

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DESCART AUSTIN BEGAY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL ROWE
rowe.michael@dorsey.com
Counsel of Record

SCOTT MAH
mah.scott@dorsey.com

DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

Counsel for Petitioner Descart Austin Begay, Jr.

January 13, 2025

QUESTION PRESENTED

Subsection (i) of Federal Rule of Evidence 801(d)(1)(B) allows for admission of a declarant's prior consistent statement only when offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." In 2014, the Rule was amended to add a subsection (ii) that broadened the admission of prior consistent statements to situations beyond recent fabrications or improper influences or motives, but critically, the amendment retained the requirement that an offered consistent statement must have been made *before* the alleged fabrication or improper influence or motive arose. Fed. R. Evid. 801 (Advisory Committee's Note to 2014 Amendment (citing *Tome v. United States*, 513 U.S. 150 (1995))).

The Eighth Circuit, in direct conflict with the Fifth Circuit, held that in so-called "mixed" situations involving impeachment that could be categorized under both subsections (i) and (ii) of Rule 801(d)(1)(B), the general preference of admission rather than exclusion necessitates a bright-line rule admitting prior consistent statements even where they would be otherwise inadmissible under subsection (i).

The question presented is: Did the 2014 amendment to Rule 801(d)(1)(B) supplant this Court's decision in *Tome* to permit introduction of a declarant witness's prior consistent statements made after the witness developed a motive to lie even where the witness was impeached under a charge that her testimony was a fabrication based on improper influence or motive?

RELATED PROCEEDINGS

United States v. Begay, No. 23-1830 (United States Court of Appeals for the Eighth Circuit) (order denying petition for rehearing issued October 15, 2024).

United States v. Begay, No. 23-1830 (United States Court of Appeals for the Eighth Circuit) (opinion issued September 10, 2024).

United States v. Begay, No. 21-CR-119 NEB/LB (United States District Court for the District of Minnesota) (order denying motion for new trial issued November 10, 2022; final judgment issued April 10, 2023).

TABLE OF CONTENTS

QUESTION PRESENTED	i
RELATED PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION.....	1
RELEVANT STATUTORY PROVISION.....	2
STATEMENT OF THE CASE.....	2
A. Legal Background.....	2
B. Factual and Procedural Background	4
REASONS FOR GRANTING THE WRIT	7
A. The Federal Circuits Have Reached At Least Three Disparate Results on this Unsettled Question of Federal Law.	7
B. This Case is the Ideal Vehicle to Address This Question.	11
CONCLUSION.....	12

APPENDIX

1. Judgment of the Court of Appeals <i>United States v. Begay</i> , No. 23-1830 (8th Cir. September 10, 2024)	A001
2. Opinion of the Court of Appeals <i>United States v. Begay</i> , No. 23-1830 (8th Cir. September 10, 2024)	A002
3. Order on Renewed Motion for Judgment of Acquittal and Motion for New Trial, <i>United States v. Begay</i> , No. 21-CR-119 (NEB/LIB) (D. Minn. November 10, 2022)	A014
4. Judgment in a Criminal Case <i>United States v. Begay</i> , No. 21-CR-119 (NEB/LIB) (D. Minn. April 10, 2023)	A026
5. Order Denying Petition for Rehearing En Banc <i>United States v. Begay</i> , No. 23-1830 (8th Cir. October 15, 2024)	A031

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Tome v. United States</i> , 513 U.S. 150 (1995)	<i>passim</i>
<i>United States v. Davis</i> 896 F.3d 784 (7th Cir. 2018).	8, 9, 10
<i>United States v. Flores</i> , 945 F.3d 687 (2d Cir. 2019).....	10
<i>United States v. Portillo</i> , 969 F.3d 144 (5th Cir. 2020)	7, 8, 9, 10

Statutes

Fed. R. Evid. 801.....	<i>passim</i>
------------------------	---------------

PETITION FOR A WRIT OF CERTIORARI

Petitioner Descart Austin Begay, Jr. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 116 F.4th 795 (8th Cir. 2024) and is reproduced in the Appendix at A002–A013. The Court of Appeals’s order denying rehearing and rehearing *en banc* is not reported but is reproduced in the Appendix at A031. The relevant decision of the United States District Court for the District of Minnesota is not reported but is reproduced in the Appendix at A014–A025.

JURISDICTION

The Court of Appeals issued its opinion on September 10, 2024, and its order denying rehearing and rehearing *en banc* on October 15, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Federal Rule of Evidence 801 provides, in pertinent part:

[. . .]

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

[. . .]

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

[. . .]

Fed. R. Evid. 801(d)(1)(B).

