No. 21-5687

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

DARREL HOCHHALTER – PETITIONER

Vs.

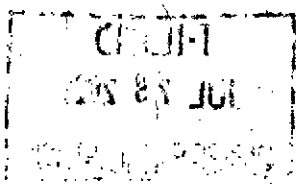
TONY PARKER AND KEVIN MYERS – RESPONDENT

6th CIRCUIT COURT OF APPEALS

FOR THE UNITED STATES

CASE NUMBER 20-6340

ON PETITION FOR WRIT OF CERTIORARI



PETITION FOR WRIT OF CERTIORARI

PRO-SE PETITIONER:

DARREL HOCHHALTER

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QUESTIONS PRESENTED FOR REVIEW

1.) As some jurisdictions have rules regarding recent fabrication and others do not; does "recent fabrication" rise to the same significance as "false evidence" in influencing the fairness of a trial per the 14th Amendment as stated in 405 US 150, and 360 US 264 and does its presence warrant a finding of plain error?

2.) In a question of impeachment and due process, per the 14th Amendment; if a witness makes a sworn testimony at trial that is inconsistent with a previous out-of-court statement, and admits freely that they made the out-of-court statement and that it was a fabrication, does that then make the out-of-court statement consistent with the current sworn testimony and is that witness still subject to impeachment proceedings?

3.) Do the 6th amendment confrontation clause and 14th amendment due process clause apply to extrinsic interviews, of a sequestered complainant, used as substantive evidence at trial where the complainant has been unduly influenced by agents of the state and defense counsel is not permitted to be present and prevent improper (leading, suggestive, repeated) questioning?

PARTIES

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioner Darrel Hochhalter is an individual serving a sentence in a Tennessee State correctional institution. No corporation is involved in this cause.

TABLE OF CONTENTS

Appendix 2: Control phone call transcript

Appendix 3: Petitioners post conviction hearing testimony

Appendix 4: Tennessee appellate opinion

Appendix 5: Post conviction opinion

Appendix 6: Habeas corpus application

Appendix 7: Habeas Corpus amendment

Appendix 8: DCS report dated 06/25/10

Appendix 9: KH affidavit

Appendix 10: Surgeons notes from KH surgery

Appendix 11: Petitioners Habeas Corpus reply

Appendix 12: Habeas corpus opinion

Appendix 13: request for certificate of appealability

Appendix 14: 6th Circuit request for appealability opinion

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

DARREL HOCHHALTER – PETITIONER

Vs.

TONY PARKER AND KEVIN MYERS – RESPONDENT

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions below

The opinion of the state court of appeals to review the merits appears at Appendix 4

The opinion of the post conviction court to review the merits appears at Appendix 5 to the petition.

The opinion of the highest state court to review the merits appears at Appendix 6 to the petition.

The opinion of the Middle District Court to review the merits in Habeas Corpus appears at Appendix 13 to the petition.

A timely application for permission to appeal was thereafter denied on the

14th day of June, 2021, and a copy of the unpublished order denying COA on June 14th, 2021 appears at Appendix 15

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the United States Supreme Court rules 10 and 13.

CONSTITUTIONAL PROVISSIONS INVOLVED

Constitutional Amendments

U.S. Constitution, 6th amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Constitution, 14th Amendment Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal statutes

FROE 103(e): A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

U.S. Sup. Ct. Rule 10, 28 U.S.C.A: Review on a writ of certiorari is not a matter of right, but of jurisdictional discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Courts discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided as important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this courts supervisory power;

(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) A state court or a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this court.

State statutes

Tenn. Code Ann. 39-13-527 (a):

Sexual battery by an authority figure is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by the

following circumstances:

(1) the victim was, at the time of offense, thirteen (13) years of age or older but less than eighteen (18) years of age; and (3)(B) the defendant had, at the time of offense, parental or custodial authority over the victim and used the authority to accomplish the sexual contact.

Tenn. Code Ann. 39-13-503 (a):

Rape is the unlawful sexual penetration of a victim accompanied by any of the following circumstances: (1) Force or coercion is used to accomplish the act.

Tenn. Code Ann. 39-13-501 (1), (6), & (7):

(1) "Coercion" means threat of kidnapping, extortion, force or violence to be performed immediately or in the future or the use of parental, custodial, or official authority over a child less than fifteen (15) years of age.

