

IN THE SUPREME COURT OF THE UNITED STATES

DESCART AUSTIN BEGAY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in applying Federal Rule of Evidence 801(d)(1)(B)(ii) to admit testimony of a witness's prior consistent statements, after petitioner's counsel attempted to impeach the witness's trial testimony on multiple theories, including an allegedly "faulty memory."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A13) is reported at 116 F.4th 795. The order of the district court (Pet. App. A14-A25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2024. A petition for rehearing was denied on October 15, 2024 (Pet. App. A31). The petition for a writ of certiorari was filed on January 13, 2025. 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 Minnesota, petitioner was convicted on two counts of aggravated sexual abuse, in violation of 18 U.S.C. 1151, 1153(a), and 2241(a)(1), and two counts of sexual abuse, in violation of 18 U.S.C. 1151, 1153(a), and 2242(1). Pet. App. A26. Petitioner was sentenced to 200 months of imprisonment, to be followed by five years of supervised release. Id. at A27-A28. The court of appeals affirmed. Id. at A2-A13.

1. On July 3, 2020, petitioner sexually assaulted and raped S.S. in her home. Pet. App. A3, A14. Earlier that day, S.S. had received a Facebook message from petitioner, a former colleague, trying to strike up a conversation; the conversation quickly fizzled out. Id. at A3. Later that afternoon, however, petitioner showed up uninvited at S.S.'s house. Ibid.

Petitioner and S.S. initially spoke outside and then went inside S.S.'s home to look at her artwork. Pet. App. A3. The two discussed painting with an airbrush, and petitioner left to get an airbrush. Ibid. After petitioner returned, he began rubbing S.S.'s arm while in the hallway of her home. Ibid. S.S. "said no," but petitioner refused to stop and stated that he had "wanted this since he was 21 years old." Ibid. (brackets omitted).

Petitioner then shoved S.S. into her bedroom and raped her. Pet. App. A3. S.S.'s son, who was playing video games in the living room, called out, distracting petitioner and allowing S.S.

to retreat to the living room, grab her son, and head toward the front door. Ibid.

As S.S. tried to leave, however, petitioner slammed the door shut and began sexually assaulting her again, despite her asking him to stop. Pet. App. A3. Subsequently, S.S. was able to break free and drove to her mother's house with her son, where she told her mother that petitioner had raped her. Ibid.

Several hours later, S.S. spotted petitioner while driving back home. Pet. App. A3. Petitioner began following her on his bicycle. Ibid. Shortly after S.S. arrived home, petitioner began pounding on her front door. Ibid. S.S. locked herself in a room, called her estranged husband to tell him that petitioner had raped her, and contacted the police. Ibid.

When officers arrived at the scene, they saw petitioner attempt to hide by "duck[ing] and div[ing]." Pet. App. A3. Petitioner then attempted to flee on his bicycle, but the officers promptly arrested him. Ibid.

2. A federal grand jury in the District of Minnesota returned a superseding indictment charging petitioner with four counts of aggravated sexual abuse, in violation of 18 U.S.C. 1151, 1153(a), and 2241(a)(1), and four counts of sexual abuse, in violation of 18 U.S.C. 1151, 1153(a), and 2242(1). Superseding Indictment 1-2.

In cross-examining S.S. at trial, petitioner's counsel repeatedly attacked her credibility. Pet. App. A21. Among other

things, petitioner's counsel uncovered several details S.S. could not remember concerning what happened during and after the assault. Id. at A5. During redirect examination, and over the objection of petitioner's counsel, S.S. testified that she told several people -- her mother, her estranged husband, and the police officers who interviewed her -- that petitioner had raped her. Id. at A4.

A jury found petitioner guilty of two counts of sexual abuse and two counts of aggravated sexual abuse. Pet. App. A4, A26. The district court sentenced petitioner to 200 months imprisonment, to be followed by five years of supervised release. Id. at A27-A28.

3. The district court denied petitioner's posttrial motions for a judgment of acquittal and for a new trial. Pet. App. A14-A25. The court rejected petitioner's argument that S.S.'s prior consistent statements -- in which she had told several people that petitioner had raped her -- were inadmissible hearsay. Id. at A21-A22. The court noted that Federal Rule of Evidence 801(d)(1)(B) permits the introduction of "statements that are 'consistent with the declarant's testimony' and offered either to (i) 'rebut an express or implied charge that the declarant recently fabricated it,' or (ii) 'to rehabilitate the declarant's credibility as a witness when attacked on another ground.'" Pet. App. A21 (quoting Fed. R. Evid. 801(d)(1)(B)). And the court found that because "[a] large portion of [the] cross-examination of S.S. attacked her credibility by impeaching her with inconsistencies,"

her testimony was admissible under Rule 801(d)(1)(B)(ii). Id. at A21-A22.

