No. 24-_____

IN THE
SUPREME COURT OF THE UNITED STATES

WARREN MACKEY,

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Circuits are applying different tests to gauge prejudice resulting from testimony that improperly bolsters or vouches for the testimony of another witness.

The question presented here is: Whether this Court should adopt a test that vacates a conviction where there is a "reasonable probability" that improper bolstering or vouching testimony affected the outcome of the trial.

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Warren Mackey petitions the Court for a writ of certiorari to review the United States Court of Appeals for the Eighth Circuit's October 2, 2023, opinion and judgment.

Introduction

At his child-sex-abuse trial, Warren Mackey's accuser, E.M., testified. After her testimony, the prosecutor called a parade of students and school personnel to recount the tearful and emotional manner in which E.M. had disclosed these allegations to them years earlier. The prosecutor presented this testimony to bolster and vouch for E.M.'s in-court testimony and the district court allowed it.

Even though the Eighth Circuit found this testimony to be impermissible bolstering, it declined to adopt an exact test for prejudice, labeled the bolstering testimony "cumulative" to the very testimony it bolstered, and refused to vacate Warren Mackey's conviction. The Tenth Circuit, addressing similar testimony,

adopted a test for prejudice that would vacate a conviction where there was a "reasonable probability" that such testimony affected the outcome. It specifically rejected the same cumulativeness conclusion reached by the Eighth Circuit.

Allowing witnesses to vouch for or bolster the testimony of the complaining witness with impunity threatens to shift the focus of criminal trials away from in-court testimony and toward out-of-court statements. This Court should resolve this split in favor of the Tenth Circuit and endorse a "reasonable probability" test for prejudice.

Warren Mackey's case is an ideal vehicle to resolve this circuit split and to establish a uniform standard. Had the Eighth Circuit used the Tenth Circuit's "reasonable probability" test, Warren Mackey's conviction would have been vacated.

Opinions Below

The decision of the United States Court of Appeals affirming Mackey's conviction and, in part, Mackey's sentence is published.[1] *United States v. Mackey,* 83 F.4th 672 (8th Cir. 2023). A copy of the decision is included in the appendix to this Petition. (Pet. App. 1A-7A) The Eighth Circuit denied Mr. Mackey's timely filed petition for rehearing on November 21, 2023. *United States v. Mackey,* Case No. 22-1590, 2023 WL 8096935 (8th Cir. Nov. 21, 2023). A copy of the Order is included in the appendix to this Petition. (Pet. App. 32A).

1 The Eighth Circuit vacated a restitution award.

Jurisdiction

The judgment of the Eighth Circuit Court of Appeals was entered on October 2, 2023. Mr. Mackey timely petitioned the Eighth Circuit for rehearing and that petition was denied on November 21, 2023. *See United States v. Mackey,* Case No. 22-1590, 2023 WL 8096935 (8th Cir. Nov. 21, 2023) (denying rehearing and rehearing *en banc*.) Mr. Mackey invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Eighth Circuit's denial of his petition for rehearing. *See* SUP. CT. R. 13(3).

Statutory and Constitutional Provisions Involved

Federal Rule of Evidence 401: Test for Relevant Evidence.

> Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

Federal Rule of Evidence 402: General Admissibility of Relevant Evidence.

> Relevant evidence is admissible unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute;
> - these rules; or
> - other rules prescribed by the Supreme Court.
>
> Irrelevant evidence is not admissible.

Federal Rule of Evidence 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Statement of the Case

One day at school, 11-year-old E.M. told her friends, K.K. and M.P., that her father Warren Mackey had touched her four or five weeks earlier. The friends, in turn, told the school counselor, Kayla Baker, who spoke to E.M. about the allegation. Ms. Baker then relayed the allegation to the school principal, Angie Guenther, who spoke to E.M. and E.M.'s mother, and then reported the allegation to the FBI.

