No. 23-5105

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IN THE SUPREME COURT OF THE UNITED STATES

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RUSSELL GARVIS GRIFFITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether Federal Rule of Evidence 803(4) requires evidence that a child victim of sexual abuse subjectively knew that the identity of her abuser was relevant to her medical treatment before a court may admit into evidence the testimony of a medical provider recounting the victim's identification of her abuser during a medical examination.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A8-A24) is reported at 65 F.4th 1216.

## JURISDICTION

The judgment of the court of appeals was entered on April 18, 2023. The petition for a writ of certiorari was filed on July 11, 2023. 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 Eastern District of Oklahoma, petitioner was convicted on

one count of aggravated sexual abuse in Indian country, in violation of 18 U.S.C. 1151, 1153, 2241(c), and 2246(2)(C); one count of sexual abuse of a minor in Indian country, in violation of 18 U.S.C. 1151, 1153, 2243(a), and 2246(2)(A); and one count of sexual abuse in Indian country, in violation of 18 U.S.C. 1151, 1153, 2242(1), and 2246(2)(A). Judgment 1. The district court sentenced petitioner to life imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A8-A24.

1. For more than a decade, petitioner sexually abused his stepdaughter, A.J. Gov't C.A. Br. 2-11. His sexual assaults began by 2005 before A.J. turned ten, escalated when she was 15, and continued until she escaped in December 2019 after having given birth to petitioner's child. Ibid.; see Trial Tr. (Tr.) 27 (A.J. was born July 1996).

In the first instance of abuse -- before A.J. had turned ten -- petitioner crawled into A.J.'s bed at night, penetrated her vagina with his fingers, forced her to touch his penis, and told her not to tell anyone. Gov't C.A. Br. 2-3. Shortly thereafter, petitioner forced A.J. to perform oral sex and ejaculated in her mouth, telling her "that's how you do it." Id. at 3 (quoting Tr. 32). Petitioner then began to commit similar sexual assaults almost nightly. Ibid.

A.J. eventually revealed petitioner's abuse to her mother, who did not believe her and informed petitioner of the accusation.

Gov't C.A. Br. 3; Tr. 34. Petitioner instructed A.J. to say that her biological father, not petitioner, had abused her. Tr. 34. Following petitioner's instructions, A.J. in 2009 falsely reported abuse by her biological father to the police. Ibid.; Gov't C.A. Br. 3.

In 2011, when A.J. was 15, the sexual abuse escalated, as petitioner began penetrating A.J.'s vagina with his penis. Gov't C.A. Br. 4. The first time that petitioner penetrated A.J.'s vagina, he told A.J. after he had finished that "[she] was his and that [she] would always be his." Tr. 39. The escalated abuse recurred nearly daily, ibid., with petitioner withdrawing from A.J.'s vagina before ejaculating, Tr. 47. When A.J. resisted or told petitioner that she did not want him to touch her, petitioner would either "make it worse," "hit [her]," or "hold [her] down." Tr. 33; see Gov't C.A. Br. 4.

In October 2011, A.J. told a friend at school about petitioner's abuse. Tr. 35. The friend took A.J. to the school principal's office, where they told the principal about the sexual abuse by petitioner, and the principal alerted the authorities. Tr. 35-36. Rebecca Williamson -- a registered nurse and paramedic who was trained and certified as a sexual assault nurse examiner -- then examined A.J. and obtained a medical history from her that Williamson used with other components of the exam to determine whether A.J. needed treatment or care or could be returned home. Tr. 124-125, 127, 129-130. As part of her medical history, A.J.

told the nurse that "her stepfather had been molesting her," Tr. 131, and recounted the sexual assaults, Tr. 131-133.

Detective Kelly Hamm, a Muskogee Police Department investigator, separately interviewed petitioner at a police station. Tr. 104-105, 109; see Tr. 109-117. When Detective Hamm "confront[ed] [petitioner] with [A.J.'s] story," petitioner denied the abuse. Tr. 117; see Tr. 112-113. During the 2011 investigation, state officials removed A.J. and her younger sister from petitioner's home and later placed A.J. in an inpatient mental-health facility after she began abusing alcohol and drugs and thinking of suicide and self-harm. Gov't C.A. Br. 5-6.

