No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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TERRANCE DEANDRE ELLISON,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether Federal Rule of Evidence 801(d)(1)(B)(i) permits introduction of hearsay purportedly to rebut a charge of recent fabrication made during cross-examination of a witness, if those hearsay statements (a) were made at a time when the witness had a motive to lie, and (b) don't relate to the direct testimony that was challenged during cross-examination.

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OPINION BELOW

On December 23, 2024, the Ninth Circuit filed an unpublished opinion affirming Terrance Ellison's drug convictions. *See United States v. Ellison*, 2024 WL 5200176 (9th Cir. 2024) (attached in appendix).

JURISDICTION

After the Ninth Circuit filed its opinion on December 23, 2024, Ellison did not seek rehearing. This petition is timely under Supreme Court Rule 13 and this Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT FEDERAL RULE OF EVIDENCE

Federal Rule of Evidence Rule 801(d)(1)(B)(i) states, in relevant part:

> A statement that meets the following conditions is not hearsay . . . . The declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is consistent with the declarant's testimony and is 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 . . . .

STATEMENT OF THE CASE

I. Relevant District Court Proceedings

Terrance Ellison was convicted of four federal drug charges: (1) conspiring to distribute methamphetamine; (2) possessing with intent to distribute methamphetamine; (3) conspiring to import methamphetamine; and (4) importing methamphetamine. *See* 21 U.S.C. §§841(a)(1), 952, 960, 963.

Latoya Alexander was a key government witness at trial. She was arrested at the San Ysidro, California, port of entry into the United States on April 28, 2020, trying to smuggle 4.4 kilograms of methamphetamine into the country. She pleaded guilty and testified at Ellison's trial in exchange for the government's promise to seek a sentence reduction. Her direct testimony was not helpful to

the government but on re-direct prosecutor was allowed to correct that by introducing Alexander's prior hearsay statements.

Alexander began her direct testimony by claiming she was introduced to Ellison by her boyfriend, Anthony Ledet, in April 2020. She knew at that time that Ledet was involved in drug smuggling. Indeed, on April 20, 2020, a week before she was arrested, she and Ledet went on a drug-smuggling trip to Tijuana, Mexico.

Alexander testified that shortly before her arrest, she drove to Las Vegas with Ellison to recruit people to smuggle drugs. She said they stopped in Victorville, California, where she met a man named Junior. She claimed she heard Junior and Ellison talk about recruiting people to smuggle drugs. Alexander testified that once they reached Las Vegas, they visited Ledet's mother, a friend of her's, and Ellison's aunt.

When she and Ellison got back to San Diego, they met-up with Claudia Alvarez, Anthony Wiseman, and Matt McKeon, all people she'd previously met through Ledet. The group went to a hotel in San Ysidro, California, where Junior told Alexander that he wanted her and Alvarez to smuggle drugs across the border. Junior said she would be carrying those "drugs for him," and he gave her instructions, during which Ellison wasn't present.

Junior's girlfriend drove Alexander, Alvarez, McKeon, and Ellison to Tijuana, Mexico. There, Alexander met with Primo, whom she'd previously met through Ledet, and from whom Junior said she would get the drugs. She said she believed that Primo brought methamphetamine and heroin to the hotel where they met, and claimed she saw Ellison packaging methamphetamine. Primo gave her and Alvarez methamphetamine, which was strapped to their bodies, and McKeon went into the bathroom, where Alexander "believe[d] he was keistering heroin."

Next, Alexander said she, Alvarez, and McKeon got into an SUV, with Ellison driving. Near the border, Ellison told them to get out and walk across. Alexander was arrested at the port of entry.

Alexander said Ellison didn't pay her, nor did he promise to do so. She assumed Junior would pay her because she heard Matt say Junior would pay him $1000. Despite this, at the prosecutor's prompting Alexander said Ellison owned the drugs.

On cross-examination, defense counsel embraced Alexander's direct testimony that it was Junior who (a) told her to smuggle drugs that day, (b) arranged for her to pick up drugs from Primo, and (c) gave her instructions.