(6) "Sexual contact" includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

(7) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the

defendant's, or any other person's body, but emission of semen is not required.

Tennessee Rule of evidence 803(26)

1. The statement must be otherwise admissible under Rule 613(b).

2. The declarant must testify at the trial or hearing and be subject to cross-examination about the statement.

3. The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement under oath.

4. The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

Tennessee Rule of evidence 613(b)

"Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require." (Further defined see STATE V. MARTIN, 964 S.W.2d 564 at 567 (TSC 1998) and STATE V. ACKERMAN 397 S.W. 3d 617, 637-640)

STATEMENT OF THE CASE

SUMATION OF RELEVENT EVENTS

The first DCS report (Appendix 8) dated as recent as the year previous to the accusations where KH's statements were that nothing had happened, inconsistent with her statements in the forensic interview BUT consistent with her trial statements (Appendix 1). The DCS report was precipitated by stories Katie had been telling her friends in an attempt to "fit in" and compete with the stories they related to her (appendix 1 pg 84[1] line 15-24, pg188 line 25, pg189 line 1-11). The DCS report was acknowledged by the prosecutor and questions were asked in the trial regarding that report (Appendix 1 pg182 lines 13-23, pg187 line 23 - pg188 line 20, pg295 line 21 - pg296 line 17).

During the trial, KH[2] testified and **denied** that the Petitioner sexually abused her in any way (Appendix 1 pg176 line 11 - pg179 line 5, pg188 line 25 - pg189 line 19, pg220 lines 23-25, pg230 lines 17-18, pg237 line 9, pg240 lines 2-21, pg251 line 5 - pg253 line 15, pg275 lines 24 - page276 line 3, pg282 line 5 - pg304 line 5, pg297 line 11 - pg298 line 4, pg312 line 13 - pg313 line 6, pg322 line 21 - pg326 line 25, pg336 line 10 - pg337 line 11) and in her affidavit sent with the application for habeas corpus (Appendix 9). K.H. admitted that she had lied to numerous people that her father had molested her (Appendix 1 pg184 line 12 - pg185 line 8, pg253 line 7-13). K.H.

explained that she was testifying to the truth now; that her **father did not** molest or rape her because "I'm now an adult and now if I lie under oath it has consequences. I did not understand that before." (Appendix 1 pg180 line 1-3), and that she had felt guilty about the fabrications (appendix 1 pg232 line 24 - pg233 line 14, pg298 line 11 - pg300 line 11, pg312 line 13 - pg313 line 6, pg348 lines 3 - 9). She has reaffirmed those statements in her affidavit (Appendix 9).

KH denied that there had been <u>any</u> penetration (the required element for the charge of rape per Tenn. Code Ann. 39-13-503) on 10 occasions. During the forensic interview the question of penetration was asked four (4) times, two of them directly referencing the claim stated in charge 7 (trial exhibit 2, timestamp 10:14:49, 10:38:26, 10:44:05, and 10:53:06), it was asked again in the juvenile hearing on 7-11-11 (trial exhibit 6, timestamp 3:17:51) and again four (4) times in the trial (Appendix 1 pg242 line 6 &7, pg287 line 16 - pg288 line 7, pg323 line 6-13, pg336 line 25 - pg337 line 3). KH reaffirmed this position in the affidavit that was submitted with the habeas reply (Appendix 9).

During the controlled phone call the petitioner denied having ever touched her there (Appendix 2 pg. 601 line 18) (in the recording, the accused can be heard saying "wha?" under his breath and using a confused and questioning tone in response to KH's assertion. This is not reflected in the transcript). The Tennessee

[1] Page numbers referenced thorough out this document shall refer to the bottom right corner technical record page number

court of appeals and the 6th circuit court of appeals took a statement out of context from that controlled phone call and called it an admission of guilt to justify the charge of rape (Appendix 5). However, the District court found that the petitioner was correct and there was no admission from the petitioner (Appendix 12). The appellate court error was then repeated by the 6th circuit court of appeals (Appendix 14).

