Confronting Rape Shield

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In 1974, this Department, with Tony Wilkert as its director, was known as the Office of Public Defender. A "comix" was produced to explain its role. In the course of the next 4 issues, we will reprint it to remind ourselves of our important mission.

The Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601

The Video Debate Rages:
Chief Justice Stephens responds to Judge Lester

Also In This Issue: Schizophrenia
The issue before the Court was whether Springs' waiver of his Fifth Amendment rights was invalid since the police refrained from telling him at his initial interrogation that they intended to use his statement against him in court. The Court held that it was not. "[W]e hold that a suspect's awareness of all possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect, voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege, [Justice] Marshall and [Justice] Blackmun dissented because on their view "a suspect's decision to waive his Fifth Amendment privilege will necessarily be influenced by his awareness of the scope and seriousness of the matters under investigation."

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LEXINGTON HERALD-LEADER
Saturday, January 24, 1987

6th Amendment outweights desire to protect children

Kentucky Attorney General David Armstrong has gone on the offensive against a law that his office says it is improper to allow alleged child abusers to cross-examine accusers in most pending burglary cases in Kentucky. Armstrong is not seeking to have the law declared unconstitutional; his has legal reasoning doesn't seem sound. Armstrong's office suit is challenging the law in Bredesen v. Kentucky, which involves a 1985 conviction of a man accused of sexually abusing two girls.

The case from Hardin County has raised the same constitutional problems that beset the Borden case. In that case Armstrong's office said the law prevents the defense from having the benefit of cross-examination by a defendant who is the alleged perpetrator of child abuse. Instead, Armstrong said the law prevents the defense from being able to present evidence or argument in court to show that the alleged perpetrator is not a credible witness, which is a constitutional problem.

"The sixth amendment and subsection of the concept of the Bill of Rights," argued Armstrong, "require the defense to present evidence that the alleged perpetrator of child abuse is not a credible witness."

The Director of the Office of Child Abuse and Neglect, Jon Cummins, has spoken to the issue. "We have no problem with a child abuser testifying. We have no problem with a child abuser cross-examining a witness. We have no problem with a child abuser being questioned by the defense. We have no problem with a child abuser being questioned by the prosecution. But we do have a problem with a child abuser being allowed to testify in court."

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The issue before the Court in Martin was whether Ohio could place the burden of proving her defense of self-protection at trial for "aggravated murder." The issue arose because of a significant "overreach" in Ohio's definitions of aggravated murder and self-protection. A conviction of aggravated murder required that the accused have acted "purposely," and with prior calculation and design," while a finding of self-protection required that the accused not have created the situation resulting in the death and that she believed she was in "imminent danger of death or great bodily harm." Proof of the self-protection defense would thus effectively negate a finding of the mental element of the aggravated murder charge, in Patterson v. New York, 432 U.S. 197 (1977), the Court held that a defendant may be required to prove an affirmative defense if the affirmative defense does not serve to negate any element of the offenses with which she was charged," Justice Powell, Brennan, Marshall, and Blackmun dissented.

Linda Vest
Assistant Public Advocate
Appalate Branch
(502) 304-5234

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Post-Conviction
Law and Comment

Confronting Rape Shield

1. Introduction

As a woman I applaud Kentucky's passage of a rape shield law; as a criminal defense attorney I explore its weaknesses. What was once a humiliating experience for the victim in a sex offense is now an unnecessary denial of a defendant's right to present an effective defense.

Rape shield was born of Victorian morality and an abusive criminal justice system that put the victim on trial instead of the defendant. Often, the complaining witness was forced to defend attacks on her chastity as her sex life was paraded before the jury by a defendant attempting to prove she consented. Such evidence was deemed relevant by the specious logic that if she consented once, she must have consented again, and if she didn't consent, she must have been asking for it. Historically, in Kentucky as in most states, evidence of a rape victim's prior sexual history was automatically admissible at trial on the issue of consent. Moreover, such evidence could be proved by either reputation or specific acts.

On the other hand, in the past the stakes were also higher for those accused of rape. Not only was there a danger of false accusations, but in many instances the death penalty could be imposed. Obviously, in our sexually active society the old rationale can no longer be justified; consent to sexual relations with partners of one's choice is not an indication of whether the complaining witness would consent to sex with the defendant. In response to this need for reform and our changing society, most states passed rape shield laws that limit or prohibit a defendant's ability to present to the jury, evidence of the victim's past sexual history with third parties. Now under Kentucky law, such evidence is automatically inadmissible solely because it involves a sex offense instead of some other crime, instead of dealing with the abuses engendered by unbridled judicial discretion, we are faced with an inflimsible legislative mandate that deprives the trial judge of all discretion.