There was only one time on cross that defense counsel challenged Alexander's direct testimony. That was when counsel asked Alexander if she'd said to agents during her post-arrest questioning that she'd driven to Las Vegas with Ellison *and* Anthony Ledet "in order to retrieve your personal belongings in your vehicle." Alexander acknowledged she'd said that but claimed it wasn't true. That post-arrest statement was contrary to Alexander's direct testimony that she went to Las Vegas with just Ellison, and the purpose was to recruit people to smuggle drugs.

After the cross, the prosecutor said, at sidebar:

> [T]here were attempts to suggest that the defendant has recently fabricated her testimony . . . . [She made] prior consistent statements that arose prior to her ever meeting with us. And so I believe that, under [Federal Rule of Evidence] 801(d)(1)(B), that the United States is now entitled to rebut an express or implied charge that the defendant recently fabricated . . . and rehabilitate her with her prior consistent statements.

The prosecutor identified the prior statements as (a) Alexander's "post-arrest statement in which she placed the blame on the defendant for this job crossing the drugs," and (b) statements Alexander's attorney "submitted in connection with her sentencing."

Defense counsel responded that Alexander had a motive to fabricate when she made those prior statements, and that makes Rule 801(d)(1)(B)(i) inapplicable. The district court nonetheless ruled the prior statements were admissible.

On re-direct, the prosecutor began by eliciting statements Alexander supposedly made to agents after her arrest. But the prosecutor didn't do that in a manner designed to rebut a suggestion of recent fabrication that was raised on cross-examination – had the prosecutor done that, she would have been limited to Alexander's testimony on cross about the Las Vegas trip. Instead, the prosecutor used leading questions to have Alexander agree that she'd told the agents the following during her post-arrest statements.

First, the prosecutor had Alexander agree that "on the date of your arrest, you identified [Ellison as] the individual who set you up." That is arguably inconsistent with Alexander's direct testimony, in which she said "Junior" devised the plan of having her smuggle drugs. Furthermore, defense counsel didn't challenge that direct testimony during Alexander's cross-examination.

Second, the prosecutor had Alexander agree that in her post-arrest statements she "told the agents that you accepted an offer from [Ellison] to transport narcotics into the United States for the payment of $1,000." But in her direct-examination, Alexander said she "expected to be paid" for smuggling the drugs because she "overheard Matthew talking" to Junior "about getting a thousand" and "assumed that I would be paid the same." Defense counsel didn't attack that testimony on cross, because it was consistent with the other testimony indicating that Junior was behind the smuggling. Thus, the government used Alexander's post-arrest hearsay on re-direct to "correct" her direct testimony.

The government then turned to statements Alexander's *attorney* made in sentencing filings, to support a Sentencing Guidelines adjustment based on mitigating role, U.S.S.G. §3B1.2. The

prosecutor used leading questions to get Alexander to agree that, in those filings, "you and your attorney" told the court the following.

First, that Ellison and Ledet "were doing some business together and that . . . on one of your first occasions meeting [Ellison], he bought a large amount of meth with him." That didn't respond to any attack during cross-examination.

Second, that Alexander traveled to Las Vegas with Ellison to recruit people to smuggle drugs. That was the *one* part of the re-direct that was aimed at a portion of Alexander's direct that had been attacked on cross.

Third, that in Mexico, Ellison (a) "wrapped you with the methamphetamine," (b) "changed the plan from driving to walking through the border," and (c) "forced you-all out of the car." That testimony was consistent with the direct, though on direct Alexander never claimed Ellison "forced her out of the car." At any rate, none of this testimony was attacked on cross.

The government came back to this during closing:

> Now, how do you know that [Alexander's] telling the truth? Well, you heard something during this trial about what she told the officers at the *time of her arrest*. . . . She told them about [Ellison] and how [he] *had recruited her to smuggle drugs* for what she believed was a thousand dollars.[1] An entire month before Mr. Ellison is arrested, Latoya Alexander is pointing the finger at him. She couldn't possibly have anticipated that he was going to be on trial here today. He's not even arrested, but she *tells the officers the truth*. And then later, when she's charged and sentenced, she tells the judge what happened. And she tells the judge the same story that you heard, and she's sentenced.

(Emphasis added.) The prosecutor summed-up, "She's been consistent. [Ellison] is the one that did this to her."