CHRONOLOGICAL EVENTS

When KH was thirteen her father discovered that KH had been visiting web sites and posting under pseudonyms. The web sites were "emo", "goth', and "vamp" sites. Each pseudonym had a different fictitious story attached but they all had "cutting" as one of the elements (Appendix 1 pg170 lines 15-22, pg324 lines 4-11). Her father confronted her and discovered that the "cutting" was real and that she had done it in order to be accepted by her peers. Realizing the danger of K.H.'s attempt to fit in and her struggles to handle social pressure, her father quit his day job, pulled her from public school and home-schooled her (Appendix 1 pg170 line 10 - pg172 line 25). K.H.'s mother was emotionally unavailable to handle the situation leaving her father to do the best he could with the situation.

During her home-school experience her father discovered that KH had a talent for art. As he has no ability in that area he encouraged her to apply to Nashville School of the Arts (NSA art magnet school) with the caveat that

[2] KH refers to Katherine Hochhalter through out this document.

if she was unable to handle the social pressures she would be pulled back out and taken to get a GED.

During her freshman year DCS received a report from the school principal and investigated the family (Appendix 8). KH admitted to her parents that she had indeed been making up stories to try to fit in again but promised to make things right if she would be allowed to remain in school. The report was investigated and dropped (Appendix 1 pg182 line 13 - pg184 line 10, pg187 line 23 - pg188 line 20, pg295 line 21 - pg296 line 17) (Appendix 8)

In her sophomore year K.H. got caught performing oral sex on her boyfriend at school and was suspended (Appendix 1 pg194 line 23 - pg196 line 21). Her father was outraged and a family dispute ensued. After that, she "used the stories that I had been telling people to get out of the house because I wanted to be with my boyfriend at the time." (Appendix 1 pg189 line 4-6, pg299 line 6-9, pg303 line 3 - pg304 line 5).

K.H. testified that after the incident with her boyfriend that led to her suspension from school, she feared not ever seeing her boyfriend again and "did not want to be at home at all so I started fitting the little pieces together... I took all the stories that I had been telling all of my friends over the years and I put it in my journals then I told Jenny [white] the same stories that I had told my friends regarding the molestation so I could get out of the house" (Appendix 1 pg303 line 10 - pg304 line 5. see also pgs 345-347).

K.H. testified that she had two sets of journals, one that was a first draft and one that was a latter draft in which she "slipped in stuff from my stories in my journal so it would seem more believable." (Appendix 1 pg190 lines 1-4, pg191 lines 3-7, pg303 lines 22-25). She went on to describe her method of fabrication and explained how to tell that the journals were fabrications due to the neat and consistent handwriting that was far neater than her handwriting when she was thirteen. K.H. never denied having written about alleged sexual abuse by her father in her journals, in fact she openly admitted to having written them recently, and to their untruthful nature (Appendix 1 pg190 lines 1-4, pg191 lines 3-7, pg303 line 22-25, pg346 line 6 - pg347 line 5). The state had K.H. read the journal entries then sought the journals to be admitted as "substantive evidence" (Appendix 1 pg266-267).

A week after her discussion with her youth leader, K.H. talked with a detective who told her if she made a controlled phone call to the petitioner "it will really help with getting you out of the house" and that if "it's a good enough story" she would not have to return to her home with the petitioner (Appendix 1 pg216 line 2 - pg217 line 10). During the controlled phone call KH attempted to manipulate her father into admitting to wrongdoing. She was very nearly successful. Her father denied that he had ever touched her (Appendix 2 pg601 line 18) or done anything towards K.H. with any intent of sexual gratification (Appendix2 pg594 line 3). However, she did manage to

