Confronting Rape Shield

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Confronting Rape Shield

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In 1974, the Department, with Tony Wholton 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 Advocate
Vol. 9 No. 3 A Bi-Monthly Publication of the DPA
April, 1987

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

Also In This Issue: Schizophrenia
after again receiving and waiving Miranda rights.

The issue before the Court was whether Spring's waiver of his Fifth Amendment rights was invalid since the police refrained from telling him at his initial interrogation that they intended to interrogate him about the murder. The Court held that it was not. "We 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 Brennan dissented on the basis that "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."

BURDEN OF PROOF
Martin v. Ohio
40 Cr. 3297
(February 25, 1987)

The issue before the Court in Martin was whether Ohio could place the burden of proving her defense of self-protection at her trial for "aggravated murder," the issue arose because former Governor's order in Ohio's definitions of aggravated murder and self-protection. A conviction of aggravated murder required that the accused have acted "purposefully, 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 fact which the state must prove in order to proceed with murder." The majority in Martin concluded that the above language in Patterson did not benefit because the state court's instructions "did not require Mrs. Martin to disprove any element of the offense with which she was charged," Justice Powell, Brennan, Marshall, and Blackmun dissented.

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(502) 364-5234

LEXINGTON HERALD-LEADER
Saturday, January 24, 1987

6th Amendment outweights desire to protect children

Kentucky Attorney General David Armstrong has gone so far as to defend the state's position that defendants who confess to child abuse during interrogation may have their confessions suppressed because their accusers are minors with potential hearing loss. While Armstrong has conceded that confessions obtained illegally are inadmissible, he maintains that defendants who are accused of abusing children have no right to self-incrimination because their legal reasoning doesn't seem sound.

Armstrong is involved in a lawsuit aimed at exposing the state's "shameful" conduct. The case involves 28 criminal cases of a accused of sexually abusing two girls. The state's Attorney General, Armstrong, refused to dismiss the case because his state's laws prevent the prosecution of children under the age of 12.

Armstrong contends that since the defendant was able to concentrate his attention on the sexual abuse of the children, he should be entitled to a defense based on the "four corners" of the U.S. Constitution.

One of those rights is outlined in the U.S. Constitution which says, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The other is the right to self-incrimination which is established in Article III, Section 2 of the U.S. Constitution.

Armstrong claims that the defendant's right to self-incrimination is protected by the federal and state Constitutions. He says that the state's laws are based on a belief that the state has no right to protect the rights of children who have been sexually abused.

The state's laws have been interpreted by Armstrong to mean that the state is not required to protect the rights of children who have been sexually abused. Armstrong has also defended the state's right to protect the rights of children who have been sexually abused.

Armstrong contends that the state is entitled to protect the rights of children who have been sexually abused. Armstrong believes that the state has a duty to protect the rights of children who have been sexually abused.

One of the reasons why Armstrong believes that the state has a duty to protect the rights of children who have been sexually abused is that the state is responsible for the care and custody of the children who have been sexually abused. Armstrong believes that the state has a duty to protect the rights of children who have been sexually abused.

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Justices M arsha ll and Brennan

The Issue

"It is a reasonable inquiry for the jury to
consider whether the state has the necessary
evidence to prove the defendant's guilt.

Jury Selection
Institute

Place: Galveston, TX

Faculty:

Cathy E. Bennett, Houston, TX
John E. Ackerman, Houston, TX
Fudge Johnson, Huntsville, AL
Anabelle V. Hall, Revon, NV
Robert S. Kall, University City, MO
Garvin Isaac, Oklahoma City, OK
Tony Natalie, West Palm Beach, FL
Robert E. Rose, Jr., Chevann, WV
Marcia E. Boon, Houston, TX
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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 per­raded before the jury by a defendant attempting to prove she con­sent­ed. What is evidence deemed relevant by the specious logic that if there is no consent there must be consen­tent 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 states 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 inflexible 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 bars evidence of a rape victim's sexual conduct and habits" at a trial involving a sex offense. The question is whether such evidence is relevant in any instance; does the state's passage of a rape shield law prevent the defendant from introducing such evidence; and, whether that exclu­sion is constitutional.

