Confronting Rape Shield

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In 1974, the Department, with Tony Wiltolt 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
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Frankfort, Kentucky 40601

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

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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 withhold from him the Miranda rights. The Court held that it was not. "M. hold that a suspect's awareness of all possible subjects of question- ing in advance of interrogation is not relevant to determining whether the suspect, voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege," Justice Marshall and Blackmun dissented because they felt "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 investiga- tion."
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 the law fails 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, 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 46 jurisdictions have enacted rape shield laws that eliminate the traditional rule of automatic admissibility. However, the law varies widely in its substantive 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 not probative of the defendant's guilt or bias. See Tannford and Bocchino, Rape Victims: Witness Protection Laws in the Sixth Amendment, 126 U.Pa.L.Rev. 344 (1968). Nevertheless, the Kentucky legislature has enacted the most restrictive type of shield statute, 10.

The Kentucky statute applies to all sexual 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 and the admissibility of its admission. 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, Bixler v. Commonwealth, Ky., App., 972 S.W.2d 566 (1998), 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 unclear if such evidence must be creatively challenged. Under this exception, the defendant can produce evidence that another person committed the crime or that as the result of the act with another, the complaining witness suffered trauma, is disabled or pregnant. 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-Presumptive Evidence.

The right of a defendant to present evidence of the prior sexual history of the complaining 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. 400, 404 (1959) and, the right to call witnesses in his own behalf. This right to compel testimony encompasses not only the substantive power but the right to present defense testimony, Washington v. Texas, 388 U.S. 14, 23 (1967). The underlying aim of these constitutional protections was greater than "integrity of the fact-finding process," Burger v. California, 385 U.S. 314, 315 (1969). Thus, together the two clauses guarantee the defendant the right to present a defense but a full and effective defense.

These constitutional rights are not absolute. Chambers v. Mississippi, 410 U.S. 284 (1973), is a fundamental concept of law that states must not abridge the admission of their own rules of evidence, and even extend relevant evidence to insure fairness and reliability in the fact-finding process when pertaining 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 right to present 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 the defendant's sixth amendment right to present evidence.

In fact, two state courts noted that such blanket exclusions conflict with a defendant's constitutional right to present a defense if the defendant isn't afforded an opportunity to establish the relevance of the proffered evidence at trial. State v. Howard, supra; State v. Delawer, Md., App., 344 A.2d 446 (1973). Since the ability of the accused to present relevant evidence is grounded in the sixth amendment, 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 Supreme Court developed such a due process balancing test in Chambers v. Mississippi, supra, and expanded it in Davis v. Alaska, 415 U.S. 508 (1974), and United States v. Nixon, 418 U.S. 683 (1984). This test balances 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 "incidental 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 police. The state refused to call the confession 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 defense attorney, the witness indicated that the confession was made "just to get him out of jail." Moreover, the Mississippi hearsay rule prohibited Chambers from introducing the testimony of three civilian witnesses who had heard the confessing of the defendant to the effects of 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 Chambers v. Mississippi, supra, and expanded it in Davis v. Alaska, 415 U.S. 508 (1974), and United States v. Nixon, 418 U.S. 683 (1984). This test balances 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 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 behavior. In other cases, the juvenile's house, the defendant was prevented from cross-examining the juvenile in relation to his confiscated probationary status by the statutory juvenile shield law. The Court found that the evidence was relevant and not protected, and indicated that the juvenile was biased, and had a motive to lie. Id. at 311. Although the court acknowledged the state's "legitimate and substantial interests" in juvenile rehabilitation, the Court held that the defendant's sixth amendment right to confront and cross-examine the witness was not outweighed by the identified state interests, id. in striking this balance the Court declared:
(We conclude that the state's desire that the juror have a right to speak with the defendant in a situation where the defendant's interests are merely collateral to the interests of the parties and the public is insufficient to overcome the second claim, that the right to speak with the defendant in a situation where the defendant's interests are merely collateral is a right protected by the Due Process Clause of the Fourteenth Amendment. The state's interest is merely a general interest in protecting the defendant against the possibility of a peremptory challenge based on the juror's belief that he or she has a conflict of interest. The second claim is therefore not covered by the list of state interests that are protected by the Due Process Clause under the Supreme Court's rationale in United States v. Butler, supra.)

Thus, Davis stands for the general proposition that a defendant has a right under the confrontation clause to have the assistance of counsel at a preliminary hearing. A defendant's right to have the assistance of counsel at the preliminary hearing is not a constitutional right, but it is a right that is protected by the Due Process Clause of the Fourteenth Amendment.