manipulate him into speaking rather clumsily about three very embarrassing events that occurred during the time she was home-schooled. The first of which was whenever she asked to shave her legs, her father would hand her the razor, wait for it to be returned, inspect her arms and legs for any new cuts, and treat the old cuts until they were healed and clear of infection (Appendix 1 pg175 line 14 - pg177 line 20, pg282 line 17 - pg284 line 13, pg324 line 4 - pg325 line 11, pg1101 lines 15-24). Second, was an event where the topic of virginity was being discussed and the occasion of her kidney surgeries were discussed. After this discussion she went to her room to try to see her hymen for herself but was unsuccessful so she asked her father to look for her. (Appendix 1 pg241 line 1 - pg242 line 21, pg287 line 11 - pg288 line 7, pg323 lines 6-13, pg336 line 10 - pg337 line 3) Seeing an opportunity to perhaps to cause her to hesitate and maintain her purity her father then looked (being in the room for a few seconds only) and told her that her first time would be very painful for her (Appendix 2 pg1099 line 12 - pg1100 line 14) He did not touch (no penetration as would be required for charge of rape) and his motives were clearly not sexual in nature as nothing sexual occurred as stated by both KH and the petitioner (Appendix 1 pg241 line 1 - pg242 line 21, pg287 line 11 - pg288 line 7, pg323 lines 6-13, pg336 line 10 - pg337 line 3, and Appendix 3 pg1099 line 12 - pg1100 line 14) (It should also be noted that the surgeons notes from KH's surgery describing the excision of the hymeneal band were also submitted with the habeas corpus reply (Appendix

10) supporting KH's trial testimony and showing that the petitioners motive for his action was not sexual gratification as would be required element for sexual assault). Third was an event in which the father had begun experimenting with the ED medication Cialis and woke up from a nap with an erection (Appendix 1 pg239 line 21 - pg240 ling 21, pg249 line 11 - pg250 line 5, pg292 line 2-23, pg294 line 12 - pg295 line 5, Appendix 3 pg1100 line 15 - pg1101 line 1). The details surrounding this event are not clear but what is clear is that both parties were embarrassed by the interaction.

K.H. testified that on May 5, 2010, she gave a forensic interview and around that time also spoke with a Department of Children's Services employee, and repeated the false stories regarding the molestation to both because she "wanted to stay out of the house". (Appendix 1 pg220 lines 4-25, also see pg179 lines 7-23).

K.H. admitted that she told these various persons the story that the Petitioner would get in the shower with her, and testified that he never actually did. K.H. admitted that she also recounted to others that the Petitioner would grab and rub her breasts in the shower, and that he was sexually aroused while doing so, but testified that that was untrue as well (Appendix 1 pg176 line 14 - pg177 line 20, pg251 line 1 - pg253 line 13, pg 282 line 17 - pg284 line 13). K.H. admitted that she had told others before the trial that she and the Petitioner took a bath together, during which the Petitioner was sexually aroused and started "thrusting", but that it was an

untrue statement and did not happen (Appendix 1 pg177 line 21 - pg178 line 10, pg238 line 13-16, pg286 line 25 - pg287 line 16) (as the petitioner is 6'2" and 240lbs. laying in a bathtub alone is impossible, let alone with another person). K.H. also admitted that she told others prior to trial that the Petitioner would take "naked naps" together, during which he would be sexually aroused, but testified that those statements were untrue (Appendix 1 pg185 line 3 - pg187 line 22, pg238 line 17 - pg240 line 21, pg285 line 6 - pg286 line 24). K.H. testified that while she told others that the petitioner touched her "private to feel if it was wet" during one of their naps and moved his hand around, it was an untrue statement and never actually happened (Appendix 1 pg186 line 25 - pg189 line 6, pg285 line 6 - pg286 line 24). K.H. testified that while the Petitioner had "looked at" her private parts to determine if her hymen was still intact, "there was nothing sexual about it" (Appendix 1 pg322 line 25 - pg323 line 13) and that he didn't actually touch her (Appendix 1 pg241 line1 - pg242 line 15, pg287 line 11 - pg288 line 7). K.H. testified that any contact was "horseplay" and once she started high school it stopped (Appendix 1 pg326 line 8 - pg327 line 12).

K.H. testified that, even though she told several people about numerous allegations of molestation, the stories were all fabricated. K.H. did not deny or equivocate making the prior inconsistent statements in response to the prosecutor's questions over two days regarding each out-of-court prior inconsistent statement. The prosecutor was very thorough in her questioning

of KH concerning each out of court statement that resulted in a charge **before** asking that the statements and journals be admitted into evidence (charge 1: Appendix 1 pg176-177, 283-284), (charge 2: Appendix 1 pg176-177, 283-284), (charge 3: Appendix 1 pg177, 287), (charge 4: Appendix 1 pg285), (charge 5: Appendix 1 pg187,286), (charge 6: Appendix 1 pg187, 286), and (charge 7: Appendix 1 pg242, 287, 323, 337). KH did not deny having made the statements, or claim to have forgotten, both of which would have been grounds for impeachment, instead she unequivocally admitted under oath as an adult to having made the claims and that they were fabricated. Each question was asked and answered before the evidence was submitted to the court.