The Kentucky legislature, in its zeal to protect the victims of sex offenses, enacted a statute that absolutely prevents the defense from presenting "sexual conduct and habits" to the jury. The Kentucky law does not contain such a blanket exclusion that fails to acknowledge the rights of persons from being deprived of their rights to confront witnesses, and to compel testimony, and to do so, present evidence vital to his defense.
The boundaries of Kentucky's rape shield law must be challenged. The constitutional lines need to be drawn and defined, while the statute may be facially constitutional. Smith v. Smith, supra. There will come a time when the statute is unconstitutional in its application. See State v. Howard, N.H., 426. At that time, the law will fail to correctly balance the competing interests of the rape victim and the accused.

This article will attempt to provide a format for analyzing and evaluating the constitutional dimensions that inevitably will arise under the rape shield statute. The examining of the constitutional requirements of the sixth amendment and focusing on the purpose for which prior sexual history is offered by the defendant, one can anticipate those instances where the statute must yield to the constitution.

II. Statutory Mechanics

To date, over 46 jurisdictions have enacted rape shield laws that eliminate the traditional rule of automatic admissibility. However, the laws vary in their substantive and procedural provisions. Of these, approximately 30 jurisdictions allow the defendant to show in a specific case, at an open hearing before the trial judge, that such evidence is relevant and admissible. Tennessee and Bocchino, Rape Victim Shield Laws in the Sixth Amendment, 128 U.Pa.L.Rev. 544 (1969). Nevertheless, the Kentucky legislature has enacted the most restrictive type of shield statute, 16.

The Kentucky statute applies to all sex offenses, including attempts and conspiracies, except for incest, it absolutely prohibits the introduction of the prior "sexual conduct or habits" of the complaining witness in the form of reputation or specific acts with parties other than the defendant. KRS 510.145; Smith v. Smith, supra.

The only two exceptions to this rule of general inadmissibility are: "evidence of the complaining witness' prior sexual conduct or habits with the defendant; and "evidence directly pertaining to the act on which the prosecution is based," KRS 510.145(3). Even in this situation, an offer of such proof requires the trial judge to determine the relevancy of the evidence and the admissibility of its admission. Accordingly, at least two years prior to trial, the defendant must alert the court, by a written motion, that there will be an offer of evidence of the prosecuting witness' prior sexual history. Then, in order to ascertain the admissibility of the evidence, the court must hold an in camera hearing to determine that "the offered proof is relevant and that its probative value outweighs its inflammatory or prejudicial nature," KRS 510.145(3)(b).

While it is clear that relevant evidence of a prior sexual relationship between the defendant and the complaining witness is admissible on the issue of consent, Davis v. Mississippi, 394 U.S. 462 (1969), and the constitutional right to present a defense must be a full and effective defense. Together, the two clauses guarantee the defendant's right to present evidence of a prior defense but the right of cross-examination is greater than "the integrity of the fact-finding process," Burger v. California, 395 U.S. 314, 315 (1969). Thus, these constitutional rights are not absolute. Chambers v. Mississippi, 410 U.S. 284 (1973). It is a fundamental concept of law that states must be able to introduce their own rules of evidence, and even exclude relevant evidence to insure fairness and reliability in the fact-finding process when presenting guilt or innocence, id., at 302.

However, regardless of the general legislative power, the state may not infringe upon the constitutional rights of a defendant, Kentucky's rape shield law, in its absolute exclusion of the complaining witness' prior sexual history with third parties, directly implicates a defendant's sixth amendment rights to offer evidence that is both critical and reliable. The defendant was convicted of murdering a police officer. However, another person had confessed this murder to the investigating police. In fact, two state courts noted that such blanket exclusion conflicts with a defendant's constitutional right to present a defense. By denying the defendant the ability to pursue a certain line of questioning on cross-examination, or to elicit certain testimony from his own witnesses, the Kentucky rape shield law casts a dark shadow over the defendant's right to confront his accuser. In fact, two state courts noted that such blanket exclusion conflicts with a defendant's constitutional right to present a defense the defendant is not afforded an opportunity to establish the relevance of the preferred evidence at trial. State v. Howard, supra; State v. Delawer, Me. App., 344 A.2d 446 (1973).

