NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL GARVIS GRIFFITH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition asks this Court to resolve a circuit split about the proper contours of Fed. R. Evid. 803(4), a hearsay exception for statements made for and reasonably pertinent to medical diagnosis or treatment. Although Rule 803(4) does not generally authorize the admission of hearsay statements of fault or identity, there is a limited exception that admits such hearsay when a child victim alleges household abuse.

In at least three circuits, and consistent with the reliability rationale for Rule 803(4), a party seeking admission of statements concerning fault or identity pursuant to the household abuse exception must show that the patient subjectively understood that the statement was relevant to their treatment. In at least four other circuits, however, no such showing is required. The question presented in this case accordingly is:

> Whether a party seeking to admit an out-of-court statement pursuant to Rule 803(4) must show that the speaker subjectively knew that the identity of their abuser was relevant to their treatment and was thus motivated to speak truthfully?

RELATED PROCEEDINGS

- *United States v. Griffith*, No. 22-7005, United States Court of Appeals for the Tenth Circuit. Judgment entered on April 18, 2023.

- *United States v. Griffith*, No. 6:21-cr-00014-RAW-1, United States District Court for the Eastern District of Oklahoma. Judgment entered on February 18, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Russell Griffith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at *United States v. Griffith*, 65 F.4th 1216 (10th Cir. 2023), and can be found in the Appendix at A8.

JURISDICTION

The court of appeals issued its decision on April 18, 2023. App. A8. Pursuant to Supreme Court Rule 13.1, the deadline to file this petition is July 17, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Fed. R. Evid. 803(4).

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . .

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

STATEMENT OF THE CASE

In this case, the victim, A.W., pointed to different family members as her abuser over her lifetime. At Mr. Griffith's trial, pursuant to Federal Rule of Evidence 803(4), the government used A.W.'s prior out-of-court statement to a nurse identifying Mr. Griffith as her abuser to argue that he had been the person abusing A.W. all along. Inconsistent with the historic rationale of Rule 803(4) and pursuant to the law of the Tenth Circuit, no showing was required that A.W. subjectively understood that identifying Mr. Griffith was pertinent to her treatment, evidence that would have been required in one, and potentially two other circuits. This petition, accordingly, asks this Court to consider the proper contours of Rule 803(4).

I. Legal Background

Rule 803(4) allows admission of hearsay statements describing medical history if the statement was "made for," "and is reasonably pertinent to," "medical diagnosis or treatment." Rule 803(4), however, does not generally apply to statements regarding fault or identity. Fed. R. Evid. 803(4), Advisory Committee Note to Paragraph 4. The only exception to this general prohibition arises in cases involving alleged household abuse. At the heart of this petition is the disagreement amongst circuit courts about what must be shown for the household abuse exception to permit admission of hearsay statements concerning fault.

In at least the Fourth, Eighth, and Ninth Circuits, and consistent with the policy rationale for Rule 803(4), a party seeking admission of a hearsay statement regarding fault must satisfy a two part-test. The first part of the test analyzes the

speaker's subjective intent in identifying the perpetrator, and the second considers whether the statement was reasonably relied upon by the physician. *See, e.g.*, *United States v. JDT*, 762 F.3d 984, 1003 (9th Cir. 2014); *Morgan v. Foretich*, 846 F.2d 941, 949 (4th Cir. 1988); *United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985).

Contrarily, the Tenth, Second, and Seventh Circuits do not require any showing regarding the subjective intent of the speaker, and only examine whether the statements were "reasonably pertinent to diagnosis or treatment" from the medical professional's perspective. *See, e.g.*, *United States v. Tome*, 61 F.3d 1445, 1450 (10th Cir. 1995); *Gong v. Hirsch*, 913 F.2d 1269, 1274 n.4 (7th Cir. 1990); *O'Gee v. Dobbs Houses, Inc.*, 570 F.2d 1084, 1089 (2d Cir. 1978). This method has been criticized for ignoring the perspective of the speaker, i.e., whether the complainant is subjectively motivated to tell the truth in a way she otherwise would not be, such that the normal hearsay rule of exclusion is dispensed with. *See North Carolina v. Hinnant*, 351 N.C. 277, 286 (2000) (criticizing "not requiring a treatment motive on the part of declarant," for "expand[ing] the scope of the medical diagnosis or treatment exception beyond the common law moorings of Rule 803(4)").