STATEMENT OF THE CASE

A. Legal Background

In *Tome v. United States*, 513 U.S. 150 (1995), this Court recognized that Federal Rule of Evidence 801(d)(1)(B) “embodies” and codifies “[t]he prevailing common-law rule . . . that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards.” *Id.* at 156, 160.

In 2014, Congress amended Rule 801(d)(1)(B) to add a new subsection (ii) to the Rule, thereby expanding the admissibility of a declarant witness's prior consistent statements in certain circumstances and allow for the substantive use of prior consistent statements that are probative for rehabilitative purposes other than those specifically enumerated in subsection (i). Subsection (i) of the Rule provides that a declarant's prior consistent statement is admissible only when offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." Fed. R. Evid. 801(d)(1)(B).

The 2014 amendment was not intended to "change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes." Fed. R. Evid. 801 (Advisory Committee's Note to 2014 Amendment). The Advisory Committee Notes specifically recognize that, "[t]he amendment retains the requirement set forth in [*Tome*]: that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence must have been made before the alleged fabrication or improper influence or motive arose." *Id.*

Post-amendment, Rule 801(d)(1)(B) now authorizes the admissibility of two categories of prior consistent statements. The first category, authorized by subsection (i), allows evidence of a witness's prior consistent statement in response to a "charge" that the witness fabricated a story based on a motive to lie. *See* Fed. R. Evid. 801(d)(1)(B)(i). Crucially, however, "the consistent statements must have been

made before the alleged influence, or motive to fabricate, arose.” *Tome*, 513 U.S. at 158. The second category, covered by subsection (ii), authorizes rehabilitative prior consistent statements when the witness’s credibility was attacked “*on another ground*”—that is, other than a charge based on a motive to lie. *See* Fed. R. Evid. 801(d)(1)(B)(ii) (emphasis added).

This Court has not yet interpreted the 2014 amendment to Rule 801(d)(1)(B). To that end, it is unresolved and lower courts have split on the question of whether a declarant witness’s prior consistent statements are admissible if that witness has been impeached under both subsection (i) and (ii) of Rule 801(d)(1)(B). This Court should clarify the confusion by reaffirming the applicability of *Tome* to the post-amendment version of Rule 801(d)(1)(B).

B. Factual and Procedural Background

On May 20, 2021, the original indictment issued, alleging one count of aggravated sexual abuse, in violation of 18 U.S.C. sections 2241(a)(1), 1151, and 1153(a), and one count of sexual abuse, in violation of 18 U.S.C. sections 2242(1), 1151, and 1153(a). (R. Doc. 1.) One week before trial, on August 17, 2022, the Government filed a superseding indictment charging Begay with four counts of aggravated sexual abuse and four counts of sexual abuse. (R. Doc. 133.)

At trial, the District Court erroneously admitted hearsay statements made by S.S., the alleged victim. Throughout the two-year law enforcement investigation, S.S. made numerous inconsistent statements to law enforcement and medical personnel about core issues, including regarding her injuries and other sexual

activity at the time of the alleged incident. (*E.g.*, TR., Vol. III, p. 411:2–4, 558:20–21.) During cross-examination, Begay impeached S.S. on some of these inconsistencies. (*E.g.*, TR., Vol. III, p. 617:21–618:7.) Begay then argued in closing as his theory of the case that S.S. falsely accused him because she feared how her abusive husband would react if he discovered her consensual sexual encounter with another man. (*See* TR., Vols. IV, V, p. 659:10–12, 880:8–882:1 (“There could be many reasons why she came in here and lied to you and lied to the SANE nurse and lied to law enforcement. I’ll give you one possible reason. . . . [H]er husband.”).)

S.S. is a victim of repeated physical abuse by her estranged husband. (*See* TR., Vol. IV, p. 650:16–651:4.) These assaults, which occurred both before and after the alleged incident with Begay, have resulted in her husband’s arrest and S.S. obtaining a no-contact order and order for protection. (*See id.* at 651:9–12, 654:20–23.) Yet at the time of the alleged assault, S.S. continued to permit her husband to spend time with his and S.S.’s adolescent son, L.S. (*Id.* at 656:12–14.) L.S. was in the home at the time of S.S.’s encounter with Begay. (*See id.* at 656:25–657:7.)

On re-direct, over Begay’s objection, the District Court allowed the Government to introduce evidence, through leading questions, those statements S.S. made to law enforcement and others, accusing Begay of assault. (*Id.* at 664:14–666:14, 667:16–20.) The Government then emphasized these hearsay statements during its closing argument, arguing that S.S. has never deviated from the basic fact of her accusation of Begay. (TR., Vol. V, p. 856:13–19, 857:6–8 (“[E]very single person that [S.S.] has disclosed this rape to, her mother, her estranged husband, the

EMTs, the responding police officers, the hospital personnel, Nurse Stacey Beito, the FBI . . . she has been consistent. She has been unequivocal each and every time.”.)