Since the ability of the accused to present relevant evidence is grounded in a vital right, a federal constitutional standard must be applied to resolve the inevitable conflict between the evidentiary rules and state policies that exclude such evidence and the defendant's right to present a defense. The United States Supreme Court developed such a due process balancing test in Chambers v. Mississippi, supra, and applied it in Davis v. Alaska, 415 U.S. 508 (1974), and United States v. Nixon, 418 U.S. 683 (1984). This test holds the state's interest in excluding the evidence against a defendant's constitutional right to introduce such evidence, if the state interest supporting the evidentiary exclusion does not outweigh the defendant's need for the evidence or the probabilistic value of the evidence excluded, it cannot be reconciled with the constitutional requirements of the sixth amendment and a fair trial. Therefore, the state policy excluding the evidence must give way to the defendant's right to introduce it.

In Chambers v. Mississippi, supra, the Supreme Court held that Mississippi's "vagueness and hearsay rules must yield to a defendant's due process rights where the defendant has demonstrated that the evidence is both critical and reliable. Chambers was convicted of murdering a police officer. However, another person had confessed this murder to the investigating police. In fact, two state courts noted that such blanket exclusion conflicts with a defendant's constitutional right to present a defense. By denying the defendant the ability to pursue a certain line of questioning on cross-examination, or to elicit certain testimony from his own witnesses, the Kentucky rape shield law casts a dark shadow over the defendant's right to confront his accuser. In fact, two state courts noted that such blanket exclusion conflicts with a defendant's constitutional right to present a defense the defendant is not afforded an opportunity to establish the relevance of the preferred evidence at trial. State v. Howard, supra; State v. Delawer, Me. App., 344 A.2d 446 (1973).

Since the ability of the accused to present relevant evidence is grounded in a vital right, a federal constitutional standard must be applied to resolve the inevitable conflict between the evidentiary rules and state policies that exclude such evidence and the defendant's right to present a defense. The United States Supreme Court reversed Chambers' conviction finding a sixth amendment violation. The Court held that the state had placed the "integrity of the fact-finding process in jeopardy," Davis v. Alaska, 415 U.S. 508 (1974), and United States v. Nixon, 418 U.S. 683 (1984). This test holds the state's interest in excluding the evidence against a defendant's constitutional right to introduce such evidence, if the state interest supporting the evidentiary exclusion does not outweigh the defendant's need for the evidence or the probabilistic value of the evidence excluded, it cannot be reconciled with the constitutional requirements of the sixth amendment and a fair trial. Therefore, the state policy excluding the evidence must give way to the defendant's right to introduce it.

In Davis v. Alaska, supra, the Supreme Court held that the right of confrontation was paramount to the state's policy of shielding and protecting a juvenile offender. Alaska had enacted a juvenile shield statute that excluded evidence of a juvenile's criminal record in any proceeding. In Davis, the state's only identification witness was a juvenile who was on probation at the time the defendant was accused of committing certain crimes. Even though some of the evidence, such as the juvenile's poor school record, the juvenile's house, the defendant was prevented from cross-examining the juvenile in relation to his probationary status by the statutory juvenile shield law. The Court found that the evidence was relevant and admissible. In Davis, the defendant's confessor was prohibited from testifying in the confessor further, because of the common law "hearsay rule that an accused may not impeach his own witness." Moreover, the Mississippi hearsay rule prohibited Chambers from introducing the testimony of three civilian witnesses who had heard the confessor orally admit to the killing.

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We conclude that the state's desire that the juror hear and deliberate on the evidence without any necessity to testify free from embarrassment and with his reputation unblemished must fall before the right of the litigant to have his day in court. The policy to which the state is committed is constitutionally re-
stRICT that effort.

While in Chambers the state in-
terests were advanced by a common law rule of evidence, and in Davis a statutory rule, in United States v. Nixon, supra, the interest was constitutionally based.

In United States v. Nixon, the President refused to deliver tapes sought by the Watergate prosecutor by asserting that they were privileged presidential communications. The Supreme Court, in resolving this constitutional showdown, weighed the presidential privilege against the Watergate defendants' Sixth Amendment right to confrontation and compulsory process. Id., at 711, The Supreme Court held that the President's 'weighty' interests in confidentiality must yield to the rights of the Watergate defendants.

Clearly, in most cases, evidence of a complaining witness' prior sexual history with third parties will be irrelevant, but not in every case. evolving case law the law is that item of evidence—an evidentiary fact—is relevant when it renders a material ultimate fact more probable or less probable than it would be without the item. R. Lawson, The Kansas Evidence Law Handbook, §2.20 (1984). See also O'Brian v. Massey Ferguson, Inc., Ky., 416 S.W.2d 891, 893 (1967). It is impossible to determine statu-
tory whether or not the Kentucky rape shield law is constitutional.