While in Chambers the state interests were advanced by a common law 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. id. at 71; The Supreme Court held that the President's "weighty" interests in confidentiality "must yield" to the rights of the Watergate defendants. id. The state's interest in protecting the President's interest was merely "general in nature," while the defendants' interests were "particular and central to the fair adjudication of a particular case in the administration of justice." id. 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

Clearly, in most cases, evidence of a complainant's prior sexual history with third parties will be irrelevant, but not in every case. For example, in United States v. Lawson, supra, the Supreme Court held that it is irrelevant to determine the guilt of a defendant charged with a sex crime. This is because the evidence is not probative of whether the defendant committed the crime charged. The evidence is also irrelevant because it is not probative of any other element of the crime. The Supreme Court noted that evidence of a complainant's prior sexual history with third parties is not probative of the defendant's guilt or innocence. The court also noted that the evidence is not probative of any other element of the crime charged. Therefore, the evidence is irrelevant and should be excluded.

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 not enough to allow the introduction of evidence of the defendant's prior sexual history. The court noted that the evidence was not probative of the defendant's guilt or innocence. The court also noted that the evidence was not probative of any other element of the crime charged. Therefore, the evidence is irrelevant and should be excluded.

In United States v. Nixon, supra, the Supreme Court held that the President's interest in confidentiality was constitutional. The court noted that the President's interest was protected by the Due Process Clause of the Fourteenth Amendment. The court also noted that the President's interest was protected by the Fifth Amendment. Therefore, the President's interest was protected by both constitutional provisions.

While evidence regarding the past sexual misconduct of the accused with third parties is admissible in many cases, the rape shield law absolutely bars the admission of such evidence as to the victim and third parties. Evidence of a complainant's past sexual conduct or prostitution under similar circumstances to the case at hand must be excluded. Other constitutional rules do not apply when the defendant seeks to admit the witness' prior sexual history to show bias, prejudice, or undue prejudice that would affect the credibility of the witness' testimony that she did not consent. See State v. Delpeter, supra.

Several rape shield statutes in other states recognize as relevant evidence of prostitution or the commission of other crimes.

In Davis v. Alaska, supra, the Supreme Court held that the state's right to cross-examine the victim's right to cross-examine the victim's prior sexual history is protected by the Kentucky Evidence Handbook, § 2.07 (1981); see also O'Brian v. Massey Ferguson, Inc., Ky., 408 S.W.2d 391 (1966), it is impossible to determine what facts are probative of the defendant's guilt or innocence. Therefore, the evidence should be excluded.

Several cases involving evidence of the victim's prior sexual history have been brought to the attention of the court. In each case, the court has held that the evidence should be excluded. In People v. Alhadeff, 685 N.W.2d 549 (1995), held:

Evidence of independent sexual acts between the accused and persons other than the victim are admissible if such acts are similar to that charged and not too remote in time provided the acts are relevant to prove intent, motive, or a common plan or pattern of activities. id. at 592.

Indeed, under Kentucky's statute, the defendant is prohibited from introducing evidence of prostitution or other crimes committed by the victim. This is because such evidence is said to be irrelevant to the issue of consent. However, it is clear that such evidence is relevant to the issue of consent.

Another example where the rape shield law clearly applies is in United States v. Nixon, supra. Davis held that the confrontation clause was violated by Alaska's refusal to permit the introduction of evidence of a complainant's prior sexual history "to show the existence of possible bias and prejudice."
In a later case, State v. Howard, N.H., 246 A.2d 457 (1968), the New Hampshire Supreme Court held that a defendant accused of statutory rape must be given the opportunity to demonstrate that due process requires the introduction of a victim's prior sexual history in a particular case, where the probative value outweighs the prejudicial effect on the complaining witness. Relying on Davis v. Alaska, supra, the Howard court stated:

In seeking out the truth in defending himself, the defendant must be afforded the right to present evidence and cross-examine witnesses in an effort to impeach or discredit their credibility, and to reveal possible motives, prejudices, or superior motives of the witnesses as they may relate directly to issues or personalities in the case. [Strongly 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.

Kentucky courts have also demonstrated a sensitivity to evidence which tends to establish bias, prejudice or motive to lie. In Parlay v. Commonwealth, Ky., 366 S.W.2d 458 (1955), the court observed:

The interests of a witness, either friendly or unfriendly, in the prosecution or in a party is not collaterally and may always be proved to enable the jury to estimate credibility, if it may be proved by the witness' own testimony upon cross-examination or by independent evidence.

See also Clark v. Commonwealth, Ky., 366 S.W.2d 458 (1955).

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.

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 so as to 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 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 proof of such 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, the trial judge, through his expert analysis of such evidence, we can preserve for appellate review the automatic exclusion of evidence that could change the outcome of the fact-finding process.

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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 defendant and their counsel from the in camera hearing in which the prosecution explained its peremptory challenges. The Court stated that under the circumstances 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.