4. The court of appeals affirmed. Pet. App. A2-A13. The court agreed with the district court that petitioner's testimony on redirect -- that she told others that petitioner had raped her -- was admissible under Rule 801(d)(1)(B)(ii). Id. at A4-A10. The court observed that petitioner had made "multiple attacks" on S.S.'s credibility. Id. at A5. One was "that she had a motive to lie because she feared that her estranged husband would become violently angry if he found out that she had consensual sex with another man." Ibid. Another was "that the jury could not trust S.S.'s recollection because she had a faulty memory, both from past drug use and her mental-health struggles." Ibid. And the court explained that while the prior consistent statements may not have been admissible to rebut the first line of attack because S.S.'s motive to lie existed at the time that she made those statements, they were admissible to rebut the second line of attack. Id. at A9-A10.

The court noted that in Tome v. United States, 513 U.S. 150 (1995), this Court had considered language similar to the language now in subsection (i) and had concluded that "only pre-motive prior consistent statements qualified" to "'rebut[] an express or implied charge . . . of recent fabrication' or acting from a recent 'improper influence or motive.'" Pet. App. A6 (quoting Tome, 513 U.S. at 157). But the court of appeals explained that

subsection (ii) was added to Rule 801(d)(1)(B) after this Court decided Tome and that the rationales this Court relied on when adopting a pre-motive requirement for subsection (i) were inapplicable to subsection (ii). Id. at A6-A8.

The court of appeals acknowledged petitioner's argument that the multiple attacks on S.S.'s credibility were inseparable from one another because petitioner "was trying 'to make the broader point' that S.S. had a motive to lie, even if he attacked her credibility in multiple ways." Pet. App. A9 (quoting United States v. Portillo, 969 F.3d 144, 174 (5th Cir. 2020), cert. denied, 141 S. Ct. 1275 (2021)) (brackets omitted). But the court observed that S.S.'s statements were nonetheless admissible under subsection (ii) because "the two categories of Rule 801(d)(1)(B) are joined by an 'or,' meaning a statement 'is not hearsay' if it satisfies either condition." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-12) that the district court abused its discretion in admitting S.S.'s prior consistent statements. The court of appeals' determination that the statements were admissible under Federal Rule of Evidence 801(d)(1)(B)(ii) is correct and does not conflict with any decision of this Court or of another court of appeals. No further review is warranted.

1. The court of appeals correctly found no abuse of discretion in the admission of S.S.'s prior consistent statements

under Rule 801(d)(1)(B)(ii). That rule specifically allows for the introduction of a witness's prior consistent statements "to rehabilitate the declarant's credibility as a witness when attacked on" a ground other than "to rebut an express or implied charge that the declarant recently fabricated [the statements] or acted from a recent improper influence or motive in so testifying." Fed. R. Evid. 801(d)(1)(B). Petitioner's counsel cross-examined S.S. about inconsistencies between her prior statements and her recollections at trial and argued "that the jury could not trust S.S.'s recollection because she had a faulty memory, both from past drug use and her mental-health struggles." Pet. App. A5. Thus, counsel attacked S.S.'s credibility on a ground covered by Rule 801(d)(1)(B)(ii), thereby rendering testimony that S.S. had previously told multiple people that petitioner had raped her admissible to rehabilitate her credibility. Ibid.

Contrary to petitioner's claim (Pet. 10), the court of appeals did not fail to "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)." To the contrary, the court expressly stated that "[t]he impeachment must truly be 'on another ground' to qualify [under subsection (ii)], one not covered by" subsection (i), and that "[o]nly when a party impeaches a witness on a ground 'other' than -- or in addition to -- a motive to lie does" subsection (ii) "kick in." Pet. App. A9

n.2 (quoting Fed. R. Evid. 801(d)(1)(B)(ii)) (brackets and emphasis omitted).

The court of appeals found that standard to be satisfied on the facts here. It took as a given that "S.S. may well have had a motive to lie at the time of the rape, making the post-rape statements inadmissible under Rule 801(d)(1)(B)(i)." Pet. App. A9. "But," it continued, "the statements were still admissible to counter the 'attacks on another ground,' like her allegedly faulty memory." Id. at A9-A10 (brackets and citation omitted). To the extent that petitioner would portray the lines of attack as inherently intertwined and completely inseparable, that factbound issue does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); see also Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (observing that under "the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when [the] 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. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals.

a. Petitioner suggests (Pet. 3-4, 11-12) that the decision below conflicts with this Court's decision in Tome v. United States, 513 U.S. 150 (1995). Tome interpreted language materially similar to that now in Federal Rule of Evidence 801(d)(1)(B)(i), before subsection (ii) was added to the Rule. See 513 U.S. at 156-157. Tome held that the language in subsection (i) "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive." Id. at 167.

