruled. Go ahead[.]

...

Prosecutor: We find out, other than a very broad picture of what the defense is, we find out exactly who the witnesses are going to be, we find out what they're going to say, we find out at trial what the evidence that the defendant puts on in large part is going to be. And what the defendant does in large part is, and the reason I think this is, the defendant sees what case we have and then they have the freedom to adapt their case to it. Do you remember day before yesterday, I asked to admit these things into evidence and went through the chain of custody showing who had handled them. [And the defense attorney objected saying] we haven't heard from the ...

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200. No. A-7688, 2002 Alas. App. LEXIS 26 (Alaska Ct. App. Feb. 13, 2002).

Defense Attorney: Objection. I want to approach.

[Bench conference as follows:]

Defense Attorney: I'm asking for a mistrial. He is getting into if I object to something. I have a right to object to it if I have a good faith argument. And now he's coming and denying this. And he's going beyond the scope. He's getting into issues that are attacks on me and attacks on the defendant. I want a mistrial. It's been continuing.

The Court: Well, I'm not going to grant a mistrial but don't you think that's just (indiscernible), you know, critiquing his defense?

Prosecutor: Your Honor, just for the purposes of the record, they're not personal attacks. I'm not critiquing his defense. I'm doing it because I think that it shows the weaknesses in the portions of the case where they carry the burden.

The Court: I have a tendency to disagree with you. I think you have used enough of that particular argument, so ...

Prosecutor: Fair enough.

The Court: ... move on.<sup>201</sup>

The defendant argued that the prosecutor's assertion that the *defense* was tailored violated his Fifth and Sixth Amendment rights.<sup>202</sup> But the court, relying on *Agard*, found no infirmity in the prosecutor's argument.<sup>203</sup>

The defendant in *Williams* argued that *Agard* was distinguishable because the prosecutor's argument went to the integrity of the entire defense.<sup>204</sup> A concurring judge, however, explained that the defense's attempt to distinguish *Agard* failed:

According to *Williams*, the important difference in his case is that the prosecutor was attacking the credibility of a defense

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201. *Id.* at \*\*8-10.

202. *Id.* at \*\*15-16 (Mannheimer, J., concurring).

203. *Id.* at \*16.

204. *Id.* at \*17.

*theory*, not the credibility of a defense witness. This is an arguable distinction, but it is not clear that this difference leads to a different legal result. Williams cites no case which relies on this purported distinction to disapprove a prosecutor's summation.<sup>205</sup>

An argument like that made in *Williams* attacks both the defendant and defense counsel, and challenges the credibility of both. A recorded pretrial consistent statement would blunt the attack on counsel as well as the attack on the defendant; accordingly, the case for its admission is compelling under Federal Rule of Evidence 403.

#### *E. Prior Inconsistent Statements*

Both Justice Ginsburg in dissent in *Agard* and the Second Circuit majority would distinguish generic attacks on a defendant's presence at trial from arguments based on some specific indication that the defendant may have tailored his testimony.<sup>206</sup> For example, if a defendant made a statement to police after an arrest that was inconsistent with trial testimony, presumably Justice Ginsburg and the Second Circuit would permit a prosecutor to comment on the defendant's presence and to suggest that the defendant tailored testimony as a result of hearing the government's evidence.

When the defendant has made an inconsistent statement, what is the role of a statement consistent with trial testimony when the prosecutor makes a specific tailoring argument? If the defendant is going to trial despite having made a statement to the police and is going to testify, presumably the defense believes it can explain away the statement to the police. In such circumstances, a pretrial statement may be just as useful to negate the tailoring charge as in the cases described above.<sup>207</sup> This is because a prior consistent statement is admissible to rehabilitate a witness's credibility if it explains an inconsistency.<sup>208</sup> For example, if the defendant makes

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205. *Id.*

206. *Portuondo v. Agard*, 529 U.S. 61, 88 (2000) (Ginsburg, J., dissenting).

207. *See supra* Parts V.C-D.

