

No. _____

In The
Supreme Court of the United States

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DOUGLAS D. McCALL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

—————◆—————

**On Petition For Writ Of Certiorari
To The Florida Fifth District Court Of Appeal**

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PETITION FOR WRIT OF CERTIORARI

—————◆—————

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A. QUESTION PRESENTED FOR REVIEW

Whether a state evidentiary rule prohibiting the introduction of extrinsic evidence of an alleged minor victim's prior inconsistent statements/recantations (i.e., a video deposition where the alleged minor victim *denied* that any criminal activity occurred) must yield to a criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments – thereby allowing the introduction of the video deposition where the minor victim recanted – in a case where the prosecution introduced not only the alleged minor victim's testimony at trial *but also a video of the alleged minor victim's prior interview with law enforcement officials where she initially made the allegations.*

B. PARTIES INVOLVED AND RELATED CASES

1. Parties Involved

The parties involved are identified in the style of the case. Petitioner, Douglas D. McCall, was the defendant in the trial court proceedings and the appellant in the appellate court proceedings. Respondent, the State of Florida, was the plaintiff in the trial court proceedings and the appellee in the appellate court proceedings.

2. Related Cases

- a. *State of Florida v. Douglas D. McCall*, case no. 2018-CF-000233, Florida Fifth Judicial Circuit Court, Lake County. Judgment entered on October 15, 2021.
- b. *Douglas D. McCall v. State of Florida*, case no. 5D22-476, Florida Fifth District Court of Appeal. Opinion entered on December 13, 2022, rehearing denied on December 21, 2022.

**C. TABLE OF CONTENTS
AND TABLE OF AUTHORITIES**

	Page
1. TABLE OF CONTENTS	
A. QUESTION PRESENTED FOR REVIEW	i
B. PARTIES INVOLVED AND RELATED CASES.....	ii
C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES	iii
1. Table of Contents.....	iii
2. Table of Authorities	v
D. CITATION TO OPINION BELOW	1
E. BASIS FOR JURISDICTION	1
F. CONSTITUTIONAL PROVISIONS IN- VOLVED	1
G. STATEMENT OF THE CASE AND STATE- MENT OF THE FACTS	2
H. REASON FOR GRANTING THE WRIT	8
The question presented is important.....	8
I. CONCLUSION.....	13
 J. APPENDIX	
1. January 9, 2023, order of the Florida Fifth District Court of Appeal	App. 1
2. December 13, 2022, opinion of the Florida Fifth District Court of Appeal.....	App. 2
3. October 15, 2021, Judgment of the Florida Fifth Judicial Circuit Court	App. 3

**C. TABLE OF CONTENTS AND
TABLE OF AUTHORITIES – Continued**

		Page
4.	Excerpt of Transcript of October 12, 2021, Trial, Pages 186-188.....	App. 6
5.	Excerpt of Transcript of October 12, 2021, Trial, Pages 203-209.....	App. 8
6.	Excerpt of Transcript of October 12, 2021, Trial, Page 305.....	App. 15
7.	Excerpt of Transcript of October 12, 2021, Trial – Testimony of D.K.	App. 16
8.	Transcript of January 25, 2018, Video-rec- ordred Statement of D.K.	App. 86
9.	Transcript of December 17, 2018, Video-rec- ordred Deposition of D.K.	App. 161

TABLE OF AUTHORITIES

Page

2. TABLE OF AUTHORITIES

a. CASES

<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	11
<i>Conner v. State</i> , 748 So. 2d 950 (Fla. 1999).....	10
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986).....	1-2, 9
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	11
<i>Diamond Offshore Servs., Ltd. v. Williams</i> , 542 S.W.3d 539 (Tex. 2018)	12
<i>Hemphill v. New York</i> , 142 S. Ct. 681 (2022)	12
<i>Jenkins v. State</i> , 385 So. 2d 1356 (Fla. 1980).....	1
<i>Kingery v. State</i> , 523 So. 2d 1199 (Fla. 1st DCA 1988)	10
<i>Mattox v. United States</i> , 156 U.S. 237 (1895).....	9-10
<i>McCall v. State</i> , 353 So. 3d 1171 (Fla. 5th DCA 2022)	1
<i>Pearce v. State</i> , 880 So. 2d 561 (Fla. 2004)	6-7
<i>Powell v. Weger</i> , 97 So. 2d 617 (Fla. 1957).....	10

b. STATUTES

§ 90.608(1), Fla. Stat. (2001)	6
§ 90.614(2), Fla. Stat.....	6-7
§ 90.803(23), Fla. Stat.....	6
28 U.S.C. § 1257(a).....	1