Although petitioner was not allowed to have contact with A.J., he repeatedly spoke to her when she called her mother from the mental-health facility. Gov't C.A. Br. 6. During those calls, petitioner persuaded A.J. to recant her accusations by convincing her that, unless she did, officials would take away A.J.'s little "sister and [her] mom." Tr. 37.

A.J. then falsely told authorities that the abuse never occurred. Tr. 37, 84. As a result, the child-welfare case was terminated, state prosecutors declined to file criminal charges against petitioner, and A.J. and her sister were returned to petitioner's home. Tr. 84. Petitioner then resumed his sexual abuse of A.J.. Tr. 38.

After A.J. turned 18, petitioner arranged for her to move into the house directly across the street from his, where he moni-

tored her with cameras from his home, controlled "[e]verything [she] did," and continued to sexually abuse her. Tr. 41-43.

By 2018, A.J. could no longer deal with the continuing sexual abuse and attempted suicide, which she believed was her "only means of escape." Tr. 40. Her suicide attempt angered petitioner, who "pulled [A.J.] out of his truck by [her] hair" before kicking and punching her. Tr. 41. Petitioner told A.J. that "there was no way out"; that "[she] was his and that [she] would always be his"; and that "it would be worse" for her if she "tr[ied] to do anything like that again." Ibid.

In early 2019, petitioner found A.J.'s journal in which she had written "everything" about the sexual abuse. Tr. 45. Petitioner told A.J. that "[she] couldn't leave" and that "there was no way out." Ibid. Around 4 a.m. the next morning, petitioner entered A.J.'s home, proceeded to her bedroom where she was sleeping, and raped her. Tr. 46-47. Unlike the prior assaults, however, petitioner ejaculated inside A.J.'s vagina. Tr. 47.

A.J. later learned that she was pregnant, and later DNA tests confirmed that petitioner was the baby's biological father. Tr. 47-50; see Tr. 240 (stipulation on DNA testing). In December 2019, shortly after giving birth, A.J. escaped from petitioner with her baby and reported petitioner's assaults to the police. Tr. 48-51; see Gov't C.A. Br. 10-11.

2. In February 2021, a federal grand jury in the Eastern District of Oklahoma indicted petitioner on one count of aggravated

sexual abuse in Indian country (for sexually assaulting A.J. in 2005 before she was ten years old), in violation of 18 U.S.C. 1151, 1153, 2241(c), and 2246(2)(C); one count of sexual abuse of a minor in Indian country (for sexually assaulting A.J. in 2011 before she was 16 years old), in violation of 18 U.S.C. 1151, 1153, 2243(a), and 2246(2)(A); and one count of sexual abuse in Indian country (for sexually assaulting A.J. in 2019 when she was an adult), in violation of 18 U.S.C. 1151, 1153, 2242(1), and 2246(2)(A). Indictment 1-2.

At trial, A.J. testified in detail about petitioner's years of sexual abuse, Tr. 27-65, and was cross-examined by petitioner's counsel, Tr. 52-60, 64-65. With respect to October 2011, A.J. testified that after she told a friend "about the sexual abuse by [petitioner]," she and the friend went to the principal's office, where they "told the principal," who then alerted the authorities. Tr. 35-36.

Detective Hamm testified that he interviewed petitioner at the police station and recorded video and audio of that October 2011 interview. Tr. 104, 109-110. Video clips of the interview were admitted into evidence. Tr. 111-116 (admitting Gov't Ex. 2-4). In the videos, petitioner is given Miranda warnings, Gov't Ex. 2, before naming his stepdaughter (A.J.) and stating her age (then 15) and date of birth, Gov't Ex. 3. The detective then asks, "Have you ever molested your stepdaughter?" and petitioner responds: "Noooo sir. No. No way." Gov't Ex. 4, at 0:03-0:07. The

detective asks, "Why do you think I'd ask that question?" and petitioner responds, "I don't know. Probably because she might have said I did." Id. at 0:11-0:17.