208. *See, e.g., United States v. Pierre*, 781 F.2d 329, 331 (2d Cir. 1986) ("Another example of a prior consistent statement with significant rebutting force is a statement offered to clarify or amplify the meaning of the impeaching inconsistent statement. In such circumstances we have allowed use of the prior consistent statement under the doctrine of

an incriminating statement to the police, he may want to argue at trial that he made the statement because he was under duress or confused. A pretrial statement made outside of custodial circumstances—consistent with in-court testimony—may help to explain the inconsistency that is being addressed by the defendant at trial. In such cases, the consistent statement serves to rehabilitate the defendant on two counts: it explains the inconsistency, and it rebuts the argument that the defendant's trial testimony was tailored to developments at the trial. Again, under Rule 403, the case for admitting such a prior consistent statement is that much stronger.

#### *F. When Comment Is Prohibited*

Some states prohibit the prosecutor from making a generic attack on a defendant's credibility by arguing that presence at trial provided an opportunity for tailoring. In *State v. Daniels*, for example, the New Jersey Supreme Court distinguished between tailoring arguments that are generic and those that are addressed to specific indications of possible tailoring by the defendant.<sup>209</sup> The court held, as an exercise of its supervisory authority, that generic tailoring arguments would be barred but case-specific tailoring arguments were permissible.<sup>210</sup> The court reasoned as follows:

We agree with Justice Stevens that generic accusations of tailoring debase the "truth-seeking function of the adversary process," violate the "respect for the defendant's individual dignity," and ignore "the presumption of innocence that survives until a guilty verdict is returned." We simply cannot conclude that generic accusations are a "legitimate means to bring about a just conviction." Therefore, pursuant to our supervisory authority, we hold that prosecutors are prohibited from making generic accusations of tailoring during summation.

When a prosecutor makes specific accusations of tailoring, however, we apply a different analysis. If there is evidence of tailoring, beyond the fact that the defendant was simply present at the trial and heard the testimony of other witnesses, a prosecutor may comment, but in a limited fashion. The prosecutor's comments must be based on the evidence in the record and

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completeness." (citing *United States v. Fayette*, 388 F.2d 728, 733-35 (2d Cir. 1968)).

209. 861 A.2d 808, 819 (N.J. 2004).

210. *Id.*

the reasonable inferences drawn therefrom. Moreover, the prosecutor may not refer explicitly to the fact that the defendant was in the courtroom or that he heard the testimony of other witnesses, and was thus able to tailor his testimony. In all such circumstances, we expect that prosecutors will act in good faith.<sup>211</sup>

If a court bars generic tailoring arguments—or goes even further and exercises its discretion to bar *all* tailoring arguments—does this mean that consistent pretrial statements by the defendant are also barred? We think not. The fact remains that a jury may draw its own inference of tailoring even without a prosecutor suggesting that it do so, generically or specifically. The probability of the jury drawing such an inference, no matter what, was the linchpin of Justice Scalia’s analysis in *Agard*.<sup>212</sup> Thus, even in jurisdictions that forbid prosecutors from arguing that presence provides an opportunity for tailoring, the defendant has a genuine need to offer evidence to negate the inference. A pretrial statement may be as useful in New Jersey and similar jurisdictions as in jurisdictions that permit prosecutorial argument regarding presence.<sup>213</sup>

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211. *Id.* (internal citations omitted).

212. *Portuondo v. Agard*, 529 U.S. 61, 68 n.1 (2000).

213. The New Jersey Supreme Court disagreed with Justice Ginsburg, *Agard*, 529 U.S. at 78 (Ginsburg, J., dissenting), and found that cross-examination of a defendant suggesting that presence in the courtroom resulted in tailored testimony was as prohibited as arguing about presence in summation:

Although not raised by defendant at trial or before this Court, we recognize that both trial courts and litigants may have questions as to whether, and to what extent, our opinion concerning prosecutorial summation applies to cross-examination by the State. For future guidance, the same analysis that we have provided for summations applies also to cross-examination. The foundational principle in that framework is that a prosecutor must have “reasonable grounds” for posing questions during cross-examination that impugn a witness’s credibility. Beyond that, if there is evidence in the record that a defendant tailored his testimony, the prosecutor may cross-examine the defendant based on that evidence. However, at no time during cross-examination may the prosecutor reference the defendant’s attendance at trial or his ability to hear the testimony of preceding witnesses.

*Daniels*, 861 A.2d at 820 (internal citation omitted).