The legislation simply cannot foreclose or list all of the circumstances that may arise in the courtroom given the possibilities of human conduct. The legislature cannot predicate by statute, the fact specific question of what evidence is relevant and admissible. Eventually, the statute will violate a defendant's due process right to confront witnesses and to compel testimony, and in doing 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 supra. There will come a time when it is unconstitutional in its application, see State v. Howard, 426 A.2d 251 (Pa. 1981). Although 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 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(5)(b). Even in this situation, an offer of such proof requires the trial judge to determine the relevancy of the evidence to the case at bar. Accordingly, at least two days 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(5)(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, Bixler v. Commonwealth, Ky. App. 712 S.W.2d 306 (1985), Kentucky also allows the admission of relevant evidence "directly pertaining to the act on which the prosecution is based." The exact meaning of this broad language is unclear, and it is not clear if the balance of other rules of evidence, and even relevant evidence to insure fairness and reliability in the fact-finding process when ascertaining guilt or innocence, is 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 logically relevant and necessary to the 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 these important state interests. In fact, two state courts noted that such blanket exclusion conflicts with a defendant's constitutional right to present a defense. In Chambers v. Mississippi, supra, the Supreme Court held that Mississippi's "pervasive and hearsay rules must yield to a defendant's need to present defense process rights where the defendant has demonstrated that the evidence is both crucial and reliable. Chambers was convicted of murdering a police officer. However, another person had confessed this murder to the police. The defendant refused to call the confessors to the stand forcing Chambers to call him in defense. On direct examination, the witness admitted confessing the crime to the police, but on cross-examination, the witness denied having confessed. The Court held that the defendant's Sixth Amendment rights were violated in the absence of cross-examination of the witness by the defendant who was entitled to present evidence against him. Pointer v. Texas, 360 U.S. 490 (1959)

The right of a defendant to present evidence of the prior sexual history of his own witness is grounded in the Sixth Amendment. The constitutional mechanisms available to the defendant to present such evidence are cross-examination of the witnesses against him, Pointer v. Texas, 360 U.S. 490 (1959), and the right to call witnesses in his own behalf. This right to compel testimony encompasses not only the subpoena power, but the right to present defense testimony, Washington v. Texas, 388 U.S. 14, 23 (1967).

The underlying aim of these constitutional safeguards is to guarantee "integrity of the fact-finding process," Burger v. California, 395 U.S. 314, 315 (1969). Thus, together the two clauses guarantee the defendant's right to present a defense, and the right to a full and effective defense.

These constitutional rights are not absolute, Chambers v. Mississippi, 410 U.S. 284 (1973). It is a fundamental concept of law that states must establish their own rules of evidence, and even relevant evidence to insure fairness and reliability in the fact-finding process when ascertaining guilt or innocence, is at 302.

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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.

**IV. Due Process Balancing and Rape Shield**

Framed in the context of the Chambers line of cases, the question becomes whether or not the prior sexual history of the complaining witness may ever be probative of an issue that is material to determining the guilt of a defendant charged with a sex crime. Clearly, in most cases, evidence of a complaining witness' prior sexual history with third parties will be irrelevant, but not in every case. See, e.g., Commonwealth v. Farnham, 382 Mass. 441 (1980). Similarly, making such evidence admissible on the ground that it is relevant to whether the complaining witness consented to a sex act with the accused, after determining that such evidence is relevant and would aid in the fact-finding process, one must look to the reason for which the evidence is offered to the defendant, for the defendant's right to present a full defense overrides the state's policy of excluding such evidence.

The articulated policies that support the rape shield law are many. The law protects the dignity of rape victims, and thus, encourages the reporting and prosecution of sex crimes. Furthermore, the shield law protects victims from embarrassment and humiliation, in other words, the rape shield law protects the privacy of personal privacy in the area of consensual sexual activity. Similarly, the statute calms the truth-telling fears of the witness who is, in the absence of evidence that is unduly inflammatory and prejudicial, it has been held, that juries react emotionally to evidence of a complaining witness' past sexual history. Such evidence distinguishes the jury from determining whether the prosecution has proved the crime because the evidence prejudices the jurors toward the prosecuting witness. The Constitution requires, the one accused of the crime.