Because subsection (ii) did not exist when this Court decided Tome, that decision does not speak to the correct interpretation of subsection (ii). Nor does the reasoning of Tome suggest that its requirement carries over to the later-adopted subsection (ii). As the court of appeals explained, "[t]he rationale for a pre-motive-statement limitation in" subsection (i) "cases is that a prior consistent statement only becomes 'a square rebuttal of the charge that the testimony was contrived as a consequence of that motive' if the witness had been saying the same thing all along, even before the motive to lie arose." Pet. App. A8 (quoting Tome, 513 U.S. at 158). But for at least three reasons, "[t]here is no similar rationale" -- let alone a textual basis -- "for importing a pre-motive-statement requirement into" subsection (ii). Ibid.

First, "if the charge is a lack of credibility based on a faulty memory * * * then a prior consistent statement made at any point * * * will 'rehabilitate' the witness." Pet. App. 8a (emphasis omitted). Second, "it is almost impossible to pinpoint a specific point in time when a faulty memory arises, unlike a motive to lie or other improper influence, so it would not 'make . . . sense' to import a timing requirement." Ibid. (brackets and citation omitted). And third, "timing has never mattered for [subsection (ii)] prior consistent statements, at common law or now." Ibid.

b. Petitioner errs in asserting (Pet. 7-9) that the court of appeals' decision in this case conflicts with the Fifth Circuit's decision in United States v. Portillo, 969 F.3d 144 (2020), cert. denied, 141 S. Ct. 1275 (2021). Indeed, the decision below cited Portillo, and the court of appeals here did not appear to view its decision as in conflict with Portillo. See Pet. App. A9.

In Portillo, the Fifth Circuit reviewed the admission of two sets of prior consistent statements under Rule 801(d)(1)(B). 969 F.3d at 171-177. The court found that the first set of statements -- made by two brothers who cooperated with the government -- was not admissible under Rule 801(d)(1)(B)(i) or (ii). See id. at 173-177. The court found that those statements (1) were made at the same time that the witnesses' motive to lie came into being, and (2) fit "squarely within 801(d)(1)(B)(i), and not the

alternative 801(d)(1)(B)(ii)" because they were used "only" to rebut the defendants' "claim that the brothers fabricated their stories." Id. at 174.

In contrast, the Fifth Circuit in Portillo found that another statement -- made by a witness who implicated a defendant in the victim's murder -- was in fact admissible under Rule 801(d)(1)(B)(ii). 969 F.3d at 176. That defendant had "attacked" the witness's credibility both by suggesting that the witness "was angry [with the defendant] for expelling [the witness] from" a gang and by suggesting that the witness's "memory was unreliable and that there were inconsistencies between his in-court testimony and his prison confession." Id. at 172-173. The Fifth Circuit explained that the defendant's "attack on [the witness's] memory was sufficient to justify the admission of his prior consistent statement under Rule 801(d)(1)(B)(ii)," citing Second Circuit precedent likewise admitting a prior consistent statement even though the "faulty memory accusations 'were brief and were not [the] main challenges' to the credibility of the witness." Id. at 176 (quoting United States v. Flores, 945 F.3d 687, 705 (2d Cir. 2019), cert. denied, 141 S. Ct. 375 (2020)) (internal quotation marks omitted). "Because [the witness] was attacked on a ground other than his alleged motive to fabricate," the Fifth Circuit explained, "the district court did not abuse its discretion in admitting [the challenged] statement." Ibid.

Thus, when addressing a factual situation comparable to the one in this case, the Fifth Circuit reached a result that is fully consistent with the decision below. Other courts of appeals have done likewise. See, e.g., United States v. Proctor, 861 Fed. Appx. 760, 767 n.5 (11th Cir. 2021) (per curiam) ("Even if the evidence were inadmissible under subsection (i) of the rule, it would have been admissible * * * under subsection (ii)" to respond to allegations of the witness's "generally faulty memory."); Flores, 945 F.3d at 704-706 (finding no error in admitting prior consistent statements under subparagraph (ii) in response to challenges alleging both a witness's faulty memory and a motive to fabricate, even though the faulty memory allegations were brief). Petitioner fails to identify any circuit that would have excluded S.S.'s prior consistent statement here.

3. In any event, this case would be a poor vehicle for considering the correct interpretation of Rule 801(d)(1)(B)(ii) because even a favorable decision would not entitle petitioner to reversal of his conviction. Any error in the admission of S.S.'s prior consistent statements was harmless given the very limited inquiry on redirect into her prior consistent statements. See 9/1/22 Tr. 664, 667 (asking S.S. on redirect whether, after July 3, 2020, she had told "a number of other people about what happened" and whether she "repeatedly told law enforcement" that petitioner had raped her).

Indeed, prior to the redirect, S.S. had already testified as to the details of the sexual assault, and the jury had learned already that, on July 3, 2020, S.S. had told her mother, her estranged husband, responding officers, and others that petitioner had raped her. See, e.g., 8/31/22 Tr. 526-527, 534-547. Given the overwhelming evidence supporting the convictions, any error in briefly admitting S.S.'s prior consistent statements during redirect did not have a substantial influence on the jury's verdicts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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