II. Procedural History

This case involves sex abuse allegations lodged by one person against three different family members. At different times over the course of her life, A.W. has pointed to her biological grandfather, her biological father, and her stepfather—Mr. Griffith—as her abuser.

A.W.'s first claim against her father was deemed unsubstantiated. A.W. now declares that her second claim against her biological father was false. In 2011, A.W. made her third claim, this time alleging abuse by Mr. Griffith. However, four months after receiving inpatient treatment where she resumed taking medication for her borderline personality disorder, A.W. shifted blame for the abuse from Mr. Griffith back onto her biological father. Then, after giving birth to Mr. Griffith's child at twenty-two years old, A.W. made her fourth report of abuse, alleging for a second time that Mr. Griffith was responsible, and claiming that he was the only man who ever abused her. A.W. now alleged that this abuse had occurred regularly in an escalating fashion since she was nine years old.

The government charged Mr. Griffith with (1) aggravated sex abuse of a minor under twelve (count one); (2) sex abuse of a minor under sixteen (count two); and (3) sex abuse of an adult by non-fatal threat (count three).[1] In his defense, Mr. Griffith steadfastly maintained that he never engaged in sexual contact with A.W. when she was a minor—and only did so when she was an adult with her consent. He also pointed to trial evidence that showed that the timing of A.W.'s reports of abuse (against her grandfather, her biological father, and her stepfather) aligned with instances when she benefited from reporting the allegations, by avoiding trouble for getting caught skipping school or abusing drugs, for example.

[1] Mr. Griffith was originally charged by the State of Oklahoma for only one count of sexual abuse of A.W. when she was an adult. Following this Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2478 (2020), Mr. Griffith's state charges were dismissed for a lack of jurisdiction.

One of the government's expert witnesses was Rebecca Williamson, a certified Sex Assault Nurse Examiner ("SANE nurse"). Ms. Williamson stated that during A.W.'s exam, she obtained A.W.'s medical history from her because it would "significantly" form the basis for her exam and facilitate providing the patient's treatment. When the government asked Ms. Williamson what A.W. said about her medical history, defense counsel objected for hearsay, which was overruled. Ms. Williamson then testified that A.W. had "some sort of non-specific endocrine disorder." The government next asked whether A.W. provided "any specifics about being sexually assaulted," and defense counsel again objected for hearsay. The district court overruled this objection and permitted Ms. Williamson to state that A.W. shared that "her stepfather had been molesting her." Defense counsel afterward objected again saying: "Objection. Your Honor. Just for the record, I am objecting to this whole line of questioning." The judge responded that it understood counsel's objection but nonetheless permitted the testimony "under the exception for medical diagnosis and treatment."

At the conclusion of trial, the jury convicted Mr. Griffith on all three charges. He was sentenced to life imprisonment.

Mr. Griffith appealed his conviction, arguing that the court wrongly admitted Ms. Williamson's testimony. Specifically, Mr. Griffith claimed that the foundation elicited at Mr. Griffith's trial would have been insufficient to allow Ms. Williamson's testimony regarding A.W.'s disclosure of his identity as her abuser in at least one circuit, and possibly three circuits. Although the claim was currently foreclosed by

Tenth Circuit precedent, *see United States v. Edward J.*, 224 F.3d 1216, 1220 (10th Cir. 2000), Mr. Griffith preserved this precise issue for this Court's review. Mr. Griffith additionally showed that he was prejudiced by Ms. Williamson's testimony because, otherwise, there was nothing to corroborate A.W.'s claims. The testimony was also cloaked in a guise of credibility because it was made to a medical professional.

The Tenth Circuit affirmed. Following its holding in *Edward J*, the court ruled that the district court properly denied Mr. Griffith's objections to the SANE nurse's testimony that A.W. identified Mr. Griffith as her abuser in 2011. App. A24.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the question presented is recurring and important and has divided the courts of appeal—with the Tenth Circuit on the wrong side of that divide.

I. Courts Are Split on the Question Raised in This Petition.

Generally, Rule 803(4) does not apply to statements concerning fault or identity. Courts, nonetheless, permit a narrow exception to this general prohibition when household abuse is alleged. This appeal concerns the prerequisites a party must satisfy before the household abuse exception may apply. Although at first blush, the current circuit split on the issue appears narrow; it is not. Applying the household abuse exception differently amongst circuits has resulted in dissimilar, unequitable outcomes in which evidence that would be inadmissible in one jurisdiction can be used to establish liability or obtain conviction in another.

