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Once, Twice, Three Times a Victim: Why a Defendant in a Sexual Assault Case Has No Right to Compel Physical Examinations

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ONCE, TWICE, THREE TIMES A VICTIM: WHY A DEFENDANT IN A SEXUAL ASSAULT CASE HAS NO RIGHT TO COMPEL PHYSICAL EXAMINATIONS

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I. INTRODUCTION

Physical examinations of alleged victims "play a prominent role in many sex offense prosecutions."[1] Victims of sex offenses are ideally examined by medical personnel following the attack either for treatment or to preserve forensic evidence.[2] These examinations proceed with the consent of the victims or, in child cases, the consent of a parent or guardian. In an era of greater emphasis and education about sexual assault, victims are coming forward months and even years after the time of the sexual assault.[3] In delayed report cases, a physical examination of the victim has the potential to cause more harm than good; any evidence gathered from the victim could be attributed to normal variations, disease, or other natural sexual contact. The healing associated with the passage of time may remove any physical evidence of penetration and allow the defendant to argue the forensic evidence does not support the victim's claims.

Courts have grappled with the issue of the defendant's right to insist on an examination where the state has refused to pursue its own. *State ex rel. J.W. v. Knight*,[4] a case that "captured the attention of prosecutors across the country," brings the debate about these examinations and their propriety into sharper focus.[5] The trial court in *J.W.* ordered a fifteen-year-old female to undergo a gynecological examination to determine hymen injury at the request of her sibling defendant.[6] In *J.W.* the defendant sought the physical examination, in part, because there were no State findings to review.[7] Many defendants facing this same circumstance have asserted a due process right to have their own experts inspect the alleged victim for evidence.[8] Confusing the issue is the fact that the United States Supreme Court has never considered whether the Due Process

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1 Troy Andrew Eid, *A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims*, 57 U. CHI. L. REV. 873, 874 (1990) (arguing that under a Fourth Amendment analysis, defendants do not have a due process right to compel a physical examination).

2 *Id.* at 873.

3 *Id.* at 874. Cases where a victim comes forward months or years after the incident will be referred to as "delayed report" cases throughout this Note.

4 679 S.E.2d 617 (W. Va. 2009).

5 Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia at 5, *J.W. v. Knight*, 679 S.E.2d 617 (W. Va. 2009) (No. 09-191), 2009 WL 2491812. Prosecutors have a constitutional duty to disclose their physician's findings to the defense if they contain exculpatory evidence under the *Brady* doctrine.

6 To protect J.W.'s privacy as a minor sexual assault victim, she will be referred to as J.W. throughout this note and throughout the cases discussed herein.

7 Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5.

8 Eid, *supra* note 1, at 873.

Clause is broad enough to include these compulsory examinations.[9] Further, the Supreme Court has not spoken as to whether a victim in a criminal case has a privacy interest enabling the victim to lawfully refuse to submit to examination.

Some states, including West Virginia, have developed various methods for dealing with such requests.[10] States' methods for determining whether to compel a victim to undergo a physical examination at the behest of the defendant vary and, without direction from the Supreme Court, have served to confound rather than illuminate the issue.

This Note will examine the *J.W.* case to provide a factual and procedural background of a case in which the issue of court-ordered physical examination arose.[11] This will highlight that the issue is not simply an academic one; instead, it is an issue that affects both victims and defendants. The idea of compulsory physical examinations is of the utmost importance both to those accused of committing sexual offenses and the victims who courageously come forward. Of course, the defendant has a compelling need to find exculpatory evidence; but, many argue that "allowing compulsory examination[s] deters victims from reporting sex crimes."[12] Part II will explain how different states approach the issue, focusing on the three major ways in which states balance the different interests involved. These standards include the "compelling need" test, which West Virginia employs; the exculpatory evidence standard, a standard that in effect denies that a compulsory physical examination can ever be ordered by a defendant; and the material assistance approach, which is arguably the easiest standard to meet.