TABLE OF AUTHORITIES – Continued

	Page
c. OTHER AUTHORITY	
Charles W. Ehrhardt, <i>Florida Evidence</i> (2002 ed.)	6
McCormick on Evidence (5th ed. 1999)	12
U.S. Const. amend. VI	1, 2, 8, 9, 11, 12
U.S. Const. amend. XIV	1, 2, 8, 9, 11, 12

The Petitioner, DOUGLAS D. McCALL, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida Fifth District Court of Appeal entered in this case on December 13, 2022 (App. 2)¹ (rehearing denied on January 9, 2023 (App. 1)).

D. CITATION TO OPINION BELOW

McCall v. State, 353 So. 3d 1171 (Fla. 5th DCA 2022).²

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a) to review the final judgment of the Florida Fifth District Court of Appeal.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him [and to] have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI. “Whether rooted directly in the Due Process Clause

¹ References to the appendix to this petition will be made by the designation “App.” followed by the appropriate page number.

² Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations and quotation marks omitted).

The Fourteenth Amendment’s Equal Protection Clause provides that no person shall be denied “the equal protection of the laws.” The Fourteenth Amendment’s Due Process Clause provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner was charged in Florida state court with one count of lewd or lascivious molestation and two counts of showing obscene material to a minor.³ The alleged victim of the purported offenses was the Petitioner’s granddaughter (D.K.⁴). The allegations were first brought in early 2018 – when the granddaughter was ten years old – and the offenses allegedly began occurring when the granddaughter was eight years old.

³ The Petitioner was charged with additional offenses, but he was acquitted of these additional charges at trial. The instant petition focuses solely on the offenses for which the Petitioner was found guilty.

⁴ Only the initials of the alleged victim are used in this petition.

In January of 2018, an employee of the Children's Advocacy Center (CAC) conducted a video interview of the granddaughter. During the interview, the granddaughter claimed that (1) the Petitioner showed her videos of naked children; (2) on one occasion, the Petitioner placed a vibrator over the clothes of her vaginal area; and (3) the Petitioner placed his hand/fingers over the clothes of her vaginal area while the two were riding a "four wheeler." (App. 86-160).

However, in December of 2018, a video deposition was conducted of the granddaughter, and during the video deposition, the granddaughter denied that her grandfather had touched her inappropriately and denied that her grandfather had shown her videos of actual humans engaging in sexual activity. (App. 161-206). For example, during the December 2018 video deposition, the granddaughter stated the following:

Q [by defense counsel]. [When he touched you while you were riding the four wheeler, d]o you think that he was doing it on purpose to touch you inappropriately, or by accident, or do you not know?

A. I'm not entirely sure, sir.

. . . .

Q. Did he ever touch you with [the vibrator]?

A. No, sir.

. . . .

Q. Okay. So none of the videos that you saw had, like, real people in them?

A. No, sir.

Q. Okay. It was all animated? Do you know what animated is?

A. Yes.

Q. Were all of the videos that you saw animated?

A. Yes, sir.

....

Q. Did your grandfather ever place a vibrator against your vagina?

A. No, sir.

....

Q. Okay. The only time – now, and you correct me if I'm wrong. Is the only time that he touched you when you were on the four wheeler – touched you in the vagina area when you were on the four wheeler?

A. Yes, sir.

Q. Was there ever any other times?

A. No, sir.

Q. And are you or are you not sure that he meant to do it in a – that he meant to touch you physically there?

A. I'm not entirely sure, sir.

. . . .

Q. Have you ever seen a movie where a child, not just a cartoon, but an actual child was naked?

A. No, sir.

(App. 178, 182-184, 188).

The case proceeded to trial in October of 2021 – when the granddaughter was thirteen years old. During the trial, the granddaughter testified and gave testimony consistent with what she had said during the January 2018 CAC interview, although she stated that her memory of the events was not very good because the alleged offenses happened years earlier:

Q [by the prosecutor]. Has it been a while since these things happened?