Compare Olesen v. Class, 164 F.3d 1096, 1098 (8th Cir. 1999) ("There is no evidence in the record that [the pediatrician] explained to L.Z. that his questions regarding the identity of her abuser were important to diagnosis or treatment[.]") *with United States v. Griffith*, 65 F.4th 1216, 1223 (10th Cir. 2023).

Specifically, the Fourth, Eighth, and Ninth Circuits employ a two-step test that is consistent with the policy rationale of Rule 803(4). This approach contemplates the speaker's subjective intent in identifying the perpetrator, as well as the objective relationship between that statement and medical diagnosis. *See, e.g.*, *JDT*, 762 F.3d at 1003; *Morgan*, 846 F.2d at 949; *Renville*, 779 F.2d at 436.

The Eighth Circuit has been a particularly stringent gatekeeper under this test. There, a victim's identification of her perpetrator to her doctor is only admissible if the government can show "that (i) the physician made clear to the victim that inquiry into the abuser's identity was essential to diagnosis and treatment, and (ii) "the victim manifest[ed] such an understanding." *United States v. Bercier*, 506 F.3d 625, 632 (8th Cir. 2007) (citing *Renville*, 779 F.2d at 438)).

And the Fourth and Ninth Circuits state that "[t]he critical inquiry is whether such statements are '*made for the purpose of medical diagnosis or treatment'* and are 'reasonably pertinent to diagnosis or treatment.'" *JDT*, 762 F.3d at 1003 (emphasis added) (citing to the Eighth Circuit's iteration of the proper test in *Renville* and the Fourth Circuit's iteration in *Morgan*); *see, e.g.*, *United States v. James*, No. 20-10122, 2021 WL 4027812, *3 (9th Cir. Sept. 3, 2021) (allowing admission under Rule 803(4) after examining whether the victims had "testified

that they understood that they were being seen by a medical professional (specifically, a nurse)"); *United States v. DeLeon*, 678 F.3d 317, 327 (4th Cir. 2012), *vacated on other grounds sub. nom. DeLeon v. United States*, 570 U.S. 913 (2013) ("Here, the district court's decision to admit [declarant's] statement under the exception contained in Rule 803(4) was not arbitrary or irrational . . . [The social worker] testified that she asked [the declarant] specific questions to gauge his credibility and to ensure he was answering truthfully. We therefore cannot say that the district court abused its discretion by concluding that [the declarant's] motive was consistent with the purposes of treatment.").

On the other hand, the Tenth, Second, and Seventh Circuits allow admission of statements of fault when household abuse is alleged and the statements merely were "reasonably pertinent to diagnosis or treatment" from the medical professional's perspective. *See, e.g.*, *Tome*, 61 F.3d at 1450; *Gong*, 913 F.2d at 1274 n.4; *O'Gee*, 570 F.2d at 1089; *see also United States v. Edward J.*, 224 F.3d 1216, 1220 (10th Cir. 2000) ("The Eighth Circuit has held . . . [that] young victims' statements to their doctors are admissible only when the prosecution is able to demonstrate that the victim's motive in making the statement was consistent with the purpose of promoting treatment . . . *We have specifically rejected* this presumption against admission of hearsay evidence under . . . Rule 803(4) exception in the case of children.") (emphasis added).

II. The Tenth Circuit and Like-Minded Courts Are Wrong.

The Court should grant certiorari because the standard matters. Hearsay is inadmissible absent an exception. Fed. R. Evid. 802. This foundational rule is only dispensed of when the statement satisfies the dictates of Rules 803 and 804. These exceptions all "depend[] on only the circumstances surrounding the hearsay statement in question" and "require a guarantee of trustworthiness." Marc D. Ginsberg, *The Reliability of Statements Made for Medical Diagnosis or Treatment: A Medical-Legal Analysis of A Hearsay Exception*, 54 UIC L. Rev. 679, 680-81 (2021) [hereinafter *A Medical-Legal Analysis*].

The specific exception at issue in this appeal is Rule 803(4), which permits admission of hearsay statements "made for" and "reasonably pertinent to" "medical diagnosis or treatment." The plain language of the rule, accordingly, contemplates a two-part inquiry. The first requirement is to consider the speaker's purpose for making the statement. Indeed, a statement cannot be "made for" "medical diagnosis or treatment" if the speaker does not subjectively believe that their statement is necessary for their care. The second requirement embodied within Rule 803(4) concerns whether the physician relied on that statement for the patient's treatment.