Part III will focus on the competing and conflicting interests defendants and victims confront. This includes delving into the limited evidentiary value that delayed physical examinations provide and touching briefly on the potential harm that a compulsory physical examination can inflict on a victim. Finally, Part IV will discuss whether the Supreme Court erred by denying certiorari in *J.W. v. Knight* and effectively denying victims a definitive answer on the bounds of their right to privacy.[13] This section will also briefly explain how Congress has helped the situation by passing the Violence Against Women Act (VAWA).[14] Because due process rights likely do not reach broadly enough to allow defendants to probe into a victim's body for evidence, I argue that the Supreme Court, by inaction, is allowing the non-constitutional right of a defendant to evidence to usurp the constitutional rights of victims.

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9 Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5.

10 *See generally* Eid, *supra* note 1, at 880.

11 J.W. v. Knight, 679 S.E.2d 617 (W. Va. 2009).

12 Oriana Mazza, *Re-examining Motions to Compel Psychological Evaluations of Sexual Assault Victims,* 82 ST. JOHN'S L. REV. 763, 771 (2008) (arguing that defendants' rights to compel psychological examinations of sexual assault victims should be limited).

13 J.W. v. Knight, 679 S.E.2d 617.

14 18 U.S.C. §§ 2241–2246 (1994).

II. BACKGROUND—THE J.W. CASE

A. *"More of a Cult than a Family"—The Curious Case of Jason Wilson*

The Wilsons were an unusual family, having moved twenty times in ten years.[15] Jason Wilson, the accused, was days away from completing basic training for the United States Army when he was arrested on charges of four counts of first degree sexual assault and one count of incest, allegedly occurring between February 2003 and May 2005.[16]

It all began when J.W., Jason's younger sister, was examined by Dr. Farid Hussain as part of the Mercer County Board of Education's "efforts to have 'J.W.' reintroduced to the formal education system over the objection of her father, who had been home-schooling [her]."[17] When asked by Dr. Hussain whether she had ever been molested or sexually abused, she replied that she had never been sexually abused.[18] Dr. Hussain referred J.W. to a licensed psychologist, Mr. Richmond, due to perceived signs of Attention Deficit Disorder.[19] During this evaluation, J.W.'s father reported that "she had told him that she had been sexually molested and abused by her brother, Jason . . . ."[20] During the subsequent visits with Mr. Richmond, J.W. described horrific stories from the family's home.[21]

When she was seven years old, J.W. was told "that she would be raped and killed and chopped up in pieces at some point in her life . . . ."[22] J.W. relayed stories of her then twelve-year-old brother Jason being sexually molested by a friend of their father's when they were living in Arizona.[23] J.W. was only seven when the alleged abuse by Jason occurred.[24] During these therapy visits, she also revealed "several touching incidents" by Jason, but denied that there was any sexual penetration or intercourse.[25] J.W.'s two young brothers were

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[15] Steve Korris, *Court asked to overturn order for exam of 15-year-old rape victim*, THE WEST VIRGINIA RECORD, May 1, 2009, http://www.wvrecord.com/news/218763-court-asked-to-overturn-order-for-exam-of-15-year-old-rape-victim.

[16] Brief in Opposition of Jason Wilson, Real Party in Interest, to Petition for a Writ of Certiorari at 2, *J.W. v. Knight*, 679 S.E.2d 617 (W. Va. 2009) (No. 09-191).

[17] *Id.*

[18] *Id.* It is not uncommon for sexual assault victims, especially children, to change their recollections of what has happened to them and to seemingly "flip-flop" on questions like this.

[19] *Id.*

[20] *Id.*

[21] *See id.* at 3.

[22] *Id.*

[23] Brief in Opposition of Jason Wilson, Real Party in Interest, to Petition for a Writ of Certiorari, *supra* note 16, at 3.