At trial, E. M., now 14, testified. She was the second witness, right after her mother. Among other things, E.M. testified that Mackey touched her twice while the pair lay in Mackey's bed. E.M. was cross-examined at length. The defense asked E.M. about lapses in her memory, being angry with her dad, her proclivity for making up stories, inconsistencies in her versions of the event, the sophistication of the language she used, and her disdain for Mackey's alcohol abuse.

Immediately after E.M. left the stand, the prosecutor called (in order) K.K., M.P., the school counselor Kayla Baker, and the school principal Angie Guenther. Responding to defense objections, the prosecutor told the district court that these witnesses would help provide "context" and would "explain why the next person was notified and why the FBI was notified." The government argued that it "[would] not be offering [these] statements for the truth of the matter asserted, but to explain how the disclosure came to light and the steps taken in response to the disclosure." The government argued that the testimony was needed to refute a claim "that the victim made it up." Over Mackey's relevance and hearsay objections, the district

court permitted all four witnesses to testify, holding that, where "there is a significant delay between the time that the incident allegedly occurred and when it was reported[,]" "the government is entitled to say when they discovered it…."

K.K. testified that repeating E.M.'s disclosure to the school counselor "was the right thing to do," and that when E.M. made her disclosure, it seemed like "it was bothering [E.M.] and she needed somebody to talk to."

Kayla Baker, the school counselor, testified that she "became aware of [E.M.] after a student approached me letting me know that [E.M.] was self-harming. And so then when I met with her to get more information, she let me know of the sexual abuse allegation." The prosecutor asked Ms. Baker, "What was [E.M.]'s demeanor when she told you?" Ms. Baker replied, "She was tearful. She broke down pretty quickly." Ms. Baker testified that she then summoned E.M.'s mother to the school for safety planning with regard to self-harming. Later, when recounting the meeting between school officials, E.M., and E.M.'s mother, Ms. Baker testified that E.M's mother was "tearful, distraught."

After Ms. Baker testified, the defense renewed its objections to this line of questioning and further objected to the disclosure that E.M. was self-harming. Overruling the renewed objection, the district judge said:

> Well, I think that as long as somebody describes the event that occurred at the time of the disclosure, that it goes to the credibility of the witnesses – the victim/witness and her motivation, so I think it's relevant.

The fourth disclosure witness, Principal Guenther, testified over defense objection that when E.M. came to her office the day she reported the assault that E.M. "was crying and shaking." Principal Guenther testified that she "learned of an incident involving E.M.'s father," called E.M.'s mother, and then called the FBI.

Warren Mackey was convicted by a jury of aggravated sexual abuse of a child under the age of 12 (in violation of 18 U.S.C. §§ 2241(c) and 1153) and abusive sexual contact (in violation of 18 U.S.C. § 2244(a)(5) and 1153). The district court sentenced Mackey to 360 months on Count I (the mandatory minimum) and 120 concurrent months on Count II.

The Decision of the Court of Appeals

On appeal, the Eighth Circuit acknowledged that the testimony of E.M.'s friends and the school employees "worked only to bolster E.M.'s credibility and to help rebut an allegation of recent fabrication." 83 F.4th at 676. Nonetheless, the Eighth Circuit concluded that, because this inadmissible testimony was cumulative of admissible testimony, "it had little or no influence on the verdict[.]" 83 F.4th at 676 (quoting *United States v. McPike,* 512 F.3d 1052, 1055 (8th Cir. 2008)).

Petitioning the Eighth Circuit for rehearing, Mackey noted that this decision conflicted with the Tenth Circuit's recent holding in *United States v. Jones,* 74 F.4th 1065 (10th Cir. 2023). The Eighth Circuit nonetheless declined to rehear Mackey's case.

Reasons for Granting the Petition

I. This Court should adopt a test that vacates a conviction where there is a "reasonable probability" that improper bolstering or vouching testimony affected the outcome of the trial.

A. A circuit split has developed over the test for prejudice where inadmissible bolstering or vouching testimony is admitted in a criminal case.

The focus of criminal trials should be upon sworn in-court testimony as opposed to out-of-court statements. The Eighth Circuit's holding has shifted that focus with its conclusion that the impermissible testimony in Mackey's case was cumulative and therefore not prejudicial. This holding directly conflicts with an authoritative decision of another United States Court of Appeals, namely *United States v. Jones,* 74 F4th 1065 (10th Cir. 2023).