Detective Hamm testified that after he "confront[ed] [petitioner] with [A.J.'s] story," petitioner asserted that "[A.J.] was lying about him touching her," Tr. 117, and sought to explain "why [A.J.] would have made th[e] allegation" by asserting that "she had done this before" and that "when she got into trouble, she made these kind of allegations," Tr. 113. The detective further testified that petitioner initially claimed that he was never alone with A.J. but subsequently changed his story, admitted that he had been alone with her, and attempted to "push the blame" for the abuse allegations onto A.J. Tr. 115-117; Gov't C.A. Br. 5.[1]

Williamson, the examining nurse, testified about her medical examination of A.J. in October 2011. Tr. 124-139. She stated that A.J.'s aunt brought A.J. for an examination at a county center where "children who have possibly been the victim of sexual abuse go to receive services," Tr. 128, and that the sexual-assault examination she conducted there -- which was "very similar to any other medical exam" -- was an "overall medical exam" designed to determine if the patient "need[ed] further treatment or care," Tr.

[1] Petitioner did not object to the admission of the video evidence or to the detective's testimony about A.J.'s allegations and petitioner's responses, Tr. 109-117, except for one objection to the detective's testimony about petitioner's own explanation of "why [A.J.] would have made th[e] allegation," Tr. 113. The district court overruled that objection, ibid., and petitioner did not press the objection on appeal.

125, 127. And she explained that obtaining a medical history is a "significant[]" part of the examination, which "assists [the medical provider] in determining whether the patient needs further treatment or could be discharged home." Tr. 130.

The nurse stated that she obtained A.J.'s medical history from A.J., Tr. 130, and testified, over petitioner's hearsay objection, that A.J. told her that "her stepfather had been molesting her," Tr. 131. The district court overruled petitioner's objection on the ground that the hearsay testimony was admissible "under the exception for medical diagnosis and treatment." Tr. 132. The nurse testified about details of the sexual assaults that A.J. recounted in her medical history, explaining that A.J. had told her that petitioner had been "putting his fingers inside of her vagina" "[s]everal times a week" "for five or more years" by 2011; that petitioner had "grabbed [A.J.'s] hair and [her] head" and made her "perform oral sex"; and that by the time A.J. was 13, petitioner had gotten "on top of her attempting penile penetration of her vagina." Tr. 131-133.

Petitioner did not dispute at trial that, in October 2011, A.J. had informed others that petitioner was sexually abusing her. Petitioner's counsel specifically acknowledged in his opening statement that jurors would "hear testimony" that "[A.J.] said that [petitioner] sexually abused her back in 2011." Tr. 26. Rather than deny the fact that A.J. made that allegation, counsel argued that A.J.'s accusations were false; that, "[w]hen [A.J.]

made her allegation in 2011, * * * it was because she [wa]s about to get in trouble"; and that the district attorney had "declined to file charges" in 2011 because A.J. "kept changing her story." Ibid. Petitioner's counsel emphasized those same points in his closing argument. Tr. 307-308.

The jury deliberated for less than two hours, Tr. 321-322, and unanimously found petitioner guilty on all counts, Tr. 323. The district court sentenced petitioner to two concurrent terms of life imprisonment for sexually abusing A.J. in 2005 (before she was ten) and in 2019 (when she was an adult) and to a concurrent term of 180 months of imprisonment for petitioner's sexual abuse of A.J. in 2011 (before she was 16). Judgment 1-2.

3. The court of appeals affirmed. Pet. App. A8-A24. The court rejected petitioner's argument that the district court had erroneously admitted Williamson's testimony about A.J.'s 2011 "statements [that] identified [petitioner] as the perpetrator of a sexual assault." Id. at A23-A24. The court explained that Federal Rule of Evidence 803(4) "creates a hearsay exception for statements made for purposes of medical diagnosis or treatment." Id. at A23. And it observed that, while petitioner "argue[d] that identification of the perpetrator wouldn't trigger Rule 803(4) because [A.J.] hadn't intended the statement to aid in her treatment," that argument was foreclosed by circuit precedent. Ibid.; see id. at A23-A24 (citing United States v. Edward J., 224 F.3d 1216, 1219-1220 (10th Cir. 2000)). The court did not reach the

government's alternative argument that any non-constitutional evidentiary error under Rule 803(4) would have been harmless because the nurse's testimony about A.J.'s 2011 identification of petitioner as her abuser was merely cumulative of other evidence on that issue. See Gov't C.A. Br. 29-30.