## CONCLUSION

Looking back to the Second Circuit's opinion in *Agard v. Portuondo*, Judge Winter appears to have been right when he reasoned in concurrence:

[T]he inference [of tailoring] suggested by the prosecutor was entirely unfair in that appellant had no chance to anticipate and rebut it by testimony. Under New York law, absent a claim of recent fabrication, appellant could not have introduced evidence of prior consistent statements—that is, evidence that he had told the same story even before witnessing the prosecution's case.<sup>214</sup>

We believe that comments like those by the prosecutor in *Agard* should open the door to admission of rebuttal evidence—specifically prior consistent statements of the type previously discussed under Federal Rule of Evidence 801(d)(1)(B) and its state analogues. However, the concern raised by Judge Winter is equally applicable to criminal defendants who face the same damaging inference even though not drawn by the prosecutor. Judge Winter's solution was to bar the kind of argument or comment made in *Agard*. But even had the Supreme Court followed Judge Winter's lead, that solution would have proven inadequate because the jury would have been free to draw, and according to Justice Scalia would have drawn, the inference suggested by the prosecutor on its own. Now that the Supreme Court has recognized the power of the inference, the correct solution is to permit defendants to introduce relevant, probative evidence (e.g., a recorded pretrial statement that tracks their trial testimony), notwithstanding the content of the prosecutor's summation. Admitting consistent statements made by the defendant before trial is well within the evidence rules: the hearsay rule poses no bar because the pretrial statement is offered only to rehabilitate credibility, not for truth,<sup>215</sup> and the statement is clearly probative to negate an inference of tailoring.<sup>216</sup>

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214. *Agard v. Portuondo*, 117 F.3d 696, 715 (2d Cir. 1997) (Winter, J., concurring).

215. Cf. FED. R. EVID. 801(c) (defining hearsay).

216. See FED. R. EVID. 401 (defining the basic relevancy requirement).

In *Agard*, all nine Justices agreed that the central function of a trial is to discover the truth.<sup>217</sup> Whether or not allowing the prosecutor to draw an inference of tailoring advances that function, admission of a defendant's recorded pretrial statement that demonstrates his testimonial consistency most certainly does. The Federal Rules of Evidence are designed to facilitate the adversarial process's search for truth, and should be so interpreted,<sup>218</sup> as should state counterparts. Evidence rules that bar defendants from offering prior consistent statements of the sort discussed here both impede the truth-seeking process and prevent defendants from offering a full and fair defense.<sup>219</sup>

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217. See *Agard*, 529 U.S. at 73 (“[T]he central function of the trial ... is to discover the truth.”); *id.* at 76 (Stevens, J., concurring) (discussing “the truth-seeking function of the adversary process”); *id.* at 77 (Ginsburg, J., dissenting) (“A trial ideally is a search for the truth ....”).

218. FED. R. EVID. 102 (“These rules shall be construed to secure fairness in administration ... to the end that the truth may be ascertained and proceedings justly determined.”).

219. The remedy we propose for criminal defendants in this Article stems from the fact that they cannot be sequestered. There are also certain government witnesses who cannot be sequestered, and it may be that the government would argue for a similar remedy as to those witnesses. The attorney for the government is allowed to designate a representative who will be free from sequestration, FED. R. EVID. 615(2), and that will often be the case agent who will testify. Also, Federal Rule of Evidence 615(3) does not permit exclusion of “a person whose presence is shown by a party to be essential to the presentation of the party’s cause.” This subdivision has been read to exempt case agents (other than the one designated under Rule 615(2)) from sequestration under certain circumstances. See *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993). Finally, victims who will testify are protected from sequestration in most instances. See 18 U.S.C. § 3771 (2000).

Whether the government could admit consistent pretrial statements of these non-sequestered government witnesses would depend on the circumstances. Admission of a pretrial statement would depend on (1) whether the case agent actually sat through all the testimony before testifying—because if the case agent comes and goes, she is not in the same situation as the defendant; (2) whether the testimony is actually corroborative of rather than independent of other witnesses—for example, an agent who merely supervised a wiretap might have nothing to say that is based on what other witnesses said; (3) the sequencing of witnesses—the earlier in the trial the case agent testifies, the weaker is the inference of tailoring and so the less probative is the pretrial statement; and (4) the obviousness of the witness’s presence throughout the trial—the jury will surely be aware of the defendant’s continual presence, but it is questionable whether the same degree of awareness will be attached to case agents and especially victims, who are not seated at counsel’s table. Trial courts are well-equipped to consider all of these factors under the circumstances to determine the strength of a tailoring inference, and can balance the probative value of the pretrial statement against its prejudicial effect under Rule 403.

