

No. _____

ORIGINAL

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SUPREME COURT OF THE UNITED STATES

(Phone Number)

QUESTIONS PRESENTED

During trial, the district court admitted the most contentious recordings of two partial forensic interviews:

One, of the victim R.M.; and the other, of his sister E.R.

Each recording detailed Petitioner's abuse of R.W. However, the district court did not allow for an ordered presentation by playing the entire recordings contemporaneously at the 'stage of the trial'. So as to assist the jurors -- for the limited purposes -- of determining the credibility of testifying witnesses. And not contemplate it as additional, independent, or otherwise credible evidence of guilt.

Instead, it instructed the jurors that they could review the selective portion of those recordings during deliberations. Thereby, denying petitioner his constitutional right to be present when evidence against him was offered and to confront it. The effects of emphasizing this evidence and privatized viewing is incalculable. The appellate panel reviewed the errors assigned under harmless error and abuse of discretion standard. This Court is petitioned to address:

- (a). Whether sending the selective and unplayed portion of the forensic interview qualifies as evidence extrinsic to the trial? And therefore, an error of type Structural?
- (b). Whether the period in which the jurors reviewed the forensic interview is properly categorized as 'stage of the trial', at which, the Constitution secures a Defendant's presence?
- (c). Under the circumstances, what should be the appropriate standard of review?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

There are no prior or related cases.

TABLE OF CONTENTS

1.	OPINIONS BELOW	1.
2.	JURISDICTION	2.
3.	CONSTITUTION, STATUTES, RULES, AND OTHER PROVISIONS	3.
4.	JURISDICTIONAL STATEMENT	4.
	TIMELINESS OF THE PETITION.	4.
5.	STATEMENT OF THE CASE	5.
	A) PROCEDURAL HISTORY.	5.
	B) SUMMARY OF THE JURY TRIAL	5.
	July 19-21, 2022.	
	C) SUMMARY OF APPELLATE PROCEEDINGS.	11.
6.	THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.	12.
7.	ARGUMENT FOR ALLOWANCE OF WRIT.	14.
	A.) DEFENDANTS RIGHT TO BE PRESENT.	14.
	B.) PLAYING OF THE RECORDINGS WAS A CRITICAL 'STAGE OF THE TRIAL'.	16.
	C.) THE QUESTIONS RAISED IN THIS CASE ARE IMPORTANT AND UNRESOLVED.	18.
8.	CONCLUSION	19.
9.	PROOF OF SERVICE.	20.

INDEX TO APPENDICES

APPENDIX A - The opinion of the United States Court of Appeals for the Tenth Circuit

TABLE OF AUTHORITIES CITED

1.	Bastone V. US 357 US 52 (1963).	
2.	Crosby V. US 113 S.Ct 748 (1993).	15.
3.	Dillon V. US 130 S.Ct 2683 (2010).	15.
4.	Hopt V. Utah 110 US 579 (1884).	14.
5.	Illinois V. Allen 397 US 337 (1970).	15.
6.	Lewis V. US 146 S.Ct 370 (1892).	14.
7.	Pollard V. US 352 US 354 (1987).	15.
8.	Rogers V. US 422 US 35 (1975).	15.
9.	Snyder V. Massachusetts 291 US 97 (1934).	17, 16.
10.	Taylor V. US 414 US 17 (1973).	15.
11.	US V. Behrens 375 US 162 (1963).	15.
12.	US V. Gagnon 470 US 522 (1985).	16, 15.

Federal rules of Criminal Procedure

1.	Rule 43	15
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Federal rules of Evidence.

1.	Rule 801	13.
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 127 F.4th 246 (10th Cir 2025); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 28th, 2025.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTION, STATUES, RULES, AND OTHER PROVISIONS

UNITED STATES CONSTITUTION, AMEND V provides :

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual Service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, Amend VI provides :

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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of criminal procedure Rule 43 provides that:

(a) When Required: Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 28th, 2025. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

TIMELINESS OF THE PETITION.

For reasons set forth in the application, -- mailed on 04/13/2025 by USPS certified mail and tracked under ~~95~~ 9589-0710-5270-2307-1522-29 -- circuit Justice Hon. NEIL M. Gorsuch were petitioned

to extend the time in which to file this petition, up to and including 05/30/2025. A decision on the Application were not received as of this submission.

As indicated mailed on the date imprinted in the Proof of Service, this Petition is timely filed under the Prison Mailbox Rule.

STATEMENT OF THE CASE

A. Procedural history.

On August 24, 2021, a grand jury in the Eastern District of Oklahoma ~~returned~~ an indictment charging Petitioner with two counts of Aggravated Sexual Abuse in Indian Country, in violation of 18 U.S.C. §§2241(c), §2246(2)(A), 1151, and 1153. Prior to trial, Petitioner filed a motion in limine to exclude the central and the most contentious evidence, the forensic interview of the victim R.W. and of R.W's half-sister E.R. The district court denied the motion.