The courts have insinuated that the alleged victim might have been coerced to testify the way she did during the trial (Appendix 12). This claim is not supported by the evidence or testimony, to the contrary, KH stated that the prosecutor "encouraged" her to exaggerate her claims (Appendix 1 pg235 line 22 - pg236 line 2), the detective threatened to return her to her home if she did not manipulate the phone call to his satisfaction (Appendix 1 pg216 line 18 - pg217 line 7), and that the foster parent encouraged more elaborate stories (Appendix 1 pg312 line 16 - pg313 line 6, Appendix 9 pg. 2). The question of coercion by her parents was asked at trial and answered to the satisfaction of the prosecutor (Appendix 1 pg178 line 11-22). The petitioner believes that there were more personal reasons for her change in testimony,

involving her friends and her personal life, which might have been too embarrassing and lengthy for her to elaborate on while on the stand. KH is an adult now with a home, career, and marriage of her own but has continued to try to help overturn this conviction with an affidavit (Appendix 9) and by helping to hire and pay for post conviction representation. The affidavit that was submitted with the habeas corpus reply was not considered in this claim by the court and an evidentiary hearing was never ordered where such a question might be asked or pursued further. It should also be noted as relevant that KH approached her father and his defense counsel (Appendix 3 pg1072 line 2-25), they did not approach her.

REASONS FOR GRANTING THE PETITION

I.) The exposure of the jury to false, fabricated statements and evidence violated the defendant's right to due process guaranteed by the 14th Amendment. The decision of the 6th circuit court of appeals regarding the fairness of this trial conflicts with or is inconsistent with prior decisions of this court.

Plain error has been ignored or excused in this case. One of the main and complex issues here seems to some confusion over what is fabricated or unreliable testimony. KH's trial testimony was consistent with the DCS report from an investigation that took place when KH was 15, one year before the allegations were made (Appendix 8). According to Tennessee Supreme Court rulings the forensic interview and statements to others were consistent, and yet they are contradictory with her trial testimony and the mentioned DCS report. KH's trial testimony solved the imbalance when she admitted to fabrication. The admission of evidence that is unreliable or fabricated would clearly prejudice a jury and violate the constitutional guarantee of due process. In most other jurisdictions recent fabrications are inadmissible in a trial for what seems to be obvious reasons and result in the cases being overturned or dismissed. In this case, the judge abused his discretion by ruling against defense counsel when the admissibility of the

forensic interview was discussed (Appendix 1 pg394-427) and violated the constitutional rights of the accused.

The Tennessee court of appeals has stated a concern regarding the exhaustion of state remedies. In addressing that issue petitioner would point out that FROE 103(e) states that "a court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." And that the Supreme Court has ruled that "The concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration'. We remain confident that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard' but we don't pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." (*MURRAY V. CARRIER,* 477 US 495 @495-496).

This petitioner realizes that the Supreme Court is hesitant to interfere with a state where admissibility of evidence is concerned; however, in this case the question of constitutionality of the application of those rules is in question. The State already has rulings based on Supreme Court rulings that were not applied or were applied in an unconstitutional manner requiring the intervention of a higher court. For example, the TSC has stated in *State V.*

Brown, 29 S.W. 3d, 427 (Tenn. 2000): "Evidence ...may yet be inadmissible if it runs afoul of other well-established rules of evidence, the most prominent being against hearsay. Generally speaking, the rule against hearsay is considered to be a rule of reliability...This difference ensures that only evidence deemed most relevant AND most reliable is appropriate for consideration by the trier of fact" (quoting *CHAMBERS*, 410 US 284 at 431). "Children and teenagers may be prone to exaggerating both the status of their consensual sexual activity, and their sexual prowess. Children may succumb to peer-pressure to fabricate stories of sexual promiscuity to be viewed as cool, or mature."(443)

The previous courts; State, district, and 6th Cir, have erroneously claimed that the evidence submitted in this case was reliable and have continuously applied Tennessee Rule of evidence 803(26) without satisfying the first condition:

1. The statement must be otherwise admissible under Rule 613(b).
2. The declarant must testify at the trial or hearing and be subject to cross-examination about the statement.
3. The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement under oath.
4. The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

Tennessee Rule of evidence 613(b) states:

> "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require."