The Eighth Circuit properly concluded that the testimony of E.M.'s friends and the school employees was improper vouching testimony that bolstered the testimony of the government's key witness. 83 F.4th at 676. The Eighth Circuit noted that it recognized that "it is possible that an 'extra helping of evidence can be so prejudicial as to warrant a new trial.'" *Id.* (quoting *United States v. DeMarce*, 564 F.3d 989, 998 (8th Cir. 2009)(additional citations omitted)). Without articulating what test it used to decide if and when "an extra helping" became too much, the Eighth Circuit found that there was not enough prejudice in Mackey's case to warrant a new trial. *Id.* The court then found that the very reason this bolstering testimony was improper – because it repeated testimony from E.M. and her mother

– was also the reason the Court believed it made no difference to the result. *Id.*

In *United States v. Jones,* 74 F.4th 1065 (10th Cir. 2023), the Tenth Circuit tackled this same question and came to the opposite conclusion. Jeffrey Jones, like Warren Mackey, was convicted of sexual abuse. His stepdaughter victims testified, as did their mother and a forensic interviewer. 74 F.4th at 1066. Using a plain-error standard, the Tenth Circuit concluded that the mother's testimony that she believed the victims was impermissible "vouching testimony" that "bolster[ed] their truthfulness on that specific occasion." *Id.* at 1069. The *Jones* Court went on to conclude that, "where the outcome 'boil[s] down to a believability contest' between the victims and the defendant, testimony vouching for the credibility of the victim is often prejudicial." *Id.* at 1072 (quoting *United States v. Whitted*, 11 F.3d 782, 787 (8th Cir. 1993)). "[G]iven the importance of [the victims'] credibility to a finding of guilt, amplified by the jury hearing the girls' mother vouch for them, there is a reasonable probability that [the mother]'s improper vouching testimony affected the outcome." *Id.* In its opinion, the *Jones* Court specifically rejected the government's argument that the mother's testimony was cumulative, noting that "the only other evidence cited by the Government is the testimony that [the victim's mother] vouched for, meaning that this evidence was also tainted by the erroneous vouching." *Id.* Stressing the "reasonable probability" standard, the *Jones* Court acknowledged that the jury might have believed the victim without the vouching testimony, but "reversal does not require us to conclude with certainty that [the

mother's vouching] testimony affected the outcome[.]" *Id.*

It is impossible to reconcile the respective rationales and outcomes of *Mackey* and *Jones*.

B. The Tenth Circuit's test best prevents a shift in focus from in-court testimony to out-of-court statements.

Both the *Mackey* and *Jones* courts held that improper testimony had been admitted. The difference is that *Jones* correctly assessed the impact of bolstering and vouching testimony and understood that adopting an overly restrictive test for prejudice risked mooting the purpose of the rule altogether.

In cases where the credibility of one witness was *the* issue, the Eighth Circuit's test would seemingly allow infinite vouching and bolstering testimony, excusing such (admittedly impermissible) testimony so long as it "merely" repeated the testimony it vouched for. By giving a pass to the use of testimony that "repeat[s] what [the victim] told the jury," 83 F.4th at 676, the Eighth Circuit at once acknowledged that bolstering a victim's testimony is impermissible *and* concluded that it will always be allowed.

The Tenth Circuit, on the other hand, noted that such testimony will almost always impact the verdict in a "believability contest." 74 F.4th at 1072. The *Jones* Court specifically (and correctly) noted that the mother's vouching testimony was "'intolerable under our system of jurisprudence, which has long recognized jurors' ability and sole responsibility to determine credibility.'" *Id.* at 1073 (quoting *United*

States v. Hill, 749 F.3d 1250, 1267 (10th Cir. 2014)).

