No. 19-8528

IN THE SUPREME COURT OF THE UNITED STATES

MELVIN RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not abuse its discretion or otherwise err in excluding evidence regarding a sexual assault victim's prior sexual history under Federal Rule of Evidence 412.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.M.):

United States v. Russell, No. 14-cr-2563 (Nov. 8, 2018)

United States Court of Appeals (10th Cir.):

United States v. Russell, No. 18-2174 (Dec. 20, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A2-A11) is not published in the Federal Reporter but is reprinted at 798 Fed. Appx. 198. The order of the district court (Pet. App. A19-A23) is not published in the Federal Supplement but is available at 2018 WL 2122938.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2019. On March 11, 2020, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and

including May 18, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on one count of aggravated sexual abuse, in violation of 18 U.S.C. 1153, 2241(a), and 2246(2)(A). Pet. App. A12. He was sentenced to 235 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A2-A11.

1. One evening in 2014, C.E., her friend Rochelle Cornfield, and Cornfield's young child were at petitioner's home. Pet. App. A3. Petitioner, C.E., and Cornfield spent the evening drinking together. Gov't C.A. Br. 7. Cornfield and her daughter eventually fell asleep on petitioner's couch. Pet. App. A3. While talking with C.E. in the kitchen, petitioner became aggressive toward C.E. and made lewd comments about her body. Ibid.

After C.E. told petitioner to stop, he grabbed her by the arms and threw her on his bed. Gov't C.A. Br. 7. Petitioner proceeded to tear off C.E.'s clothing, get on top of her, and sexually assault her. Pet. App. A3. During the assault, which lasted several hours, petitioner choked C.E., held a samurai sword to C.E.'s neck, and threatened to kill her. Ibid.; Gov't C.A. Br. 8. Cornfield's daughter eventually began to cry, at which point petitioner stopped. Pet. App. A3. C.E. then left petitioner's

residence with Cornfield and her daughter. Ibid. C.E. told Cornfield that petitioner had raped her, and Cornfield observed a handprint around C.E.'s neck. Gov't C.A. Br. 8.

C.E. went to the local emergency room and asked for a rape kit. Gov't C.A. Br. 9. A nurse conducted a Sexual Assault Nurse Examination with C.E. Pet. App. A3. During the examination, the nurse identified 32 separate injuries to C.E.'s body, including bruises and injuries to C.E.'s neck, chest, chin, arms, breasts, abdomen, thighs, lower legs, and buttocks. Ibid.; Gov't C.A. Br. 10. The nurse also identified seven separate injuries to C.E.'s genital area, including external bruising as well as internal bruising and tearing. Pet. App. A3; Gov't C.A. Br. 10-11. The nurse later testified that C.E.'s internal genital injuries indicated that she had been "very roughly handled." Pet. App. A57.

During the examination, the nurse asked C.E. several specific questions about the assault. Gov't C.A. Br. 10. In response, C.E. stated that petitioner had penetrated her with his penis, finger, and a foreign object, bitten her on her nipples, and placed her in a sleeper hold until she almost passed out. Ibid.; Pet. App. A40. C.E. also stated that petitioner had worn a condom during the assault. Pet. App. A57. The nurse asked C.E. if she had engaged in vaginal intercourse with another person within five days of the assault, and C.E. stated that she had. Id. at A3.

The nurse also collected swab samples from C.E. for DNA testing. Pet. App. A3, A45, A49. Later testing identified petitioner's DNA in samples taken from C.E.'s gluteal folds and breast. Gov't C.A. Br. 13. Petitioner's DNA was not found on the vaginal, cervical, or oral swabs, and none of the samples tested positive for petitioner's semen. Ibid.; Pet. App. A4.

Dr. Dwayne Gibbs also examined C.E. at the hospital. Gov't C.A. Br. 11. Dr. Gibbs later testified that he observed bruises to C.E.'s face, chest, abdomen, arms, legs, and external genitalia, and that he saw what appeared to be a bite mark on one of her breasts. Ibid. Dr. Gibbs characterized C.E.'s external genital injuries as "minor and mild." Id. at 12 (citation omitted). He did not conduct an internal pelvic examination. Ibid.

During an interview with FBI agents, petitioner agreed to a series of statements. Gov't C.A. Br. 12. He agreed that he was a "very, very violent person" and had used a samurai sword "to make things go [his] way." Ibid. (citation omitted) (brackets in original). Then, after defining rape as "forcing yourself upon somebody or, if not, having intercourse without their consent," petitioner admitted that he had raped C.E. Ibid. (citation omitted); see Pet. C.A. Br. 18 (explaining that "at the end of" petitioner's interview, he "confessed to sexually assaulting C.E."); Pet. App. A4.