On July 19, 2022, the case proceeded to trial. On the third day of trial, the jury returned a guilty verdict against the Petitioner on both the counts.

A timely notice of Appeal was filed with the court of appeals for the Tenth Circuit. See Appeal No. 23-7061. The Primary question on appeal was whether or not the district court abused its discretion in admitting the two forensic interviews. After briefing the oral arguments were held. Finally, the court of appeals affirmed the judgment deciding that the district court did not abuse its discretion. This Petition followed.

B. Summary of the jury trial July 19 - 21 2022.

In the summer of 2018, R.W. who was then five-years old, moved in with his father, the Petitioner. His seven-year old half-sister, E.R. lived in with Petitioner at the same home.

At trial, E.R. testified to an incident. She saw her father sexually abuse R.W.. She recalled that she was making a grilled cheese sandwich when she heard her father and R.W. in her bedroom. She said, it sounded like R.W. was "[k]ind of" screaming, so she went to check on him. When she peered through the cracked door, she observed her father's penis "touching" R.W's butt. R.W. was lying on his stomach, and his father had one hand on R.W.'s back holding him down. Her

father was clutching a can of compressed air in his other hand and was inhaling from it while he abused R.W.

Similarly, R.W. testified to this incident. And that such abuse has happened more than once. See A at 3.

On January 8, 2019, Michael Leonard of the Oklahoma Department of Human Services Child Welfare Department investigated the Petitioner's care of E.R. and R.W. Mr. Leonard testified that neither R.W. nor E.R. disclosed anything that raised suspicion. However, when he interviewed the Petitioner, Petitioner revealed that he had a problem with huffing compressed air. Subsequently, the same evening the children were taken out of Petitioner care. R.W. returned to live with his grandmother, whereas E.R. went to live with her mother. The two children never saw or spoke to each other again.

Eventually, E.R. returned to live with the Petitioner. Petitioner's girlfriend also moved into their house. E.R. testified to an incident, -- about two years after the prior incident with her half-brother, -- she walked in on her father and his girlfriend engaged in sex. She informed her mother of this incident. At the same time, E.R. told her mother of the incident involving her father and R.W.

E.R.'s mother reported the matter to child services. On February 3, 2021, Lara Welch, a lead forensic interviewer with Sara's Project in Ardmore, conducted a forensic interview of E.R. In that interview E.R. disclosed that she witnessed Petitioner sodomizing R.W.

On March 2, 2021, Kailee Callahan, a licensed professional counselor with the Oklahoma Commission on Children and Youth conducted a forensic interview of R.W. After initial discomfort and repeated denials, eventually R.W. too disclosed that Petitioner has abused him. Soon after, Sheila Johnson, a Sexual

Assault Nurse Examiner (SANE), conducted a sexual assault exam on R.W. Johnson was aware of the information R.W. had disclosed during his interview to Callahan. However, the examination did not reveal any injuries or scarring to R.W's genitalia. Since the facility did not have one, she was unable to use a culpa-scope. When Johnson inquired with R.W. as to any injuries to his bottom, R.W. refused to answer her questions.

The law-enforcement interviewed the Petitioner. The Petitioner indicated he was not sure as to why they wanted to speak to him. During the interview, the investigators informed the Petitioner that two or more people have reported that he had abused R.W. The expressly recited the E.R. witnessing the incident. Upon further inquiry, the Petitioner had no response to any of the allegations, but praised his children. However, he admitted to using compressed air to get high.

In August of 2021 the grand jury in the Eastern District of Oklahoma indicated Defendant with two counts of aggravated sexual abuse in Indian Country. Shortly before trial, the Defense filed motion in limine seeking to exclude the recorded forensic interviews of E.R. and R.W. as hearsay. The motion argued :

[T]he interview is hearsay, Rule 801 F.R. Evid., with no exceptions and is not admissible under the law. This statement is a statement made by a declarant, R.W. and E.R., not while testifying at the current trial or hearing and offered to prove the truth of the matter asserted. Rule 801(c). F.R.Evid.. Hearsay is not admissible. Rule 802. F.R. Evid..

Without awaiting for the record to develop, the district court prematurely denied the motion, stating :

Upon the presentation of proper foundation testimony, the Court will admit the forensic interview into evidence. The interviews will not be played during the trial but will be included with all of the evidence admitted during the trial and given to the jury for use during deliberations.