The tests for prejudice between these two circuits are radically different. Had the *Mackey* Court employed the *Jones* "reasonable probability" test and recognized the inherent prejudice of bolstering testimony in believability contests, it would have been forced to vacate Mr. Mackey's conviction. Had the *Mackey* Court placed the same emphasis upon the jury's role to decide credibility, it would not have sanctioned the prosecution's use of bolstering witnesses to repel the claim "that [E.M.] made it up."

The goal of this improper testimony – by the admission of the government in *Mackey* – was to strengthen the government's narrative. In *Old Chief v. United States,* 519 U.S. 172 (1997), this Court held that the prosecution's desire to craft and strengthen its narrative is an insufficient basis for relaxing the rules of evidence or allowing unfair prejudice against the defendant. 519 U.S. 172,186-192 (1997). *See also* Anne Bowen Poulin, "The Investigation Narrative: An Argument for Limiting Prosecution Evidence," 101 IOWA L. REV. 683, 695 (Jan. 2016)("The prosecution should focus its proof on the crime itself, and not [on narrating] the investigation of that crime.") (footnotes omitted.) The Eighth Circuit has, in effect, endorsed a relaxation of the rules of evidence to facilitate the use of prejudicial testimony by the prosecution in aid of its narrative.

More fundamentally, the Eighth Circuit has permitted the focus of criminal trials to shift from in-court testimony to out-of-court statements.

C. This Court should resolve this conflict.

A test is needed to assist district and circuit courts in assessing the risk of prejudice from such bolstering testimony, especially when, as in Mackey's case, that bolstering testimony involves out-of-court statements. This Court has stepped in to resolve conflicts similar to this one. In *Tome v. United States*, 513 U.S. 150 (1995), this Court addressed the admissibility of prior consistent statements. Matthew Tome, like Warren Mackey, was charged with federal felony sexual abuse of a child. 513 U.S. at 153. After the victim struggled to testify, the government was allowed to call six witnesses who testified about the victim's seven prior statements implicating Tome. *Id.* This Court's analysis regarding the prejudicial weight of disclosure testimony rings just as true in the context of bolstering testimony:

> If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones…. In response to a rather weak charge that A.T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.'s detailed out-of-court statements to them.

513 U.S. 165.

To maintain the principles this Court announced in *Tome*, this Court should grant certiorari.

D. The question presented here is important.

The rules of evidence prohibiting vouching or bolstering testimony make little

sense if the government can so easily circumvent them. The Eighth Circuit's rationale raises the same concerns this Court raised in *Tome, i.e.,* that "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones." 513 U.S. at 705. "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eyewitness. But '[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.'" *Id.* (quoting *United States v. Salerno,* 505 U.S. 317, 322 (1992)). The admission of bolstering testimony, circuit-wide, will "undercut [defendants'] ability to present [their] defense[s] to the fullest." *Jones*, 74 F.4th at 1073. "[I]gnoring it would offend core notions of justice and seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Id.* (quoting *Hill,* 749 F.3d at 1267).

E. This case is an excellent vehicle for resolving this question.

Warren Mackey's case frames the question of prejudice perfectly. Mackey objected to the admissibility of the vouching and bolstering testimony at the trial level. The issue was thoroughly litigated at both the district- and circuit-court levels. The Eighth Circuit opinion explicitly held that the testimony "worked only to bolster E.M.'s credibility and to help rebut an allegation of recent fabrication." 83 F.4th at 675, 676. With these findings, the Court can cleanly address the proper test for prejudice and the risk of prejudice attendant to bolstering and vouching testimony.

Conclusion

The circuit courts of appeal have carved out their tests for prejudice resulting from bolstering testimony without direct input from this Court. Asa result, the manner in which the circuits handle improper bolstering and vouching testimony varies widely. The Eighth Circuit's test allows the focus of criminal trials to shift from in-court testimony to out-of-court statements made to friends, teachers, counselors, principals, and police officers. Conversely, the Tenth Circuit has recognized the inherent prejudice in allowing bolstering and vouching testimony. This Court should grant Warren Mackey's petition for a writ of certiorari to prevent the shift in focus permitted by the Eighth Circuit and to resolve the disparate treatment of this impermissible testimony by the circuits.

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