2. A federal grand jury sitting in the District of New Mexico charged petitioner with one count of aggravated sexual

abuse, in violation of 18 U.S.C. 1153, 2241(a), and 2246(2)(A). Superseding Indictment 1; see 18 U.S.C. 1153(a) (federal jurisdiction over certain sexual-abuse crimes in Indian country). Shortly before trial, petitioner filed a motion seeking to admit as evidence C.E.'s answer during the sexual-assault examination that she had sexual intercourse with another person within five days of the assault by petitioner. Gov't C.A. Br. 3.

Federal Rule of Evidence 412 generally bars "evidence offered to prove that a victim" of an alleged crime involving sexual misconduct "engaged in other sexual behavior." Fed. R. Evid. 412(a)(1). The advisory committee notes describe the Rule's purpose as safeguarding "victim[s] against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process," thereby "encourag[ing] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders." Fed. R. Evid. 412 advisory committee's note (1994 Amendments).

Rule 412 provides three exceptions to its general rule of exclusion in criminal cases, two of which are relevant here. First, under Rule 412(b)(1)(A), the court may admit "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." Fed. R. Evid.

412(b)(1)(A). Second, under Rule 412(b)(1)(C), the court may admit "evidence whose exclusion would violate the defendant's constitutional rights." Fed. R. Evid. 412(b)(1)(C).

Petitioner contended that the proffered evidence satisfied the exception in Rule 412(b)(1)(A) because it was offered to establish that prior consensual sex could have been the source of C.E.'s genital injuries. Pet. App. A4. Petitioner also invoked the exception in Rule 412(b)(1)(C), asserting that exclusion of C.E.'s statement to the nurse would violate his constitutional rights, including his right to present witnesses in his defense. Id. at A7-A8; Gov't C.A. Br. 4. In its response, the government observed that petitioner had failed to offer any evidence that C.E.'s numerous and significant injuries could have been caused by prior consensual activity. Gov't C.A. Br. 4.

After holding a hearing, the district court denied petitioner's motion. Pet. App. A19-A23. The court explained that, based on the sexual-assault examination, the nurse had "indicated that the injuries" suffered by C.E. "suggest violent or rough sex, and no evidence suggests otherwise." Id. at A21. And the court found that petitioner "ha[d] brought no specific evidence to the court's attention tending to show that someone else was responsible for the alleged victim's injuries or that the prior sexual encounter was in any way violent or rough." Ibid. The court accordingly determined that petitioner's "'proffered evidence bears no adequate connection to the injuries or events in this

case,'" and instead "bears 'only a speculative and tenuous relationship' to the claim that [someone else] may have caused [C.E.'s] injuries"; that petitioner's "proffer comes up short" on both exceptions; and that "exclusion is warranted." Ibid. (quoting United States v. Pablo, 696 F.3d 1280, 1299 (10th Cir. 2012)). Petitioner unsuccessfully renewed his Rule 412 motion during trial. Gov't C.A. Br. 13; Pet. App. A109-A113.

The jury found petitioner guilty of aggravated sexual abuse, Pet. App. A3. The district court sentenced petitioner to 235 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A2-A11.

The court of appeals reviewed the district court's application of Rule 412(b)(1)(A) for an abuse of discretion. Pet. App. A5. The court of appeals recognized that, under Rule 412(b)(1)(A), "evidence of a victim's prior sexual behavior" is admissible when it "is offered to prove that someone other than the accused was the source of the victim's injuries." Id. at A6 (citing Fed. R. Evid. 412(b)(1)(A)). The court explained, however, that for the exception to apply, the "relationship between the evidence in question and the victim's injuries must be more than 'speculative.'" Ibid. (quoting Pablo, 696 F.3d at 1299).

Observing that petitioner had "conceded in oral argument * * * that he offered no evidence concerning the nature of C.E.'s

alleged prior sexual behavior," the court of appeals emphasized that petitioner "relies completely on speculation that C.E.'s specific injuries could have been caused by prior consensual sex." Pet. App. A6. The court of appeals explained that, "[d]ue to the lack of substantive evidence, the district court had nothing on which to consider the application of the exception" in Rule 412(b)(1)(A). Ibid. "Under these circumstances," the court of appeals continued, "the court clearly did not abuse its discretion in ruling that [petitioner]'s evidence was too tenuous to invoke the exception in Rule 412(b)(1)(A)." Id. at A6-A7.