In Davis v. Alaska, supra, the Supreme Court recognized that the juvenile shield law was a valid legislative statement of public policy. However, the policy was forced to yield in the face of a more compelling policy, the defendant's right of cross-examination to show possible biases, prejudices, or ulterior motives. Indeed, under Davis, the state sufficiently protects, as the Constitution requires, the one accused of the crime.

It rules of evidence are to be uniformly applied, what distinguishes a pattern of promiscuous sexual conduct on the part of the prosecuting witness, from the common law doctrine that allows the introduction, against the defendant, of prior bad acts or crimes in exclusion must be sufficiently compelling and probative, and the value of the offered evidence slight, to justify the exclusion.

One can imagine several fact patterns where the prior sexual history of the complaining witness with third parties would be crucial at trial. One can easily construct scenarios of evidence of exclusion of such evidence on constitutional grounds. A couple of examples illustrate this point. For instance, constitutional questions arise where there is evidence of a pattern of promiscuous conduct or prostitution under similar circumstances to the case at hand. Other constitutional questions arise when the defendant seeks to admit the witness' prior sexual history to show bias, prejudice, or undue motive that would affect the credibility of the witness' testimony that she did not consent. See State v. Deladur, supra.

Several rape shield statutes in other states recognize as relevant, the evidence of prostitution or the prior sexual conduct. These statutes admit such testimony following an in camera hearing to assess the probative value of the evidence versus its prejudicial effect. See Minn. Stat. Ann., § 609.347; Neb. Rev. Stat., § 56-259; Nev. Rev. Stat., § 123; and Fla. Stat., § 794.010(2). Indeed, a Minnesota case applied the common evidentiary standard of "common scheme or plan" in a sex case, State v. Hill, Minn., 244 N.W.2d 731 (1977).

In Pennsylvania, the Pennsylvania Supreme Court examined the issue of evidence of prostitution by the complaining witness, or other testimony to show the witness had engaged in sexual practices with persons similar to the defendant under similar circumstances. This distinction cannot be constitutionally justified. Even when one examines the state's interest in protecting a sex victim by keeping potentially prejudicial information from the jury, the defendant's general interest cannot prevail where the defendant's need in the evidence is specific and legitimate. Davis v. Alaska, supra; Dailey v. Mississippi, supra.

Another example where the rape shield law clearly effectively a defendant's right to present probative evidence to the jury is promised upon the holding in Davis v. Alaska, supra. Davis held that the confrontation clause was violated by Alaska's refusal to permit the defendant to introduce evidence of a possible sexual witness "to show the existence of possible bias and prejudice."
eral and may always be proved to enable the jury to estimate credibility, it may be proved by the witness' own testimony upon cross-examination or by independent evidence, id at 285.

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 relevance 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.

Y, 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 constitutionally challenged in its absolute prohibition 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 procedure 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 prima facie case 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 review as an issue of the relevance of such evidence, we can preserve for appellate review the automatic exclusion of evidence that could change the outcome of the factfinding process.

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6th Circuit Highlights

In United States v. Davis, 40 Cr.L. 2358, 16 S.C.R. 3, 8 (1987), the Sixth Circuit reviewed the procedure one federal trial court followed in dealing with a Batson challenge. During voir dire, defense counsel objected to the 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.

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.

The 6th Circuit found no Sixth Amendment violation in the blind strike method of exercising peremptory challenges in United States v. Nosely, 40 Cr.L. 2364, 16 S.C.R. 3, 11 (1987). Under the blind strike method, both the defense and the government exercise their peremptory challenges simultaneously without benefit of knowing who the other side is striking. The Court noted that since the true nature of the peremptory challenge right is to reject rather than select potential jurors, the mere simultaneous exercise of challenges does not impair the accused's rights under the Sixth Amendment.

ABSENCE OF COUNSEL

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 the defendant's counsel. The client's objection to proceeding in the absence of counsel 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.

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