The TSC explained when and why extrinsic evidence of a prior inconsistent statement is admissible as substantive evidence according to 613 (b):

"The purpose of rule 613(b) is to allow introduction of otherwise inadmissible extrinsic evidence for impeachment. Extrinsic evidence of a prior inconsistent statement remains inadmissible when a witness unequivocally admits to having made the prior statement. The unequivocal admission of a prior statement renders the extrinsic evidence both cumulative and consistent with a statement made by the witness during trial. Extrinsic evidence of a prior consistent statement is generally inadmissible and not subject to Rule 613(b). Accordingly, the admissibility of the extrinsic evidence is contingent upon whether the witness admits or denies having made the prior inconsistent statement." STATE V. MARTIN, 964 S.W.2d 564, 567 (TSC 1998).

Again in STATE V. ACKERMAN 397 S.W. 3d 617 637-640 "To be admissible as substantive evidence via rule 803(26), a statement must first be admissible as a prior inconsistent statement via rule 613 (b). That rule provides that

'extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded as opportunity to interrogate the witness thereon, or the interests of justice otherwise require.' Tenn. R. Evid. 613(b).' Extrinsic evidence of a prior inconsistent statement is inadmissible, however, unless the witness denies making the statement or equivocates about making it. State V. Martin, 964 S.W.2d 564, 567. 'Extrinsic evidence of a prior inconsistent statement remains inadmissible when a witness unequivocally admits to having made the prior statement.' Id.

The prosecutor was very thorough in her questioning of KH concerning each out of court statement that resulted in a charge before asking that the statements and journals be admitted into evidence (Appendix 1; charge 1: pg176-177, 283-284, charge 2: pg176-177, 283-284, charge 3: pg177, 287, charge 4: pg285, charge 5: pg187, 286, charge 6: pg187, 286, and charge 7: pg242, 287, 323, 337). KH did not deny having made the statements, or claim to have forgotten, both of which would have been grounds for impeachment, instead she unequivocally admitted under oath as an adult to having made the claims and that they were fabricated. Each question was asked and answered before the evidence was submitted to the court.

In the Supreme Court ruling IDAHO V WRIGHT, 497 US 805, 821-822 guidelines regarding the admissibility of evidence were listed as follows:

1.) Spontaneity and consistent repetition

2.) Mental state of declarant.

3.) Use of terminology.

4.) Lack of motive to fabricate.

Guideline 1 applies as the DCS report (Appendix 8) was inconsistent with the other out of court statements and interviews. Guideline 2 applies as KH was angry, vindictive, and recalcitrant. Guideline 4 applies as KH admitted her motive to fabricate and admitted to doing so. However, in the same opinion, The Supreme Court backpedals and softens its stance leaving courts in a grey area and leading to some jurisdictions adhering to these guidelines and others ignoring them.

Some jurisdictions have argued back and forth regarding the way in which forensic interviews are conducted, the 8th circuit is among those. In that District the argument has been based upon UNITED STATES V. ROUSE, 111 F3d 561. In that argument they use Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) to bring in the expert testimony from *UNITED STATES V. ROUSE,* 111 F3d 561 where Dr. Undwerwager and a professional publication by Stephen j. Ceci and Maggi Bruck (Suggestibility of a Child Witness: A Historical Review and Synthesis (113 Psychological Bulletin 403-439 (1993)) spells out the problems with interrogation techniques like those used in forensic interviews.

The court quoted the Ceci-Bruck article stating "Repeated questions can produce a change of answers as the child may interpret the questions as

"I must not have given the correct response the first time" and the child's answers may well become less accurate over time (or even within a single interview) in an inaccurate report." (UNITED STATES V. ROUSE, 111 F3d 576-577) and "preconceived assumptions of the interviewer are the most powerful determinant of what comes out of an interview" (id footnote 9). Such repeated questions are notable throughout the forensic interview in this case but most telling is the question of penetration that was repeated no less than five times, each answered "no", before the answer was finally "yes" at the end of the interview then denied nine (9) times over the course of the proceedings.