Turning to the exception in Rule 412(b)(1)(C), the court of appeals recognized that a court may "admit evidence of a victim's prior sexual conduct when exclusion of that evidence would conflict with the defendant's constitutional rights." Pet. App. A7 (citing Fed. R. Evid. 412(b)(1)(C)). The court explained that, when determining whether a defendant's constitutional right to present witnesses in his defense was violated by the exclusion of evidence, it applies a "two-part test": "'First, we examine whether that testimony was relevant, and if so, whether the state's interests in excluding the evidence outweighed [the defendant's] interests in its admittance.'" Ibid. (quoting United States v. Powell, 226 F.3d 1181, 1199 (10th Cir. 2000), cert. denied 531 U.S. 1166 (2001)) (brackets in original). "'Second, we examine whether the excluded testimony was material -- whether it was of such an

exculpatory nature that its exclusion affected the trial's outcome.'" Ibid. (quoting Powell, 226 F.3d at 1199).

Reviewing the constitutional issue de novo, the court of appeals determined that petitioner's right to present witnesses in his defense was not violated by the exclusion of his proffered evidence. Pet. App. A7-A9. The court reiterated that petitioner "admittedly has no evidence that prior consensual sex could have caused C.E.'s specific injuries." Id. at A8. "Just as with his Rule 412(b)(1)(A) argument," the court of appeals explained, "[petitioner] failed to provide the district court with any evidence to consider in applying the relevance test for Rule 412(b)(1)(C)." Ibid. "Without more," the court of appeals reasoned, "[petitioner's] interests in admitting C.E.'s answers to the [sexual-assault examination] questions do not outweigh the state's interest in protecting the victim's private, sensitive information." Ibid. The court accordingly "affirm[ed] the district court's decision to exclude evidence of C.E.'s other sexual behavior." Id. at A9.

The court of appeals also denied a separate claim about the absence of a jury instruction on a lesser included offense of assault. Pet. App. A9-A11. The court determined that any error in denying the instruction was harmless, explaining that "[t]he evidence against [petitioner]" -- which included statements from his FBI interview and C.E.'s extensive injuries -- was "overwhelming." Id. at A11.

ARGUMENT

Petitioner contends (Pet. 4-7, 20-26) that the court of appeals erroneously required him to "effectively prove that the complainant's other sexual behavior exonerates him" before permitting admission of such evidence under Rule 412. Pet. 6. The court did not, however, impose such an "exoneration" requirement, but instead simply required that "the relationship between the evidence in question and the victim's injuries" be "more than 'speculative,'" Pet. App. A6 (citation omitted), and that the proffered testimony be "'relevant,'" id. at A7 (citation and emphasis omitted). Its unpublished decision is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, this case would not be a suitable vehicle for addressing the question presented because petitioner's proffered evidence would also be inadmissible under Federal Rule of Evidence 403, and in any event, any error in excluding the evidence was harmless. Further review is unwarranted.

1. Rule 412 generally precludes the admission of "evidence offered to prove that a victim" of an alleged crime involving sexual misconduct "engaged in other sexual behavior." Fed. R. Evid. 412(a)(1). Rule 412 "safeguard[s] the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process." Fed. R. Evid. 412 advisory committee's note

(1994 Amendments). As relevant here, such evidence may nonetheless be admissible under Rule 412(b)(1)(A) if it is "offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence," Fed. R. Evid. 412(b)(1)(A), or under Rule 412(b)(1)(C) if its exclusion "would violate the defendant's constitutional rights," Fed. R. Evid. 412(b)(1)(C). Here, the court of appeals correctly affirmed the district court's determination that neither of these exceptions opened the door to evidence of C.E.'s sexual history based solely on petitioner's speculation that C.E. might have sustained her injuries during a consensual sexual encounter.

With respect to Rule 412(b)(1)(A), the court of appeals explained that the evidence proffered by petitioner "relies completely on speculation that C.E.'s specific injuries could have been caused by prior consensual sex." Pet. App. A6; see id. at A21 (district court finding that petitioner's "'proffered evidence bears no adequate connection' to the injuries or events in this case") (quoting United States v. Pablo, 696 F.3d 1280, 1299 (10th Cir. 2012)). Because petitioner "offered no evidence concerning the nature of C.E.'s alleged prior sexual behavior," the court of appeals determined that petitioner's speculative proffer "was too tenuous to invoke the exception" for evidence offered to prove that someone else may have caused any of C.E.'s many injuries. Id. at A6-A7. The court similarly determined that the Rule 412(b)(1)(C) exception was inapplicable because petitioner

"admittedly [had] no evidence that prior consensual sex could have caused C.E.'s specific injuries." Id. at A8. Those determinations were correct. If a defendant's unsupported assertion of the possibility that another sexual encounter might have caused a victim's injuries were alone enough to warrant application of the exceptions, they would swallow a large portion of Rule 412 itself.