ARGUMENT

Petitioner contends (Pet. 9-12) that the admissibility of hearsay statements made for medical diagnosis or treatment under Federal Rule of Evidence 803(4) requires proof that the victim -- in this case, a minor child -- "knew the identity of her abuser was important to her treatment," Pet. 10. The decision of the court of appeals is correct, and any disagreement in the courts of appeals is limited and would not warrant this Court's review. In any event, this case would be a poor vehicle to consider the question presented because Williamson's testimony that A.J. identified petitioner as her abuser in 2011 did not have any substantial influence on the jury verdict. Other trial evidence clearly showed that A.J. had accused petitioner of sexually assaulting her in 2011 and petitioner's counsel specifically acknowledged the fact of A.J.'s 2011 accusation in his presentation to the jury. This Court has previously denied a petition for a writ of certiorari involving a similar issue, see Kappell v. United States, 547 U.S. 1056 (2006) (No. 05-7521), and the same result is warranted here.

1. Federal Rule of Evidence 803(4) expressly permits the admission of a hearsay "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." Fed. R. Evid. 803(4).[2] The Rule is not textually limited to statements made to physicians, and can apply to statements made to "ambulance drivers" or "even members of the family." Id. advisory comm. note. Williamson's testimony about A.J.'s October 2011 statements identifying petitioner as A.J.'s abuser, which A.J. made during a medical exam as part of her medical history, were admissible under that Rule.

a. As courts have recognized, "[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household" are "reasonably relied on * * * in treatment or diagnosis" because "child abuse involves more than physical injury"; the "nature and extent of the psychological problems which ensue * * * often depend on the identity of the abuser"; and "where the abuser is a member of the

[2] Before 2011, Rule 803(4) applied to "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Fed. R. Evid. 803(4) (2008), available at 28 U.S.C. App., p. 384 (2008). The rule's 2011 amendment was "intended to be stylistic only." Fed. R. Evid. 803 advisory comm. note (2011 Amendment).

victim's household," the "course of treatment" can "include[] removing the child from the home." United States v. Renville, 779 F.2d 430, 436-438 (8th Cir. 1985); see, e.g., United States v. Kootswatewa, 893 F.3d 1127, 1134 (9th Cir. 2018); Danaipour v. McLarey, 386 F.3d 289, 297 (1st Cir. 2004); United States v. Joe, 8 F.3d 1488, 1494-1495 (10th Cir. 1993), cert. denied, 510 U.S. 1184 (1994); Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988).

As courts have also recognized, "evidence of the context in which the statements were made" can provide "[a]n adequate foundation" for concluding under Rule 803(4) that a child's statements were made for diagnosis or treatment. Kootswatewa, 893 F.3d at 1133. Such evidence can "support[] the inference that [the child] understood that the [medical provider] was seeking information for purposes of diagnosis or treatment" and provided information to the provider for those purposes. Ibid. And courts have recognized "many ways" that can "demonstrate that [a] statement was made for the purpose of diagnosis or treatment." Danaipour, 386 F.3d at 297 n.1.

In particular, courts have found that, "[a]bsent evidence indicating otherwise," the fact that a child's statements were made "in response to questions posed by a medical professional during a medical examination conducted at a medical facility" will generally allow "the district court [to] reasonably infer from those circumstances that [the child] was providing information for purposes of diagnosis or treatment." Kootswatewa, 893 F.3d at

1133; see Danaipour, 386 F.3d at 297 n.1. As this Court has explained in the context of reviewing state conviction involving a four-year-old sexual-assault victim's statements to a nurse and physician, "statements made in the course of receiving medical care * * * are made in contexts that provide substantial guarantees of their trustworthiness." White v. Illinois, 502 U.S 346, 349-350, 355 (1992); see Morgan, 846 F.2d at 949 (observing that a "young child will have the same motive to make true statements for the purposes of diagnosis or treatment as an adult" and that such a motive "may be stronger" than an adult's).

b. In this case, the court of appeals correctly determined that the district court did not abuse its discretion in admitting nurse Williamson's testimony identifying petitioner as A.J.'s abuser. Pet. App. A23-A24; see General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings."). The decision below relies on the court of appeals' prior decision in United States v. Edward J., 224 F.3d 1216, 1219-1220 (10th Cir. 2000), which itself relied on United States v. Pacheco, 154 F.3d 1236 (10th Cir. 1998), cert. denied, 525 U.S. 1112 (1999). See Pet. App. A23-A24. While those decisions decline to adopt an approach that would separately require "establish[ing] the children understood the medical importance of telling the truth" as a prerequisite to admissibility under Rule 803(4), Edward J., 224 F.3d 1219, the contextual approach that they follow can

itself suffice to demonstrate that a statement was "made for * * * medical diagnosis or treatment" within the meaning of the Rule.