The trial began on July 19, 2022. The prosecutor's opening statement began by quoting R.W.'s forensic interview : "How did it feel? So hard. How did it make your butt feel? Like I was sitting on metal burns. I was burning." The Prosecutor told the jury, this was "[a]n experience described by R.W. at the age of seven." The prosecutor added :

How does this experience begin? With a big sister. E.R.... E.R. was talking to her mother. She tells her mom she saw her dad do nasty things to her brother. E.R. describes looking through a door, seeing her dad on top of her little brother anally raping him. ... E.R. lived with the defendant for a long time. But E.R. went to live with her mom. And when E.R. went to live with her mom in Carter County, this is when she told [her] what happened.... [Her mother] takes E.R. to meet with a forensic interviewer at Sara[]' Project.... That's how this process starts. See A at 6.

Then the prosecutor narrated the account of R.W.'s forensic interview. The Defense did not raise objections. E.R. was the first witness. On direct, she testified to the events she witnessed. On cross, the defense inquired into her recollection of the incident.

R.W. was the next witness. He testified to his father sexually abusing him. On cross, the defense posed questions as to whether and how many times he had spoken to the prosecution. Later, the government called Kelsey Blevins, the lead forensic interviewer at the child abuse network. She discussed the process of conducting forensic interviews in child sexual abuse cases. On cross, the defense inquired whether "a child's answers about sexual activity could and sometimes in some instances [did] reflect prior exposure to sexual activities between adults?" The idea of interposing persons.

On the second day of trial, the Prosecution called Ms. Callahan, the counsellor who had conducted the forensic interviews of R.W. After questioning and authenticating the record of the interview, the prosecutor moved to admit the recording into evidence. The Defense objected stating the interview was merely a "hearsay, repetition, cumulative, waste of time for the jury". A at 7-8. To this, the prosecution argued that the Defense had attacked R.W's credibility and thus

the recording evidence was admissible under Rule 801. The defense failed to challenge this response. Eventually, the district court overruled the objections and admitted the recording into evidence.

Next the government called Ms. Welch, who had conducted the forensic interview of E.R. After questioning her and authenticating the recording of the interview, the prosecutor moved to admit the recorded interview into the evidence. The defense objected "based on our previous record." The district court overruled the objections and admitted the recording into evidence.¹.

On the final day of the trial, the jury returned a verdict of guilty on both the counts. At sentencing the district court imposed two concurrent terms of life sentence.

C. A summary of appellate proceedings.

On the direct appeal the panel addressed whether the district court abused its discretion by admitting the two recorded interviews under the Federal Rules of Evidence 801. The second issue involved whether admission of these recordings were of the kind structural error. The panel concluded that the videos were admissible as prior consistent statement under Rule 801(d)(1)(B)(i) and (ii). As to the structural error issue, the panel found the arguments were unpersuasive.

1. Consistent with its pretrial ruling, the district court informed the jurors that the videos would not be played in the courtroom. They were advised that they would indeed have access to them during the deliberations. This petition argues that such admonition raised the spectre of the evidence at hand.

IV - THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE COURT

Our system of trials allow for the jurors to return the verdict based on evidence properly adduced during the 'Stage of the trial', in a manner consistent with our adversarial system. This includes honoring the accused's constitutional right to be present at all 'Stages of the trial'. By cleverly orchestrating maneuvers, the prosecution forced the issue of admitting forensic interviews of the testifying witnesses, under the guise of prior-inconsistent-statements. The defense opposed. The district court sided with the prosecution. However, it did not play the whole recording contemporaneously for the jurors benefit, -- for the limited purposes of determining the credibility of the witnesses in question. And expressly ensuring that the jurors do not consider the Recordings as additional, independent, and credible evidence of Petitioner's guilt.

Instead, by augmenting the jury deliberations with evidence 'unplayed' during the prior 'Stage of the trial' the district court:

- (a) Violated Petitioners due process;
- (b) Unfairly emphasized on the most controversial pieces of evidence, its credibility, and reliability; and,
- (c) Denied Petitioners Constitutionally protected right to remain present at the critical stage of the trial, i.e. viewing of evidence, gauge its affects, and if possible cure any defects, prejudices, as a result thereof.

It did so, with little or no explanation for the benefit of reviewing court, or without a limiting instructions to the jurors themselves. Despite clear indications that the errors assigned could have resounding affect on the trial practices in criminal cases, the court below reviewed them under the harmless-error or abuse-of-discretion standard.

On review it found "that the threshold requirements of Rule 801(d)(1)(B) were met. R.W. and E.R. both testified, they were subject to cross-examination about the statements they made in their interview, and those prior statements were consistent with their in-court testimony." App: A at 10.

In reaching its decision to affirm, the court of appeals failed to take into account

- (i) At which 'stage of the trial' the evidence in question will be applied by the jurors?
- (ii) Whether or not the accused's presence was constitutionally required at the stage?
- (iii) Whether or not playing the recordings for the first time during deliberations violated the accused's due process?

Petitioner respectfully urges that all manner of this decision are erroneous and at variance with this Court's decision as explained in the arguments below:

ARGUMENT FOR ALLOWANCE OF WRIT

A.) DEFENDANT'S RIGHT TO BE PRESENT.