A. Yes, ma'am.

Q. It is easy for you to remember every single detail?

A. No, ma'am.

(App. 31). Yet, at the conclusion of the prosecutor's direct examination of the granddaughter, the following was stated to the jury:

Q. And at the time you gave that interview at the Children's Advocacy Center, were these events fresher in your mind than they are now three years later?

A. Yes, ma'am.

(App. 33). Following the granddaughter's testimony – and in order to bolster the granddaughter's credibility – the prosecution requested to play for the jury the January 2018 CAC video interview. Pursuant to Florida's statutory child hearsay exception, *see* § 90.803(23), Fla. Stat., the trial court granted the prosecution's request (App. 6-7), and the jury was able to view the video of the January 2018 CAC interview. (App. 8-15, 86-160). However, the trial court *denied* the defense's request to play for the jury the December 2018 deposition video. (App. 6-7). Rather, the trial court applied Florida rule of evidence governing prior inconsistent statements⁵ and the trial court held that if the

⁵ In *Pearce v. State*, 880 So. 2d 561, 569-570 (Fla. 2004), the Florida Supreme Court stated the following about Florida's rule of evidence governing prior inconsistent statements:

[I]ntroduction of a prior statement that is inconsistent with a witness's present testimony is also one of the main ways to attack the credibility of a witness. *See* § 90.608(1), Fla. Stat. (2001); *see also* Charles W. Ehrhardt, *Florida Evidence* § 608.4 (2002 ed.). . . .

Before a witness can be impeached with a prior inconsistent statement, the proper foundation must be laid. Prior to questioning a witness about the contents of a previous inconsistent statement, counsel must call to the witness's attention the time, place, and person to whom the statement was allegedly made. As provided in section 90.614(2),

Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate the witness on it. . . . If the witness denies making or does not

granddaughter (on cross-examination) admits making the prior inconsistent statement, then the defense would be precluded from introducing the extrinsic video evidence of the prior inconsistent statements. (App. 6-7). During her cross-examination, the granddaughter admitted to giving prior inconsistent statements during the December 2018 video deposition⁶ and therefore the jury did *not* see the December 2018 video deposition (even though the jury did see the video of the January 2018 CAC interview).

On direct appeal, the Petitioner argued that the Petitioner's constitutional rights were violated as a result of the trial court preventing the defense from

distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible.

Thus, if the witness admits making the prior statement, examining counsel may not offer any evidence to prove the statement was made.

(Some citations omitted).

⁶ For example, on cross-examination, the following occurred:

Q [by defense counsel]. I'm looking at line 18 (inaudible). Did you ever previously state that you were not sure whether or not his contact was on purpose?

A. Yes, sir.

. . . .

Q. Based upon – based upon seeing your previous answer, are you still certain that what happened on the four wheeler was on purpose?

A. Yes, sir. I believe that when I answered that question previously I was – I don't think I fully comprehended what had happened.

(App. 54-55).

playing for the jury the December 2018 video deposition. The Florida Fifth District Court of Appeal rejected this claim and affirmed the Petitioner’s convictions and sentence without explanation. (App. 2).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The question presented in this case is as follows:

Whether a state evidentiary rule prohibiting the introduction of extrinsic evidence of an alleged minor victim’s prior inconsistent statements/recantations (i.e., a video deposition where the alleged minor victim *denied* that any criminal activity occurred) must yield to a criminal defendant’s constitutional rights under the Sixth and Fourteenth Amendments – thereby allowing the introduction of the video deposition where the minor victim recanted – in a case where the prosecution introduced not only the alleged minor victim’s testimony at trial *but also a video of the alleged minor victim’s prior interview with law enforcement officials where she initially made the allegations.*

As explained below, the Petitioner requests the Court to grant his certiorari petition and thereafter consider this important question.

The Sixth Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him [and to] have compulsory process

for obtaining witnesses in his favor.” U.S. Const. amend. VI. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations and quotation marks omitted).

The trial in this case was “he said”/“she said.” The Petitioner’s defense was that the granddaughter fabricated the allegations against him – and there was evidence introduced that the granddaughter’s mother (i.e., the Petitioner’s daughter) stood to gain financially if the Petitioner was incarcerated. The December 2018 video deposition was the *best evidence* to support the Petitioner’s theory of defense – because on that video, the granddaughter denied that the Petitioner had engaged in any criminal conduct. However, the jury never got to see that video. Yet the jury did see the January 2018 video where the granddaughter initially made the allegations in this case.