In Pacheco, for instance, the court of appeals determined that the trial court permissibly exercised its discretion to admit a doctor's testimony about a child's identification of her abuser during a medical examination, where the doctor explained "'why they [we]re there'" to the five-year-old and no evidence indicated that the child (who testified at trial) "did not understand she was being examined by doctors and needed to be truthful." 154 F.3d at 1241. As the court has observed, Rule 803(4) does not "contemplate[]" that specific "inquir[ies] into the declarant's motive" would be "necessary to ensure that the rule's purpose is carried out" because "the rule itself" applies to "statement[s] made for purposes of medical diagnosis or treatment" "'in contexts that provide substantial guarantees of their trustworthiness.'" Joe, 8 F.3d at 1494 n.5 (quoting White, 502 U.S at 355); cf. United States v. Tome, 61 F.3d 1446, 1449-1450 (10th Cir. 1995) (noting, before Pacheco, that "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility") (quoting White, 502 U.S. at 356).

As in Pacheco, the context here was sufficient to bring A.J.'s statements within the ambit of Rule 803(4). A.J. made her 2011 statement identifying petitioner as her abuser when she was 15 years old to a registered nurse in a county facility for sexual-

abuse victims during a medical exam that was "similar to any other medical exam." Tr. 127. The nurse looked at A.J.'s eyes, listened to her breathe, took her pulse and temperature, and asked questions to discover if there was "anything that [was] bothering [A.J.]" to determine if she needed "treatment or care." Tr. 127. Given that context, it is reasonable to infer that the 15-year-old was sufficiently familiar with medical settings involving diagnosis and treatment and would reply truthfully. Petitioner could have cross-examined A.J. and the nurse, but petitioner failed to seek evidence from them about A.J.'s statements and proffered no other evidence undermining the inference that A.J.'s statements in response to the nurse's medical-exam inquiries were "made for * * * medical diagnosis or treatment," Fed. R. Evid. 803(4)(A).

c. Petitioner does not appear to dispute that that the context surrounding A.J.'s statements in her 2011 medical examination permitted the district court to infer that her statements were "made for * * * medical diagnosis or treatment," Fed. R. Evid. 803(4). And any such factbound contention that the district court abused its evidentiary discretion would not warrant this Court's review. See Sup. Ct. R. 10; United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Petitioner instead appears to contend (Pet. 10) that Rule 803(4) required a more specific evidentiary foundation that A.J. "knew the identity of her abuser was

important to her treatment," beyond the contextual inquiry indicated by the court of appeals' precedents.

That contention lacks merit. As this Court has recognized, "knowledge can be inferred from circumstantial evidence." Staples v. United States, 511 U.S. 600, 615 n.11 (1994); see also, e.g., Rehaif v. United States, 139 S. Ct. 2191, 2198 (2019) (citing Staples). Where contrary evidence is absent, it is reasonable to infer that a patient who provides information in response to an inquiry from a medical professional in the process of medical diagnosis or treatment is providing that information "for * * * medical diagnosis or treatment." Fed. R. Evid. 803(4). That may particularly be true of patients who are minors, and may not even contemplate the other uses to which the information could be put. Indeed, to the extent that petitioner would require some more targeted showing of the victim's mindset, he would all but preclude the admission of testimony from minor victims.

2. Petitioner errs in contending (Pet. 2-3, 6-8) that decisions in the Eighth, and "potentially" the Fourth and the Ninth Circuits are irreconcilable with the decision below.[3] He signifi-

[3] Petitioner also errs in suggesting (Pet. 3, 8) that the Second and Seventh Circuits admit evidence under Rule 803(4) without any showing that the declarant's statement was made for diagnosis and treatment. Neither of the decisions that petitioner cites resolves that question. The Second Circuit in O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084 (1978), addressed the ability of a doctor to testify, based on written reports, to a patient's statements to other doctors. Id. at 1089. In the 46 years since O'Gee, no Second Circuit decision has cited O'Gee when applying Rule 803(4). The Seventh Circuit's decision in Gong v. Hirsch,

cantly overstates the scope of any disagreement and identifies no division of authority warranting this Court's review.