"Children will lie for personal gain, and material and psychological rewards need not be of a large magnitude to be effective." Id. The bribe or insinuation to K.H. would have been one of disbelief and return home to parents that had, in her mind, every reason to dislike or punish her extreme behavior. All she had to do to avoid that end was satisfy the interviewer and the case worker in the adjacent room. K.H's trial testimony that she had lied in that interview simply reinforces the point of the case made in Rouse.

In the present case KH stated that the prosecutor "encouraged" her to exaggerate her claims (Appendix 1 pg235 line 22 - pg236 line 2), the detective threatened to return her to her home if she did not manipulate the phone call to his satisfaction (Appendix 1 pg216 line 18 - pg217 line 7), and that the foster parent encouraged more elaborate stories (Appendix 1 pg312 line 16 -

pg313 line 6, Appendix 9pg. 2), not to mention the case worker that asked repeated, leading, and suggestive questions in the forensic interview itself.

The petitioner has provided some of the missing e-mails where KH's peers encouraged her to take drastic action, combined with the already demonstrated susceptibility of KH to peer pressures the TSC has stated in their opinion in STATE V. BROWN, 29 S.W. 3d, 427 (Tenn. 2000) "children and teenagers may be prone to exaggerating both the status of their consensual sexual activity, and their sexual prowess. Children may succumb to peer-pressure to fabricate stories of sexual promiscuity to be viewed as cool, or mature." Is it so difficult for the courts to believe that a teenager might make such a mistake and then regret it later as KH stated (Appendix 1 pg232 line 24 – pg 233 line 14, pg298 line 11- pg 300 line 11, pg 312 line 13 – pg 313 line 6, pg348 line 3-9)?

So the extrinsic evidence was inadmissible and does not possess the required indicia of reliability required for due process. This court has stated "A new trial is required if 'the false testimony could...in any reasonable likelihood have affected the judgment of the jury...'" (**Giglio V. U.S.** 405 us 150 at 153 (quoting **Napue V. People of State of Ill.** 360 us 264 at 271)). As the jury was exposed to three out of four days of fabricated and inadmissible testimony and evidence, the resultant bias that affected them should be obvious and the remedy should be equally obvious being an order to vacate and remand for a new trial.

The requirements for plain error are:

1) The error must be a deviation from legal rule
2) The error must be obvious
3) The error must affect substantial rights
4) The error must seriously affect the fairness or integrity of the judicial proceedings.

With those guidelines;

1) The error was a deviation from the rules of evidence as they are applied in Tennessee; Rule of evidence 803(26) and 613(b) as described in Tennessee Supreme Court rulings in STATE V. MARTIN, 964 S.W.2d 564, 567 and STATE V. ACKERMAN 397 S.W. 3d 617 637-640 **And** was contrary to federal holdings in CHAMBERS, 410 US 284 at 431, IDAHO V WRIGHT, 497 US 805, 821-822, GIGLIO V. U.S. 405 U.S. 150 at 153, and NAPUE V. People of State of Ill. 360 U.S. 264 at 271.
2) The evidence used was inadmissible, unreliable recent fabrication. A DCS report from just the year before, a sworn statement **and** an affidavit stating that the statements, journals, and reports to people in authority were fabrications with motive, pressure to exaggerate, and a description of method and means.
3) The error affected the right to a fair trial, to be tried with evidence that has indicia of reliability per the requirements of the 14th

amendment, and the due process of confrontation found in the 6th amendment. These are significant rights guaranteed by the Constitution of the United States to all citizens thereof. Everything I have read indicates that the courts would rather let a guilty man go free than convict an innocent man.

4) That the jury was exposed to this fabricated evidence over three days out of four days of trial would prejudice even the most elect of citizens, that the fabricated evidence is the only evidence that contains the required elements for the charges and with out it there can be no charges, that the trial court abused its discretion regarding of the rules of evidence (Appendix 1 pg394-427 and 503-509), all contribute to error that affected every aspect of the integrity of this trial.