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[1] Alexander *actually* testified that Junior recruited and directed her, and she assumed Junior would pay her $1000.

The prosecutor took the error a step further, arguing – falsely – that Ellison claimed Alexander set up the smuggling venture:

> But why does the defendant need you to desperately believe that, instead, it was Ms. Alexander that concocted this plan, that this woman went into Mexico with Este and decided, "Hmm. Maybe I'll commit my first felony conviction, and I'll cross drugs across the border. . . ."

Ellison didn't claim that Alexander "concocted this plan," and Alexander testified that Junior did so. The government was unsatisfied with that testimony so it "fixed" it with inadmissible testimony, then compounded that error with a false argument.

II. Ninth Circuit Opinion

On appeal, Ellison argued that the district court erred by admitting Alexander's hearsay statements. The Ninth Circuit rejected that claim, holding that because Ellison "went into Alexander's post-arrest statements" during cross, the barrage of re-direct testimony was admissible. *Ellison*, 2024 WL 5200176, *1.

REASONS FOR ALLOWING THE WRIT

The Court should grant this petition because the Ninth Circuit "has decided an important federal question in a way that conflicts with [a] relevant decision[] of this Court," specifically *Tome v. United States*, 513 U.S. 150, 157 (1995). *See* S. Ct. R. 10(c).

If a witness's prior inconsistent statement is used for impeachment, a prior consistent statement, otherwise barred by the hearsay rule,[2] may be used to rebut the adverse credibility inference if the requirements of Rule 801(d)(1)(B)(i) are met. That Rule states:

[2] "The traditional view has been that a prior statement, even one made by the witness, is hearsay if it is offered to prove the matters asserted therein." 2 *McCormick on Evidence* §251 (8th ed. 2020).

> A statement that meets the following conditions is not hearsay . . . . The declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is consistent with the declarant's testimony and is 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 . . . .

For two reasons, the district court erred under *Tome* when it ruled that Alexander's prior statements were admissible under this Rule.

First, any prior consistent statement must have been made before a potential motive to fabricate arose. *See Tome*, 513 U.S. at 167. Of course, cnce a person has been arrested, or even knows she is being investigated, she has a motive to fabricate under Rule 801(d)(1)(B)(i). *See United States v. Bao*, 189 F.3d 860, 864 (9th Cir. 1999); *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996); *United States v. Frederick*, 78 F.3d 1370, 1377 (9th Cir. 1996); *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989).

Both sets of Alexander's statements were made after she had been arrested, thus Rule 801(d)(1)(B)(i) doesn't apply. And admission of statements from Alexander's sentencing filings was especially egregious because those were *her attorney's statements*, made to support a sentencing pitch.

Second, prior statements are not admissible" under the Rule "to counter all forms of impeachment or to bolster the witness merely because she has been discredited." *Tome*, 513 U.S. at 157. Instead, prior statements "are admissible [under the Rule] only if offered to rebut a charge of recent fabrication or improper influence or motive." *Id.* Accordingly, the Rule only permits admission of "a prior consistent statement that is consistent with the declarant's challenged in-court testimony." *Collicott*, 92 F.3d at 979; *see also Weinstein's Federal Evidence* §801.22[1][a]; *Bao*, 189 F.3d at 865. Furthermore, "where a party inquires into part of a conversation" on cross-examination, the Rule doesn't permit the opposing party to "introduce the whole conversation as

substantive evidence under the Rule even though the statements do not rebut a charge of recent fabrication or improper motive." *Collicott*, 92 F.3d at 979.

The only time on cross that Alexander's testimony was "challenged" with a prior inconsistent statement was when defense counsel had her admit that in her post-arrest statement she told agents that she'd driven to Las Vegas with Ellison *and* Anthony Ledet, "in order to retrieve your personal belongings in your vehicle." That was inconsistent with Alexander's direct testimony that she went to Las Vegas with just Ellison, to recruit people to smuggle drugs. Had the Rule's motive-to-fabricate time-bar not applied, that was the only permissible subject for rebuttal on re-direct.

Because Ninth Circuit "has decided an important federal question in a way that conflicts with" *Tome*, the Court should grant this petition. *See* S. Ct. R. 10(c).

CONCLUSION

Ellison requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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Date: March 20, 2025

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