The jury entered a split verdict. It convicted Begay of two counts of aggravated sexual abuse and two counts of sexual abuse, and acquitted him on two counts each of aggravated sexual abuse and sexual abuse. (R. Doc. 152.)

In denying Begay’s motion for a new trial, the District Court found S.S.’s hearsay statements admissible under the 2014 amendment to Rule 801(d)(1)(B), which “allows for the substantive use of prior consistent statements that are probative for rehabilitative purposes other than those specifically enumerated in subsection (i).” (Appx. at A021 (internal quotation omitted).) The District Court held that because “[a] large portion of Begay’s cross-examination of S.S. attacked her credibility by impeaching her with inconsistencies,” the Government could, on re-direct, use “her prior consistent statements to ‘rebut’ those attacks” under the Rule. (*Id.*, at A021–A022.) However, the District Court erred by failing to distinguish between the two types of impeachment contemplated by the new version of Rule 801. The purpose of Begay’s impeachment of S.S. was not to attack the credibility of her testimony by suggesting it was merely inconsistent or the result of faulty memory. Rather, as noted above, Begay argued that S.S. fabricated her testimony out of fear of physical repercussions from her estranged husband.

Begay timely appealed to the Eighth Circuit, asking it to interpret the 2014 amendment to Rule 801(d)(1)(B) as an issue of first impression and arguing that the

court should follow the Fifth Circuit’s decision in *United States v. Portillo*, 969 F.3d 144 (5th Cir. 2020). In *Portillo*, the Fifth Circuit held the amendment retained and could not be rigidly applied to circumvent the *Tome* limitation. *Id.* at 174–77. The Eighth Circuit rejected Begay’s argument and held that in so-called “mixed” situations where any impeachment occurs that could be categorized under both subsections (i) and (ii) of Rule 801(d)(1)(B), the door automatically opens, categorically, for the admissibility of prior consistent statements generally, including to bolster a witness’s general credibility. The Eighth Circuit declined to rehear the case *en banc*, Appx. at A031, and this petition timely followed.

REASONS FOR GRANTING THE WRIT

This Court should grant review to address the direct conflict between the Fifth and Eighth Circuits regarding the continued applicability of *Tome* to the post-amendment version of Rule 801(d)(1)(B). Moreover, review is warranted because the Eighth Circuit’s decision constitutes a decision on an important question of federal law that has not been, but should be, settled by this Court.

A. The Federal Circuits Have Reached At Least Three Disparate Results on this Unsettled Question of Federal Law.

This Court has not yet interpreted the 2014 amendment to Rule 801(d)(1)(B). To that end, this Court has not addressed whether or the extent to which the *Tome* limitation on pre-motive statements applies to subsection (ii) of the post-amendment Rule. Following the Eighth Circuit’s decision here, the federal circuits have now reached at least three disparate results on this unsettled and important

question of federal law, with the Eighth Circuit and the Fifth Circuit in direct conflict.

In *Portillo*, the Fifth Circuit held that the *Tome* limitation applies to 801(d)(1)(B)(ii). 969 F.3d at 175. In explaining its reasoning, the court concluded that it would be improper to interpret 801(d)(1)(B)(ii) to function as “an end-run around the limitation in 801(d)(1)(B)(i)” when “the declarant [is] primarily attacked on the basis of an improper motivation.” *Id.* at 175–76. Resolving the issue at hand, the court found the district court had abused its discretion in admitting the prior consistent statements of two cooperating witnesses after the defendants had consistently argued the witnesses were motivated to lie. *Id.* at 174–77. Although the defendants had exposed numerous inconsistencies in the witnesses’ statements and testimony at trial, the court found this was done “in order to make a broader point” that the witnesses’ testimony was fabricated and motivated by an improper purpose. *Id.* at 174. Accordingly, the court held that “it [was] impossible to separate the defendants’ attack on the [witnesses]’ motivations from their charges of inconsistency, making it difficult to hold that the [witnesses] were attacked on ‘another ground’” such that admission would be proper under 801(d)(1)(B)(ii). *Id.* at 175.