a. The Fourth and Ninth Circuits -- which petitioner describes only "potentially" in conflict with the decision below, Pet. 2 -- are not in fact in conflict with it. Indeed, the Ninth Circuit's decision in United States v. Kootswatewa, supra, made clear that "evidence of the context in which [such] statements were made" can itself provide "[a]n adequate foundation" for concluding that they were made for medical diagnosis or treatment. Kootswatewa, 893 F.3d at 1133; see pp. 12-13, supra. And while the Fourth Circuit has stated that "the declarant's motive in making the statement must be consistent with the purposes of promoting treatment" to be admissible, Morgan, 846 F.2d at 949 (citation omitted) (cited at Pet. 7), that is fully consistent with allowing a medical provider to testify about a child's statement to the provider based on an inferential context-based showing that the child's statement was made for medical diagnosis or treatment.

Indeed, as the petition itself recounts (Pet. 8), in the more recent of the two decisions that it cites, the Fourth Circuit

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913 F.2d 1269 (1990), found no abuse of discretion in the exclusion of a physician's letter under Rule 803(4) because the patient's statement recounted in the letter expressed the "patient's [own] conclusion as to the appropriate medical diagnosis," which was "hardly a matter upon which an expert in the field could rely in rendering an opinion." Id. at 1273-1274 & n.5. At all events, any conflict between the Second and Seventh Circuits and the circuits on which petitioner relies would not provide a basis for reviewing the Tenth Circuit's decision in this case.

declined to disturb a determination that a child's "motive was consistent with the purposes of treatment" based on a social worker's testimony "that she asked [an eight-year-old child] specific questions to gauge his credibility and to ensure that he was answering truthfully." United States v. DeLeon, 678 F.3d 317, 327 (4th Cir. 2012), vacated on other grounds, 570 U.S. 913 (2013); see id. at 319. The circumstances here are analogous. See pp. 14-15, supra.

b. Petitioner's assertion of a division of authority thus ultimately rests on petitioner's view (Pet. 7) that the Eighth Circuit requires a showing that the circumstances of this case would not satisfy. But while the court below has stated its disagreement with what it perceived to be the Eighth Circuit's approach, see Edward J., 224 F.3d at 1219-1220 & n.3, the Eighth Circuit's case law reflects significant internal tension and does not provide a sound basis for further review in this case.

The Eighth Circuit's leading decision in the Rule 803(4) child-abuse context is United States v. Renville, supra. Consistent with the general approach of the courts of appeals, discussed above, Renville recognized that, generally, "[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to [medical] treatment," as required by the Rule. Renville, 779 F.2d at 436 (emphasis omitted); see pp. 11-12, supra. Renville then sets forth a further criterion for admissibility,

namely, that "the declarant's motive in making the statement must be consistent with the purposes of promoting treatment." 779 F.2d at 436.

In addressing that criterion, Renville initially observed that a conclusion that a patient's identification of his abuser was not made for medical diagnosis or treatment must "rest[] on the obvious assumption" that the patient is "under the impression that he is being asked to make an accusation that is not relevant to the physician's diagnosis or treatment." 779 F.2d at 438. The court then noted that "this assumption does not hold where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding." Ibid. Renville upheld the admission of identification testimony without that specific showing. See id. at 438-439 (upholding admission where doctor explained that exam and questions were to treat any problems and no evidence contradicted view that the child made her statements "as a patient responding to a physician"). And the Eighth Circuit has not interpreted Renville to invariably require such a specific showing.

Instead, the Eighth Circuit has cited Renville for the proposition that "[s]tatements of fault made to a physician by a child who has been sexually abused by a household member meet [the court's] two-part test and are admissible under Rule 803(4)." United States v. Shaw, 824 F.2d 601, 608 (8th Cir. 1987), cert.

denied, 484 U.S. 1068 (1988); accord United States v. Longie, 984 F.2d 955, 959 (8th Cir. 1993) (following Shaw). And the Eighth Circuit has repeatedly applied Rule 803(4) to uphold the admission of a child's statement during a medical examination that identifies the child's abuser without requiring evidence that the medical provider specifically explained to the child that the truthful identification of the abuser is important to diagnosis or treatment or that the child manifested such an understanding. See, e.g., Longie, 984 F.2d at 959; United States v. Provost, 875 F.2d 172, 177 (8th Cir. 1989), cert. denied, 493 U.S. 859 (1989); United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir 1987); Shaw, 824 F.2d at 608. Those decisions permit courts to rely on context to infer that a statement identifying an abuser was "made for * * * medical diagnosis or treatment," Fed. R. Evid. 803(4)(A).