This reading of Rule 803(4) is consistent with the statement's reliability hinging on "the likelihood that the patient believes that the effectiveness of the treatment received will depend upon the accuracy of the information provided to the physician." John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 Ga.

L. Rev. 353, 359-60 (1999) [hereinafter *An Interdisciplinary Analysis*]. Said differently, Rule 803(4) is primarily concerned with "the state of mind of the declarant," i.e., whether the speaker "belie[ves] that an accurate and truthful statement is important to proper treatment." *Id.* at 364.

Rule 803(4), however, generally does not apply to hearsay statements regarding fault or identity, Fed. R. Evid. 803(4), Advisory Committee Note to Paragraph 4, which "seldom are made to promote effective treatment" since "the patient has no sincere desire to frankly account for fault because it is generally irrelevant to an anticipated course of treatment" and "physicians rarely have any reason to rely on statements of identity in treating or diagnosing a patient." *United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985). "These statements are simply irrelevant in the calculus in devising a program of effective treatment." *Id.*

Consistent with the reliability rationale for Rule 803(4), the Fourth, Eighth, and Ninth Circuits properly require proof that the speaker was subjectively motivated to tell the truth before admitting statements of fault or identity in cases of household abuse. The approach of the First, Second, Seventh and Tenth Circuits, on the other hand, wrongly require no showing that the speaker knew the identity of her abuser was important for her treatment.

Additionally, certiorari should be granted because Rule 803(4) is rooted in flawed behavioral assumptions. The reality is that, in a post-*House*[2] world, there is no question that patients, young and old, lie to their doctors. *See* Ginsberg, *A Medical-Legal Analysis*, 54 UIC L. Rev. at 680-81. The reasons patients lie abound: fear of judgment, the difficulty of retelling a unpleasant experience, embarrassment, not wanting to appear like a complicated or unreasonable patient, or not wanting to take up too much of the physician's time. *Id.*

In light of Rule 803(4)'s already strained premise, it is improper for some courts to extend the rule to allow admission of statements by children regarding fault or identity. A child's social disposition is unrelated to treatment, and thus lacking in any historical indicia of reliability. Capowski, *An Interdisciplinary Analysis*, 33 Ga. L. Rev. at 406. Furthermore, there is no good reason to abandon the historical indicia of liability to make an exception for statements by children, who may "have difficulty understanding that they are receiving treatment or being diagnosed and that accurate and truthful statements are needed to promote treatment." *Id.* The reliability of any statement by a dependent is also undermined by the fact that "[t]ruthful answers to the identity of the abuser may well wrench a child from the reassuring presence of its mother or father or both," an undoubtedly difficult reality that any child might naturally avoid by being untruthful. *Id.*

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[2] *See generally*, Vasilachi, *Dostoyevsky and House M.D.—Everybody Lies . . . To Themselves?*, Medium, https://medium.com/@avasilachi/dostoyevsky-and-house-m-d-everybody-lies-to-themselves-d39a1a23b390 (Mar. 20, 2019) (describing how the leading character's mantra in the medical television drama, *House*, was "everybody lies").

In sum, the behavioral justification for Rule 803(4) requires, at a minimum, consideration of the speaker's subjective awareness of a need to be honest before excepting such statements from the general prohibition against statements of fault or identity.

III. This Case Is an Ideal Vehicle to Consider This Important, Recurring Issue.

A. This Important, Recurring Issue Warrants this Court's Intervention.

It is necessary for this Court to intervene because inconsistencies amongst the circuits regarding the standard of admission of statements pursuant to Rule 803(4) thwart the very purpose that the Federal Rules of Evidence were created: uniformity. Wright, et al., *§ 5006 Enactment of the Federal Rules of Evidence*, Fed. Prac. & Proc (2d ed. 1982).