The nurse's testimony regarding the sexual-assault examination reinforces that the district court did not abuse its discretion or otherwise err in declining to apply the exceptions. The nurse testified at the pretrial hearing that "[a]ny injury in the genital area is abnormal" and that "any injury that can be seen with the naked eye" -- as some of C.E.'s could be -- "is significant." Gov't C.A. Br. 19 (citation omitted). The nurse also testified that C.E.'s injuries were consistent with C.E.'s account of petitioner's behavior. Ibid.; see Pet. App. A56-A57 (trial testimony). Although, when asked on cross examination whether "consensual sex can lead to injuries in the vaginal area," the nurse agreed that "it can," Gov't C.A. Br. 20 (citation omitted), that general observation did not render petitioner's Rule 412 proffer non-speculative. First, a statement that consensual sexual activity can lead to genital injuries does not imply that consensual sex usually has that effect or that it did in this case. To the contrary, the nurse confirmed at trial that C.E.'s "genital injuries [showed] that she was very roughly handled," Pet. App. A57, and "appear[ed] to be consistent with her

account" of the assault, id. at A53. Second, petitioner has acknowledged that he lacks any affirmative evidence indicating that C.E.'s injuries were sustained during a consensual sexual encounter. Id. at A6, A9.

Thus, as the district court correctly recognized, the evidence "indicated that [C.E.'s] injuries suggest violent or rough sex, and no evidence suggest[ed] otherwise." Pet. App. A21. Petitioner's factbound disagreement with the lower courts' assessments of the record does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

2. Petitioner contends (Pet. 6) that the lower courts erroneously required him to "effectively prove that the complainant's other sexual behavior exonerates him" before admitting his proffered evidence. See Pet. 25. But a requirement that evidence offered under the exceptions must be "more than 'speculative'" does not force a criminal defendant to prove "exoneration." Pet. App. A6-A7. Nor does it impose a unique burden on defendants seeking to admit such evidence. Cf. Holmes

v. South Carolina, 547 U.S. 319, 327 (2006) (describing traditional evidentiary limits on "the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged"). Instead, that standard -- which petitioner appears at times to accept (see, e.g., Pet. 5 (explaining that petitioner sought to prove that "C.E.'s other sexual behavior bore more than a speculative relationship to his defense")) -- prevents circumvention of the general prohibition set forth in Rule 412 through speculative, tenuous, or irrelevant factual allegations. Allowing a defendant to put an alleged victim's sexual history at issue in such cases would undermine Rule 412's general protection for victims of sexual crimes and the crucial interests that the Rule safeguards.

Petitioner's argument (Pet. 24-25) that the court of appeals erred in its application of its precedent in United States v. Begay, 937 F.2d 515 (10th Cir. 1991), is incorrect and would not, in any event, warrant this Court's review. In Begay, the Tenth Circuit allowed evidence of prior sexual activity to be admitted in circumstances involving eyewitness testimony about a prior sexual assault. Id. at 520-523. Contrary to petitioner's contention, the unpublished decision here did not require petitioner to bolster his Rule 412 proffer with the same type of supporting evidence. It simply explained that a finding of relevance under Rule 412(b)(1)(C) requires some non-speculative evidence, and that petitioner offered none. Pet. App. A9. The

court of appeals correctly determined that, given the "complete absence of evidence indicating that C.E.'s prior sexual behavior could have caused her injuries," the exclusion of the prior-sexual-activity evidence did not violate petitioner's constitutional rights. Ibid. In any event, this Court does not grant review to resolve intra-circuit conflicts. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

3. Petitioner contends (Pet. 20-26) that the courts of appeals are "split as to whether [a] defendant[] proffering evidence under Federal Rule of Evidence 412 must proffer substantive evidence regarding the complainant's 'other sexual behavior'" and "effectively prove, prior to trial, how the complainant's other sexual behavior exonerates him." Pet. 20, 25 (capitalization and emphasis omitted). That is incorrect.

a. According to petitioner (Pet. 21), the Tenth and Eighth Circuits impose an inappropriately heightened evidentiary requirement on defendants seeking to introduce evidence of a victim's other sexual behavior under Rule 412. For the reasons explained above, petitioner's claim that the Tenth Circuit applied such a standard lacks merit. Petitioner is also incorrect with respect to the Eighth Circuit. Petitioner principally relies (Pet. 21) on the Eighth Circuit's decision in United States v. Pumpkin Seed, 572 F.3d 552 (2009). But that case turned on Rule 403's bar on excessively prejudicial evidence, not Rule 412. Id. at 557-558. Petitioner's reliance (Pet. 21-22) on United States v.

