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Confronting Rape Shield

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In 1974, this Department, with Tony Wilhoit 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
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 use his statements against him in the murder. The Court held that it was not. "I think hold that a suspect's awareness of all possible subjects of questioning in advance of interroga
tion is not relevant to determining whether the suspect, voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege, Justice Marshall and Brennan dissented because of the view that "a suspect's decision to waive his Fifth Amendment privilege will necessarily be influenced by his awareness of the scope and serious
ess of the matters under investigation."

**LEXINGTON HERALD-LEADER**

Saturday, January 24, 1987

AS

6th Amendment outstretches desire to protect children

Kentucky Attorney General David Armstrong has gone on record as saying that the 6th Amendment to the Constitution gives everyone in society a desire to protect children. He said that this desire is so natural that everyone knows he is right and that no one would argue against him.

"The Sixth Amendment, as we read it in Kentucky or the Constitution in any other state, makes no dis
tinction between preliminary hearings and trials. The rights of the accused are protected in the hearing, and they are protected in the trial. The only difference is that the trial is made in public and the hearing is made in private."

Armstrong contends that since the defendant was able to conduct his hearing in secret, he was entitled to constitutional rights. More than 30 states have filed briefs with the Supreme Court in support of Armstrong's argument, which Armstrong sees as giving federal support for pro
tecting victims of child abuse.

That may be true, and we would not argue the argument that these victims are less entitled to the rights that were denied them in the past. But the argument is still compelling and should prevail in this case. We should weigh the rights of public safety against the rights of child abuse victims. It is not enough to say that American citizens are entitled to these rights under the U.S. Constitution.
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, 424 S.W.2d 242 (Ky. 1967). This article will attempt to provide a format for analyzing and evaluating the constitutional dimensions that inevitably will arise under the rape shield statute. Examining 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 45 jurisdictions have enacted rape shield laws that eliminate the traditional rule of automatic admissibility. However, the law varies in breadth and procedural provisions. Of these, approximately 30 jurisdictions allow the defendant to show in a specific case, at an in camera hearing before the trial judge, that such evidence is relevant and necessary to the defense. In other words, the defendant can introduce relevant evidence which may arise in any given factual situation on the admissibility of prior sexual acts of the prosecuting witness. 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(1)(b). Even in this situation, an offer of such proof requires the trial judge to determine the relevancy of the evidence to the case in question. 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(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, KRS 712.5, W.2d 356 (1965), 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 essential that its boundaries must be creatively challenged. Under this exception, the defendant can produce evidence that another person committed the crime or that as a result of the act with another, the complaining witness suffered trauma, is diagnosed as a pregnant woman. In other words, the defendant can introduce relevant evidence which explains a physical fact which is in evidence at the trial. Unfortunately, these two exceptions do not cure the constitutional deficiencies that may arise in any given factual situation on the admissibility of prior sexual acts of the prosecuting witness.

III. A Defendant's Sixth Amendment Right to Present Relevant, Non-Presumtional Evidence.

The right of a defendant to present evidence of the prior sexual history of his or her alleged victim's sex life is grounded in the Sixth Amendment. The constitutional mechanics available to the defendant to present such evidence are cross-examination of the witnesses against him, Pointer v. Texas, 360 U.S. 400, 404 (1960), 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 safeguards was to ensure that "the fact-finding process 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 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 may, in certain instances, enact rape statutes that are constitutional. The United States due process balancing test in Chambers v. Mississippi, supra, and its holding in Davis v. Alaska, 415 U.S. 308 (1974), as well as United States v. Nixon, 418 U.S. 683 (1984), test the state 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 probative 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 "relevance" and "hearsay" rules must yield to a defendant's due process rights where the defendant has demonstrated that the evidence in question is both critical and reliable. Chambers was convicted of murdering a police officer. However, another person had confessed this murder to the defendant, and at the time of the confession, the defendant refused to call the confessor 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 by the attorney for the government, Chambers was prohibited from cross-examining the confessor further, because of the common law "rule that a defendant 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.

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," in Davis v. Alaska, supra, and in Davis v. Alaska, 415 U.S. 308 (1974), although the Davis court held that the Sixth Amendment rights are not absolute, the Court ruled that the state policy favoring the admission of the evidence did not outweigh the defendant's need for such evidence and the probative value of the excluded evidence. Therefore, the Supreme Court reversed Chambers and held that the "state policy excluding the evidence must give way to the defendant's right to introduce it."
We conclude that the state's desire that the juror have a right under the confrontation clause to expose the bias and interests of a witness, and that a state court constitutionally restrict that effort.

While in Chambers the state interests 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 rights to confrontation and compulsory process. 418 U.S. at 711. The Supreme Court held that the President's 'weighty interests in confidentiality must yield' to the rights of the Watergate defendants.

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 guilt of a defendant charged with a sex crime. Certainly, there will be some cases where evidence of the complaining witness' past sexual experience will be relevant and probative of the outcome of the trial. However, the state also has an interest in protecting the defendant from false accusations by untrustworthy witnesses. In its about-face concern for the complaining witness, Kentuckiana's law fails to balance, as 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, this 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's sufficiently protect, as the Constitution requires, the one accused of the crime.

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 constitutionally restricts that effort.

The rights of the Watergate defendants were not at issue in Davis, but the balancing of the state's desire to keep official machineries secret and the individual's right to an open and fair trial is established in the intersection of these two principles. That balance should be similarly considered in the case of the accused's right to cross-examine witnesses to show bias and prejudice.

Examples illustrate this point. For instance, constitutional questions arise where there is evidence of a pattern of sexual misconduct. In such a case, if the only evidence produces an admission of such evidence on the issue of consent, the defendant's right to cross-examine the witness should be balanced. Similarly, the trial court must balance the right of the defendant in a rape case to cross-examine the complaining witness on bias and prejudice against the state's desire to keep personal privacy in the area of consensual sexual activity.

The state has an interest in protecting the complaining witness from false accusations. Yet, the state also has an interest in protecting the defendant from improper admissions of evidence. In its about-face concern for the complaining witness, Kentuckiana's law fails to balance the one accused of the crime.

While evidence of the past sexual behavior of the complaining witness may be relevant and probative of an issue that is material to determining guilt of a defendant charged with a sex crime, this 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.
tural 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.

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 rele-
ance of the testimony as well as
probativeness and potential preju-
dice 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
may set the stage for appellate
review on issues with great con-
stitutional implications.

V. Conclusion

As a general proposition, the
frequency of the complaining wit-
ness' prior sexual experience does
not normally show a tendency to
consent or an inability to be
truthful. Nevertheless, the Ken-
tucky rape shield law must be
considered to be constitutional
challenged in light of 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 inter-
ference with the legislative pur-
pose 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 continually
question the statute's failure to
provide the defendant with a pro-
dural mechanism or opportunity
to demonstrate before the trial judge
that due process requires the
admission of prior sexual history
where the claim of consent or
sexual experience are subject to
prior sexual history

6th Circuit Highlights

In United States v. Davis, 40 Cr.L. 2358, 16 S.C.R. 3,8
(1987), the 6th 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 re-
move black jurors. When the defense
established a prima facie case of ra-
cially 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 conclud-
ed 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.