Additionally, each year, more than 1,000 criminal defendants are indicted for sex abuse offenses. U.S. Sentencing Comm'n, *Quick Facts: Sex Abuse Offenders*, (2022).[3] Congress also recently eliminated the statute of limitations on civil suits for those who were child victims of forced labor, sex trafficking, sexual abuse, and sexual exploitation to recover actual and punitive damages. *See* Eliminating Limits to Justice for Child Sex Abuse Victims Act, Pub. L. No. 117-176 (amending 18 U.S.C. § 2255(a)). This new legislation has the potential to inundate courts with child sex abuse claims once thought foregone. Rule 803(4), conceivably, will be

[3] Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Sexual_Abuse_FY22.pdf.

implicated in many of these cases. *See, e.g.*, John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. Davis J. Juv. L. & Pol'y 1, 5 (2010) (explaining that "[child sex abuse] investigation[s] typically include[] an examination"). Moreover, the household abuse exception to the general prohibition against statements regarding fault or identity is applicable to virtually every child sex abuse case since these offenses are commonly committed by a family member or someone the family trusts. Darkness to Light, *Child Sexual Abuse Statistics* (last visited June 21, 2023).[4] In sum, this issue of what prerequisites should be met to permit statements of fault or identity is important and reoccurring. This Court should therefore grant certiorari.

B. Mr. Griffith Preserved This Critical Issue to His Case.

Mr. Griffith additionally preserved this important issue by objecting at trial and by challenging the court's admission of Ms. Williamson's testimony before the Tenth Circuit. Specifically, at trial, when the government asked Ms. Williamson to describe A.W.'s medical history, Mr. Griffith objected for hearsay. Mr. Griffith repeatedly renewed his hearsay objection as the government continued asking Ms. Williamson to described the specifics of A.W.'s sexual assault allegations. Ms. Williamson ultimately testified that A.W. identified Mr. Griffith as her assailant, and Mr. Griffith thereafter objected again saying: "Objection. Your Honor. Just for the record, I am objecting to this whole line of questioning." The judge

[4] Available at: https://www.d2l.org/wpcontent/uploads/2017/01/all_statistics_20150619.pdf

responded that it understood counsel's objection but nonetheless permitted the identification testimony "under the exception for medical diagnosis and treatment."

Mr. Griffith then challenged the district court's ruling on appeal on the same grounds asserted in this petition. He argued before the Tenth Circuit that the evidence was wrongly admitted because the foundation the government supplied would have been insufficient to permit Ms. Williamson to testify that A.W. had previously identified Mr. Griffith as her abuser in at least one circuit, and possibly three circuits. This case is, therefore, an ideal vehicle for resolving the current circuit split.

C. Mr. Griffith Can Show That This Issue Was Prejudicial in His Case.

This case is an ideal vehicle to resolve this important issue because Mr. Griffith can show that the contested evidence–the only corroborating proof of A.W.'s allegations–made a difference to the outcome of his case.

A.W. supplied the only direct evidence of the assaults, and her credibility was greatly undermined by her prior recantations and inconsistent statements. Mr. Griffith, moreover, presented a plausible theory that A.W. only made her 2011 report to keep out of trouble, since the timing of the disclosure coincided with her getting caught skipping school and abusing drugs. Ms. Williamson's testimony, however, directly rebutted Mr. Griffith's theory for it showed that A.W. reported the 2011 allegations to a credible source.

Ms. Williamson's testimony also was the government's best support for its theory that A.W. truthfully identified Mr. Griffith in 2011, but she only recanted and blamed Mr. White in the past because Mr. Griffith had pressured her to do so. Although A.W. described the abuse to a police officer and a social services worker around this time, this evidence was significantly undermined by A.W. ultimately changing her story and claiming either that the abuse did not happen or that the perpetrator was her biological father, not Mr. Griffith. Because A.W. recanted, the social services worker dismissed the case against the Griffiths, with no criminal charges being filed against Mr. Griffith. And it logically followed that if A.W. was telling the truth in 2011, then her claims now were much more believable.

However, in reality, absent any showing that A.W. understood that identifying a specific person as her abuser was essential for her medical care, A.W.'s statement to her doctor was actually no more reliable than a similar statement to a teacher, friend, or family member—none of which would have been admissible. Especially in the case where A.W. had pointed to her grandfather, stepfather, and biological father as her potential abuser over the years, the admission of hearsay testimony so lacking in any guarantee of trustworthiness was improper. For these reasons, resolving this significant question in Mr. Griffith's favor would enable him to return to the district court and seek exclusion of the evidence and acquittal under a standard that he may be able to meet. This case is therefore an ideal vehicle for this Court to address the proper contours of Rule 803(4).

CONCLUSION

Petitioner, Russell Garvis Griffith, Jr., respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

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July 11, 2023