Seibel, 712 F.3d 1229 (8th Cir.), cert. denied 571 U.S. 910 (2013), is likewise misplaced. The Eighth Circuit's rejection in that case of a defendant's fact-specific theories for introducing evidence of a third party's semen on the victim's bedding, see id. at 1235, does not suggest that it applies a heightened evidentiary standard under Rules 412(b)(1)(A) or (C). And even if it did, that would not warrant certiorari in this separate case from a different circuit.

b. Petitioner also errs in contending (Pet. 22-23) that the decision below conflicts with the decisions in Doe v. United States, 666 F.2d 43 (4th Cir. 1981), and United States v. Anderson, 467 Fed. Appx. 474 (6th Cir. 2012) (per curiam). In Doe, the evidence deemed admissible was not related to a potential alternative explanation for the victim's injuries, but instead concerned the defendant's intent and state of mind. 666 F.2d at 48. The district court admitted evidence of "the victim's conversations with [the defendant]" and of the defendant's "knowledge, acquired before the alleged crime, of the victim's past sexual behavior." Ibid. The court of appeals affirmed, reasoning that both pieces of evidence fell beyond the scope of Rule 412 altogether. Id. at 49. First, the court determined that "the victim's conversations with [the defendant] [were] relevant, and * * * not the type of evidence that [Rule 412] excludes." Id. at 48. Second, the court found that the defendant's knowledge of the victim's previous sexual behavior was relevant and that Rule

412 did not bar such evidence "when offered solely to show the accused's state of mind." Ibid. The decision in Doe, which did not apply any of Rule 412's three exceptions to the evidence in question, has no bearing on the question presented here.

The unpublished decision in Anderson is likewise inapposite. Anderson involved an exception to Rule 412's general prohibition that is not at issue here -- namely, Rule 412(b)(1)(B), which permits a court to admit "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent." Fed. R. Evid. 412(b)(1)(B). In Anderson, the defendant's "sole defense was consent," and the defendant proffered evidence of past sexual encounters with the alleged victim. 467 Fed. Appx. at 479-481. "[A]cknowledg[ing] that there is no bright-line rule governing the admissibility of evidence under Rule 412(b)(1)(B)," the court of appeals determined that, based on the factual circumstances of the case, the district court had improperly excluded testimony by the defendant regarding prior sexual encounters with the victim. Id. at 479, 480. Because that decision was unpublished and involved a different exception to Rule 412, a different defense (consent), and different facts, it does not indicate that the Sixth Circuit would grant relief to petitioner on the facts here.

4. Finally, even if the question presented otherwise warranted further review, this case would be an unsuitable vehicle, for two separate reasons.

First, even if an exception to Rule 412 applied, the evidence at issue would independently be inadmissible under Rule 403. That Rule provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by the danger of * * * unfair prejudice." Fed. R. Evid. 403. Even evidence that meets one of the three exceptions to Rule 412's general rule of exclusion continues to be inadmissible if the evidence does not "also satisf[y] other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403." Fed. R. Evid. 412 advisory committee's note (1994 Amendments).

Here, the government maintained before the district court and the court of appeals that the unfair prejudicial effect of introducing C.E.'s prior sexual activity far outweighed the probative value of that evidence. See Gov't C.A. Br. 32. Because both courts determined that petitioner's evidence was inadmissible under Rule 412, neither reached the Rule 403 question. But Rule 403 is an alternate ground for affirmance. Because the nurse's testimony regarding C.E.'s prior sexual history is untethered from any evidence linking it to C.E.'s injuries, it is at most minimally probative of the source of those injuries. At the same time, admitting the nurse's testimony would have triggered unfair prejudice by exposing C.E.'s private affairs, subjecting them to

public attack, and inviting a mini-trial about the precise nature of her prior sexual activities.

Second, any error in the district court's evidentiary rulings would in any event be harmless. As the court of appeals explained in rejecting petitioner's jury-instruction argument, "[t]he evidence against [petitioner] is overwhelming." Pet. App. A11. During petitioner's FBI interview, he confessed to raping C.E., agreed that he was a "very, very violent person," and admitted that he had used a samurai "to make things go [his] way" during the assault. Ibid. (citation omitted) (brackets in original). C.E.'s extensive injuries -- genital and otherwise -- align with both her and petitioner's accounts. Id. at A3; Gov't C.A. Br. 9-11. The exclusion of petitioner's speculative theory that C.E.'s injuries were sustained during a prior consensual encounter would not have affected the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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