As far back as 1884, this Court has recognized a criminal Defendant's right to be present at his trial as a matter of Due process under the Fifth and Fourteenth Amendment. See Hopt V. Utah 110 U.S. 579 (1884), or alternatively, as a matter of Federal rules of criminal procedure. See Lewis V. United States 146 S. Ct. 370 (1892).

Congress codified this right in the Federal Criminal cases by approving Rule 43, which became effective in 1946. Even as amended in 1976 and subsequently so, the Rule preserved the Defendant's right to be present "at every stage of the trial", barring a few exceptions, none that apply here, nor did Petitioner waive those rights. To a large extent, the right to be present is rooted in Confrontation clause of the Sixth Amendment. See Illinois v. Allen 397 U.S. 337 (1970). However, in United States v. Gagnon 470 U.S. 522, 105 S.Ct. 1482 (1985) the Court expounded upon the extent of a Constitutional right to be present where the confrontation of witness is not an issue. It has even acknowledged that in some circumstances a violation of Rule 43 may be reviewed under Harmless error. See Rogers v. United States 422 U.S. 35 (1975).

In the past, the Court has had opportunity to address "Volunteer absence", See Taylor v. United States 414 U.S. 17 (1973); cf. Crossby v. United States 113 S.Ct. 748 (1993); "Out of Court Communications between Judge and jurors, See Rogers v. United States *Supra*, United States v. Gagnon *Supra*, and "absence of defendant at sentencing", See Pollard v. United States 352 U.S. 354 (1957); Bartone v. United States 375 U.S. 52 (1963); United States v. Behrens 375 U.S. 162 (1963); Dillon v. United States

Whatever the rules of evidence parties relied on to frame arguments, and the district court admitted in favor of, playing of the recordings were a critical 'stage of the trial' that required defendants presence. By merely admitting and declining to play them contemporaneously, in favor of ordered presentation, the district court lost the control of the critical evidence. There is no real indication, whether or not the jury in fact viewed the recording. Observing how the jury visibly reacted to this evidence is a right that is fundamental and assures him "who stands in jeopardy that he may in person see, hear, and know all that is placed before the tribunal having power by its finding to deprive him of liberty or life." Id at 132

Therefore, admitting but not playing is an error. The effects of error are simply hard to measure. It will always result in fundamental unfairness. Certainly, abuse-of-discretion or harmless error standard of review was not appropriate. It is Petitioner's position that a *de novo* review ^{is} appropriate standard under the circumstances.

130 S.Ct. 2683 (2010)

B.) PLAYING OF THE RECORDING WAS A CRITICAL 'STAGE OF THE TRIAL'

In Gagnon and Snyder V. Massachusetts 291 US 97 (1934) the Court came on the heels of defining the confines of "Stage of the trial". In Snyder, the contested issue was the jury's visit to the scene of the crime to absorb it in detail, so as to better understand the evidence presented during the stage of the trial. The accused there was excluded from accompanying the jurors during the view, Even-though he was present at every stage of the proceeding in the Court. Id at 119. The Court reiterated that "[a] leading principle that pervades the entire law of criminal procedure is that after indictment found, nothing shall be done in the absence of the Prisoner." Id at 129. As the cases cited in n.16 and n.23 the right of presence at every step in the trial, whether it be during the giving of oral testimony, the submission of a document, the presentation of physical exhibit, the argument of Counsel, the charge of the Court, or the rendition of the verdict, is critical and inviolate.

C.) THE QUESTIONS RAISED IN THIS ARE
IMPORTANT AND UNRESOLVED.

The Tenth Circuit has decided a federal question in a way in conflict with the applicable decisions of the court is a firm basis for granting certiorari in this case:

- (i) The Tenth circuit has made a highly questionable ruling on the application of Defendants presence during a critical 'stage of the trial.' The question whether playing of recording is a 'stage of the trial' should be answered directly by this Court.
- (ii) The petition presents this Court a more fundamental question for review -- whether playing of the entire recording contemporaneously, so as to gauge its impact, and allay its concerns was a process that was due;

The decisions of the Tenth Circuit is sufficiently unusual considering the trial record makes legal basis sufficient for review. It is thus important for this Court to reiterate the principles of Defendants presence at all stage of the trial.

CONCLUSION

The judgment below is a unique departure from the Principles of fairness consistently upheld by this Court, which require that a conviction obtained in an accused's absence from the critical stage of the trial be set aside. As such it represents a breach in the wall erected by the Fifth and Sixth Amendment to the Constitution. These fundamental rights were designed to protect an accused, Public trust in the judicial proceedings, and the integrity of the Verdict.

This Petition for a writ of certiorari should therefore, be GRANTED.

Respectfully Submitted

Stetson Bruce

By: STETSON BRUCE

Date: 5-11-2025