

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government does not address or attempt to reconcile the core issue raised in Begay's petition. Instead, the opposition inaccurately suggests Begay's petition raises fact issues while minimizing the clear split between the Eighth Circuit and Fifth Circuit. Review is warranted because the petition involves an important question of federal law that has not been, but should be, settled by this Court. The Court should grant the petition.

I. Begay's Petition Does Not Rely on Any Disputed Issue of Fact.

At trial, Begay argued 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.) 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.) Begay impeached S.S. on some of these consistencies (*e.g.*, TR., Vol. III, p. 617:21-618:7) in service of his “broader point,” *see United States v. Portillo*, 969 F.3d 144, 174 (5th Cir. 2020), about S.S.’s motive to falsely accuse him.

In its opposition, the Government sidesteps the issue raised in Begay’s petition by suggesting the characterization of Begay’s impeachment is a “factbound issue that does not warrant this Court’s review.” (Opp. at 8.) Not so. There is no

dispute about the facts raised in Begay’s petition. In its opinion, the Eighth Circuit acknowledged that S.S.’s testimony fit into “both categories” of impeachment contemplated under 801(d)(1)(B). (Appx. at A005.) Nor did the court challenge Begay’s position that his impeachment was a so-called “mixed” situation involving both “category-one” and “category-two” lines of impeachment in service of a broader argument that S.S. had a motive to lie. (*Id.* at A008.) After accepting this premise, the Eighth Circuit proceeded to apply its view of the law and held that, so long as any impeachment occurs that could be qualified as “category-two,” the door opens generally for introduction of any rehabilitative prior consistent statements, and which may be argued for any purpose. (*Id.* at A009.) In sum, Begay’s petition seeks review of the Eighth Circuit’s application of an unsettled¹ issue of law and does not require the Court to review or weigh evidence.

II. The Eighth Circuit’s Opinion Squarely Conflicts with the Fifth Circuit’s Opinion in *Portillo*.

Contrary to the Government’s argument, the Eighth Circuit’s opinion here directly conflicts with the Fifth Circuit’s *Portillo* decision. The Government initially claims the Eighth Circuit did not view its decision as in conflict with *Portillo* because the court cited the case at one point in its opinion. (Opp. at 10.) While the

¹ The Government argues that the Court’s decision in *Tome v. United States*, 513 U.S. 150 (1995) “does not speak to the correct interpretation of subsection (ii)” and that its reasoning does not “carr[y] over to the late-adopted subsection (ii).” (Opp. at 9.) This is contradicted by the Advisory Committee’s Note to the 2014 Amendment, which specifically recognized 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.”

Eighth Circuit did cite *Portillo* in summarizing Begay's argument (Appx. at A009), the court did not otherwise address the case or offer any substantive analysis regarding its reasoning.

The Government then argues the Fifth Circuit would have reached the same result as the Eighth Circuit here because, in *Portillo*, the court considered two different sets of challenged prior consistent statements and found that one of the sets was properly admitted under Rule 801(d)(1)(B) because the defendant had attacked the witness's memory and specifically argued that a lapse in time was responsible for the inconsistencies in testimony. *Portillo*, 969 F.3d at 176. As to the other set of prior consistent statements, however, the Fifth Circuit found that, although the defendants had exposed numerous inconsistencies in the witnesses' statements and testimony at trial, 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 Fifth Circuit 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. That is the exact situation here and, if presented with the same facts, the Fifth Circuit would have reached a different result than the Eighth Circuit.

Regardless, the Government ignores the Eighth Circuit's endorsement of a categorical, bright-line rule that permits the introduction of prior consistent statements in any "mixed" situations involving both category-one and category-two

impeachment even where the prior consistent statements would be otherwise inadmissible under Rule 801(d)(1)(B)(i). This conflicts with the 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.

III. This Case Is an Ideal Vehicle.

This case is the proper vehicle to address this question. Contrary to the Government’s position, the admission of S.S.’s prior consistent statements was not harmless error. The Government ignores that, after soliciting the prior consistent statements on re-direct through leading questions, the Government then emphasized that testimony during its closing argument. (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.”).) As such, the Government’s use of the improper bolstering testimony was neither “very limited” nor “brief[]”; rather, it played an outsized role in a split verdict.

CONCLUSION

This Court should grant the petition for writ of certiorari.

This 31st day of March, 2025.

Respectfully submitted,



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