In *United States v. Davis* decided by the Seventh Circuit, the defendant argued the district court erred by admitting prior consistent statements from two key government witnesses, whom the defendant alleged orchestrated a scheme to frame him. 896 F.3d 784, 786 (7th Cir. 2018). After one of the witnesses was unable

to recall relevant details at trial, the government called a responding police officer to testify about incriminating statements the witnesses had previously made about the defendant. *Id.* at 787. Although he did not object to the officer’s testimony at trial, the defendant argued on appeal that, under *Tome*, the prior consistent statements should not have been admitted because the witnesses had reason to fabricate their statements to the officer. *Id.* at 788–89. Considering the issue in light of the 2014 amendment to Rule 801(d)(1)(B), the Seventh Circuit observed that there had “been no interpretation of 801(d)(1)(B)(ii) since its addition,” *id.* at 789, and held that, based on the language of the amended rule, it is “unclear whether the rule from *Tome* applies to Rule 801(d)(1)(B)(ii) as it unequivocally does to Rule 801(d)(1)(B)(i).” *Id.* Ultimately, the court affirmed on this issue after finding the district court did not plainly err by failing to *sua sponte* bar the prior consistent statements under a “debatable” interpretation of Rule 801(d)(1)(B). *Id.*

In contrast to *Portillo* and *Davis*, the Eighth Circuit here conclusively determined that the disjunctive nature of the 2014 amendment requires that in “mixed” situations involving both category-one and category-two impeachment, the general preference of admission rather than exclusion dictates that prior consistent statements should be admitted even where they would be otherwise inadmissible under subsection (i). (*See Appx.* at A009.) Although it did not address the issue directly, the implicit consequence of the Eighth Circuit’s decision is a holding that

the 2014 amendment supplanted *Tome* and the pre-motive limitation no longer applies upon the occurrence of any “category-two” impeachment.¹

The categorical, bright-line rule endorsed by the Eighth Circuit in this case directly conflicts with Fifth Circuit’s decision in *Portillo*, which, by contrast, mandates a holistic and nuanced inquiry into the nature of the at-issue impeachment in the context of the particular case. 969 F.3d at 174–77. The Eighth Circuit’s decision is also inconsistent with Seventh Circuit law following *Davis*, which found that it is “debatable” and “unclear whether the rule from *Tome* applies to Rule 801(d)(1)(B)(ii) as it unequivocally does to Rule 801(d)(1)(B)(i).” 896 F.3d at 789.

What’s more, the Eighth Circuit’s interpretation conflicts with the plain language of Rule 801(d)(1)(B). While the two subsections in the amended rule are joined by an “or,” the Eighth Circuit did not recognize the caveat in subsection (ii) that the attack on the witness’s credibility must have been “on another ground” than that contemplated by subsection (i). According to the Eighth Circuit, so long as *any* impeachment that could be qualified as “category-two” occurs, the door opens generally for introduction of any rehabilitative prior consistent statements, and which may be argued for any purpose. (See Appx. at A009.) This interpretation of

¹ The Eighth Circuit’s decision is consistent with the Second Circuit’s decision in *United States v. Flores*, 945 F.3d 687 (2d Cir. 2019). In *Flores*, the Second Circuit admitted a declarant witness’s prior consistent statements under 801(d)(1)(B)(ii) after a charge of faulty memory, even though the faulty memory accusations “were brief and were not [defendants’] main challenges” to the credibility of the witness. *Id.* at 705. Rather, the court found sufficient that the challenges to the witness’s memory “were in fact made.” *Id.*

subsection (ii) renders subsection (i) superfluous. Moreover, the implication of the Eighth Circuit’s decision is to authorize the use of general rehabilitation evidence to respond to specific charges of inconsistencies.

This entrenched split results in both civil and criminal litigants being subject to materially different rules—and in the case of criminal defendants, receiving different protections under federal law—by dint of their geographic location. This Court should address the split and provide needed clarity.

B. This Case is the Ideal Vehicle to Address This Question.

This case is the proper vehicle to address this question. The evidentiary issue was directly raised, timely objected to during trial, and this case cleanly presents the question.

The district court’s error in admitting the testimony also played an outsized role in the split verdict. That is, the Government did not rely on S.S.’s prior hearsay statements merely to rebut or rehabilitate an attack on the witness’s faulty memory; rather, it used the testimony to bolster her general credibility, emphasizing during its closing argument that S.S. had never deviated from the basic fact of her accusation. (TR., Vol. V, p. 856:13–19, 857:6–8 (“[E]very single person that [S.S.] has disclosed this rape to, her mother, her estranged husband, the EMTs, the responding police officers, the hospital personnel, Nurse Stacey Beito, the FBI . . . she has been consistent. She has been unequivocal each and every time.”).) The facts of this case highlight the importance of the issue and

demonstrate the consequences of an interpretation of the Rule that disregards the *Tome* limitation.

CONCLUSION

For the foregoing reasons, Petitioner Descart Austin Begay, Jr. respectfully requests this Court grant the petition for a writ of certiorari.

This 13th day of January, 2025.

Respectfully submitted,



MICHAEL ROWE
rowe.michael@dorsey.com
Counsel of Record

SCOTT MAH
mah.scott@dorsey.com

DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

*Counsel for Petitioner Descart Austin Begay,
Jr.*