The question remains, was the error harmful or would the outcome of the trial have been different? Since KH not only recanted her previous statements but openly and unequivocally admitted to having fabricated or exaggerated them to the extent that she described her methods and motives; all of her previous statements (especially the forensic interview) would have been excluded from the trial. The only remaining evidence would have been KH's trial testimony and the two recordings of the petitioner neither of which contain any of the required elements from the indictment nor any admission to anything that violated the law; to the contrary, the petitioner says

"nothing I did was for sexual gratification" (required element per Tenn. Code. Ann. 39-13-501(6)), "I never touched your clitoris" (penetration being the required element per Tenn. Code. Ann. 39-13-503), all while unaware the conversation was being recorded. Opinions to the contrary have taken phrases out of context (in the recording, the accused can be heard saying "wha?" under his breath and using a confused tone. This is not reflected in the transcript). Even then, the recording alone cant be used to support the charges as the Tennessee Supreme Court ruled in Helton "An admission is an acknowledgement by the accused of certain facts which tend together with other facts to establish guilt; while a confession, putting to one side the problem of corroboration, an admission is not sufficient in itself to support a conviction." (Helton V. State, 547 SW2d 564, 567 (TSC)) The US Supreme court holds to the same standard in Opper V. United States, 378 U.S. 84, 89. So the error was clearly not harmless; the prosecutions entire case rested on KH's previous statements.

It has taken a considerable amount of time and effort by the petitioner to understand these rules, how they apply, and how to phrase an argument for the courts. The result is a plain error that has gone far too long without being recognized and the remedy for plain error is; that the state should be ordered to vacate the charges and the case be remanded for a new trial.

CONCLUSION

The Jury was prejudiced against the defendant after being exposed to three days of inadmissible and unreliable recently fabricated evidence. The admission of unreliable fabricated evidence was an error affecting the fairness of the trial that can be attributed to both defense counsel and the state court, was not harmless, and should result in the case being remanded for a new trial

The state has stated that it is up to the jury to determine the weight and reliability of evidence presented in court. To a certain degree, that is true, however, it has also been long held that the evidence presented needs to be reliable. The jury must weigh complete and reliable evidence; otherwise there would be no need for evidentiary rules to prevent unreliable evidence. The very existence of said rules sets the boundaries for the jury's considerable power. According to the rules by which trials are bound both federally and in this state, the evidence was not reliable, and did not posses the proper indices required for reliability and so the weight given it by the jury is suspect for bias.

A ruling in this case would provide unified guidance regarding fairness of trials and reliable evidence, and correct an injustice that has been done on an American citizen who's guaranteed constitutional rights have been violated.

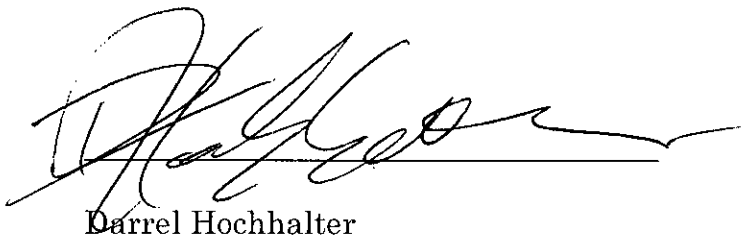
A ruling in this case might also be beneficial in the future as this issue is becoming more prevalent in political as well as personal lives. Charges such as the ones in this case are so easily turned into convictions that they have become a tool, or instrument used to easily remove people from positions of authority, be they parents, spouses, teachers, or candidates for political office. Often the complainant child, upon maturing, feels guilty for their actions as a child and comes forward with the truth seeking to correct an injustice. A clear path to justice in those cases is needed.

All jurisdictions would benefit from guidance regarding the way forensic interviews should be conducted as well as the treatment of the child by agents of the state in cases like this. In particular, the state of Tennessee would benefit greatly from rules that clear up any ambiguity regarding recent fabrication, and a rewrite of rule 613 (b) to reflect the states rulings and the intent of that rule.

The court should issue a certificate of appealability because the Petitioner has pursuant to U.S. Sup. Ct. rule 10, 28 U.S.C.A. shown that (a) a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this courts supervisory power; (c) a state court or a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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