With these cases as constitutional foundation, one must question whether or not the Kentucky rape shield statute violates a defendant's right to cross-examine witnesses and compel testimony. Such an analysis requires first, the threshold determination of whether the evidence offered by the defendant is relevant, and second, a balancing of the defendant's need for the evidence in a specific fact situation versus the state interest in excluding the evidence.

Thus, Davis stands for the general proposition that a defendant has a right under the confrontation clause to expose the bias and interests of a witness, and that a state court must constitutionally re-
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terests were advanced by a common law rule of evidence, and in Davis a statutory rule, in United States v. Nixon, supra, the interest was constitutionally based.
Kentucky courts have traditionally held that a defendant accused of statutory rape must be afforded the right to contest the charge. The Howard court found the statute unconstitutional in its application. The court stated:

"...Strictly construed, our state rape shield statute precludes an accused from making any showing that the victim's prior sexual activity has a bearing on any of these factors."

The Howard court found the statute constitutional on its face, but unconstitutional in its application.

These are only two examples where the constitutionality of Kentucky's rape shield law is subject to challenge. By focusing on the purpose for which the evidence is offered, one establishes the relevancy of the testimony as well as probative value or potential prejudice to the truth finding process itself. Moreover, by demanding an in camera hearing before the trial court, on evidence automatically excluded by the shield statute, one can set the stage for appellate review on issues with great constitutional implications.

V. Conclusion

As a general proposition, the frequency of the complaining witness' prior sexual experience does not normally show a tendency to consent or an inability to be truthful. Nevertheless, the Kentucky rape shield law must be construed in a manner that does not prevent the introduction of evidence of the prosecuting witness' sexual relations with third parties. The Kentucky courts must be given the opportunity to construe the statute so as to uphold the constitutional rights of the defendant while creating the least possible interference with the legislative purpose reflected in it. This can be done by utilizing traditional relevancy analysis, i.e., whether the offered evidence makes the truth or falsity of the disputed fact more or less likely. If the evidence is relevant, the Davis v. Alaska, supra, balancing test must be employed to weigh the state's interest that rape shield was designed to protect against the probative value of the excluded evidence. We must continually question the statute's failure to provide the defendant with a procedural mechanism or opportunity to demonstrate before the trial judge that due process requires the admission of prior sexual history evidence because the probative value in this case outweighs its prejudicial impact on the complaining witness and the jury. Unless a purpose is established by the Kentucky courts, the sixth amendment rights of a criminal defendant accused of a sex crime will always be at risk. In narrowly framing the issue to the trial judge, through a written motion, and requesting an in camera hearing of such evidence, we can preserve for appellate review the automatic exclusion of that evidence that could change the outcome of the fact-finding process.

The Sixth Circuit held that the right to be present at trial, under the Constitution and federal rules, was not violated by the exclusion of the defendants and their counsel from the in camera hearing in which the prosecution explained its peremptory challenges. The Court stated that once the defense had established a prima facie case of racial motivation sufficient for the trial court to make inquiry of the prosecution, there was nothing more for the defense to do and their participation was no longer necessary for the trial court to make its determination.

The Sixth Circuit limited its decision to this case alone and expressly declined to establish general procedures to be followed when a Batson challenge arises.

In United States v. Davis, the Sixth Circuit highlights the importance of this case in the context of peremptory challenges. Counsel for one of three jointly tried co-defendants experienced an unexpected scheduling conflict during the presentation of the prosecution's case. As a result of the conflict, counsel was unable to cross-examine the prosecution's first witness (the victim) but informed the trial court he would be satisfied with any cross-examination conducted by co-defendant's counsel. The client's objection to proceeding in her counsel's absence and her request for a new attorney were denied. The Sixth Circuit held that defense counsel's absence from the trial proceedings was not subject to a harmless error analysis.

6th Circuit Highlights

BATSON HEARINGS

BLIND STrike PEREMPTORIES

The 6th Circuit found no Sixth Amendment violation in the blind strike method of exercising peremptory challenges in United States v. Mosley, which held that defense and government's use of peremptory challenges to remove black jurors. When the defense established a prima facie case of racially motivated exclusion of blacks from the jury panel, the trial court allowed the prosecution to explain the reasons for its exercise of the challenges in an in camera hearing. After the hearing, the court concluded that the prosecution was justified in exercising its challenges but would not disclose on the record what transpired during the hearing.