In an early case interpreting and applying the Confrontation Clause, this Court stated the following about the jury being able to observe a witness’ demeanor:

[T]o prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness,

but of compelling him to stand face to face
*with the jury in order that they may look at
 him, and judge by his demeanor upon the
 stand and the manner in which he gives his
 testimony whether he is worthy of belief.*

Mattox v. United States, 156 U.S. 237, 242-243 (1895) (emphasis added). In a criminal case, a witness’s demeanor while giving testimony plays an *integral* role in the jury’s view of the facts and determination of credibility. See *Powell v. Weger*, 97 So. 2d 617, 619 (Fla. 1957) (“The appearance and reaction of the witnesses, their vocal inflection and their general demeanor often substantially influence the degree of credibility accorded their testimony.”); *Conner v. State*, 748 So. 2d 950, 955 (Fla. 1999) (describing the jury’s chance to observe the demeanor of the witness and assess the witness’s credibility as one of the “threefold purpose[s]” served by the right of confrontation); *Kingery v. State*, 523 So. 2d 1199, 1205 (Fla. 1st DCA 1988) (noting “that a witness’s demeanor is a primary factor in an evaluation of that witness’s credibility”). In this case, the jury was able to observe the granddaughter’s demeanor while she was on the witness stand – *and* while watching the video of the January 2018 CAC interview. However, the jury did *not* get to see the granddaughter’s demeanor when she denied the allegations during the December 2018 video deposition; rather, the jury only heard the granddaughter admit – during cross-examination – that she had previously made inconsistent statements (i.e., the defense was reduced to cross-examination from a cold transcript). Bringing out on cross-examination that an alleged victim has given

prior inconsistent statements pales in comparison to presenting the jury with a video of those denials/recantations – especially when the prosecution was able to play for the jury a previous video where the alleged victim initially made the allegations. Based on the facts and circumstances of this case, the only way that the jury could properly judge the granddaughter’s credibility (i.e., judge her appearance, reaction, vocal inflection, and general demeanor) was to see *both* of the granddaughter’s previous video statements.

In rejecting the Petitioner’s request to introduce the granddaughter’s December 2018 video deposition, the trial court relied on a state rule of evidence governing prior inconsistent statements. However, state evidentiary principles must yield to a criminal defendant’s constitutional rights. Once the prosecution was permitted to play for the jury the granddaughter’s January 2018 CAC interview, the Petitioner’s Sixth and Fourteenth Amendment rights outweighed Florida’s evidentiary rule regarding prior inconsistent statements and the Petitioner should have been permitted to play for the jury the granddaughter’s December 2018 video deposition. *See Chambers v. Mississippi*, 410 U.S. 284 (1973) (striking down a Mississippi hearsay rule because, when combined with that state’s voucher rule, the defendant was prevented from presenting witnesses in his defense); *Davis v. Alaska*, 415 U.S. 308 (1974) (holding that a defendant’s right of confrontation under the Sixth Amendment trumped a state statute that prohibited a witness from being cross-examined regarding confidential juvenile records);

Hemphill v. New York, 142 S. Ct. 681 (2022) (holding that the application of a state court “opening the door” evidentiary principle violated the defendant’s right of confrontation under the Sixth Amendment).

“If, as it is often said, a picture is worth a thousand words, then a video is worth exponentially more.” *Diamond Offshore Servs., Ltd. v. Williams*, 542 S.W.3d 539, 542 (Tex. 2018) (footnote omitted). “Since ‘seeing is believing,’ and [video] evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect.” 2 McCormick on Evidence § 212 (5th ed. 1999). The Petitioner was denied the opportunity to present his best evidence (i.e., the December 2018 video deposition) using the *same medium* that the prosecution presented its best evidence (i.e., the January 2018 CAC video interview). As a result of the trial court’s ruling, the Petitioner was denied his rights under the Sixth and Fourteenth Amendments.

The question presented in this case has the potential to impact other criminal prosecutions nationwide. By granting this petition, the Court will then have the opportunity to address this important question and thereafter decide whether the playing field should be leveled in cases where the prosecution introduces video evidence of an alleged victim’s prior interview with law enforcement officials. Accordingly, for the reasons set forth above, the Petitioner prays the Court to grant his certiorari petition.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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