A separate strand of Eighth Circuit decisions, however, has introduced confusion into that circuit's case law. Those decisions are grounded in a Confrontation Clause decision, Olesen v. Class, 164 F.3d 1096 (8th Cir. 1999), applying the constitutional test that this Court eventually overruled in Crawford v. Washington, 541 U.S. 36 (2004). See Ohio v. Roberts, 448 U.S. 56 (1980). That test permitted the prosecution to introduce a hearsay statement in a criminal trial when, inter alia, the statement fell within a "firmly rooted hearsay exception." Roberts, 446 U.S. at 66. In Olesen, the Eighth Circuit rejected the invocation of South Dakota's "equivalent of [Rule] 803(4)" as a "firmly rooted hearsay

exception." Id. at 1098. In doing so, it described Renville as allowing a child-abuse victim's statements to a physician only "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding." Ibid. But it later found Renville to be "inapposite" because Renville's Rule 803(4) decision was not "based on the Confrontation Clause." Id. at 1099.

A few Eighth Circuit panels have since relied on Olesen or a Confrontation Clause decision following Olesen in non-Confrontation-Clause Rule 803(4) contexts, but the results of those cases do not conflict with the decision below in this case. In United States v. Gabe, 237 F.3d 954 (8th Cir. 2001), the panel found error under Rule 803(4) but affirmed based on a finding of harmlessness. Id. at 958-959. The panel in United States v. Beaulieu, 194 F.3d 918 (8th Cir. 1999), involved a victim's testimony that "she understood the purpose of her visits with [medical providers] was 'just to get evidence,'" id. at 921 (brackets and citation omitted), which would be reversible error under any approach. And in United States v. Bercier, 506 F.3d 625 (8th Cir. 2007), the Eighth Circuit found error where the government did not attempt at trial to "offer [the evidence] under Rule 803(4), such that "no foundation" for its admission, and because the evidence itself "strongly suggested that the purposes of the [doctor's] interview went far beyond [the doctor's] role as a treating physician." Id. at 632.

To the extent that some Eighth Circuit decisions would support an approach in tension with the decision below, that would at best reflect an intracircuit conflict that the Eighth Circuit itself can resolve. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."); cf. Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (holding that a subsequent panel must follow the earliest of prior conflicting panel opinions). It would not provide a sound reason for this Court to review the decision below in this case.

3. At all events, this case would be a poor vehicle to consider the question presented, because the admission of nurse Williamson's testimony about A.J.'s identification of petitioner, even if erroneous under Rule 803(4), was harmless. A non-constitutional evidentiary error is harmless if the record provides a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 764-765, 776 (1946); see Brecht v. Abrahamson, 507 U.S. 619, 631-632 (1993). And here, Williamson's testimony that A.J. stated that petitioner had molested her had no significant effect on the verdict because it was merely cumulative to other evidence of A.J.'s October 2011 accusation, which was never a fact in dispute in this case.

Even before Williamson testified at trial, testimony from A.J. and Detective Hamm -- supported by video evidence of petition-

er's police interrogation -- had already established that, in October 2011, A.J. had accused petitioner of sexually abusing her. See pp. 6-7, supra; see also Pet. 15 (acknowledging that A.J. "described the abuse to a police officer and a social services worker"). And the fact of such an accusation was never disputed at trial.

Petitioner's counsel specifically admitted to the jury in both his opening and closing arguments that A.J. had made that accusation. See pp. 8-9, supra. Petitioner's defense was simply that A.J. was lying when she accused him of abuse. See ibid. The jury, however, evaluated the credibility of A.J.'s in-court testimony and the balance of the evidence at trial and unanimously found petitioner guilty beyond a reasonable doubt of sexually abusing A.J. in 2005, 2011, and 2019. See pp. 5-6, 9, supra. Nurse Williamson's cumulative testimony about the undisputed fact of A.J.'s 2011 identification of petitioner as her abuser had no substantial effect on that verdict.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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