[24] *Id.*

[25] *Id.*

forced to grope their sister in instances their father called lessons.[26] Further, it came to light that J.W.'s father had physically abused all of the children when they were growing up.[27] This evidence later prompted Justice Margaret Workman of the West Virginia Supreme Court of Appeals to posit: "Why isn't [the father] prosecuted?"[28]

Mr. Richmond, as a mandatory reporter, referred the incidents to the appropriate authorities.[29] When J.W. was subsequently interviewed by Sergeant Clemons of the West Virginia State Police, J.W. reported "several incidents of being touched inappropriately" over the years she had grown up.[30] She again denied any sexual penetration.[31] Jason eventually gave a statement admitting "touching his sister and one incident of digital penetration" when they were living in West Virginia.[32] J.W., in "play therapy sessions" with a member of the State's prosecution team for sexual molestation cases, first alleged "repeated sexual intercourse of a forcible and traumatic nature spanning six [6] years and encompassing activities in several states."[33]

The indictment for the State eschewed the earlier J.W. allegations of sexual abuse and pursued Jason Wilson based on J.W.'s later disclosed claims that Jason had repeatedly and sometimes forcibly raped her from ages six through twelve.[34] J.W. also later implicated her brother, Jeffrey Wilson, who was also charged with sexual offenses and incest.[35] The alleged assaults occurred in a number of places, including the family's former residence in Arizona, and allegedly continued when the family moved to West Virginia.[36] Because these allegations were reported three years later in counseling, and because J.W. "is very bashful," a physical examination of J.W. was never requested by the prosecutor.[37]

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26 *See* Korris, *supra* note 15.

27 *Id.*

28 *Id.* In response, the Prosecutor responded that she did not know why the father was not prosecuted. *Id.*

29 Brief in Opposition of Jason Wilson, Real Party in Interest, to Petition for a Writ of Certiorari, *supra* note 16, at 2.

30 *Id.* at 3.

31 *Id.*

32 *Id.* at 4. The brief points out that both J.W. and Jason Wilson were under the age of 18 at that time. *Id.*

33 *Id.*

34 Brief in Opposition of Jason Wilson, Real Party in Interest, to Petition for a Writ of Certiorari, *supra* note 16, at 4–5. J.W. was age nine in February 2003 and age eleven in May 2005. Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5, at 2.

35 *See* Brief in Opposition of Jason Wilson, *supra* note 16 at 9. .

36 *Id.* at 9.

37 *See* Korris, *supra* note 15.

B. *Jason Wilson's Defense— "Is The Child Real Shy?"*[38]

On January 13, 2009, Jason Wilson filed a "Motion to Permit Physical Examination of J.W."[39] The stated reason for this motion was "'to determine if there is any physical evidence that this fifteen-year-old (J.W.) has had repeated traumatic intercourse.'"[40] In support of his motion, Jason offered statements by J.W. to "various medical providers, psychologists, and investigators in which J.W. purportedly denied that any physical penetration or intercourse had occurred between Jason and herself."[41] In the motion, Jason requested "'a discreet, confidential physical examination by a qualified medical doctor to determine if there is any evidence' of 'repeated traumatic intercourse.'"[42] Jason contended that the physical examination was "unlikely to cause any 'greater emotional upset than the State has already submitted her to' through its prosecution."[43] In the motion, Jason proposed measures that he asserted would protect the confidentiality of J.W.[44] The results of the gynecological exam would be reviewed in camera for evaluation of its probative value for the defense.[45] Jason further asserted that gynecological exams are "routinely performed" in cases involving rape allegations.[46] Jason finally asserted that the evidence he sought from the gynecological examinations was not available from any other source.[47] The prosecutor learned that J.W. had never had a pelvic examination, and she was very resistant to the idea of such an exam.[48] As a result, the prosecutor opposed the defendant's motion for a compulsory physical examination of J.W.

The trial court, after hearing arguments on the motion to permit a physical examination, concluded that "in light of the allegations" made by J.W. and the victim's age, requiring J.W. to undergo a physical examination would not be intrusive.[49] The judge observed that "the victim [was] fifteen (15) years of age and females of that age customarily have pelvic examinations."[50] The judge

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[38] *Id.* At oral arguments in front of the West Virginia Supreme Court of Appeals on April 29, 2009, Justice Menis Ketchum asked the prosecutor if the reason J.W. did not wish to undergo the physical examination is because the girl was very shy.

[39] Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5, at 10.

[40] *Id.* at 10.

[41] *See Knight*, 679 S.E.2d at 619.

[42] *Id.* (citation omitted).

[43] *Id.* (citation omitted).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Knight*, 679 S.E.2d at 619.

[48] Korris, *supra* note 15.

[49] *Knight*, 679 S.E.2d at 619.

[50] *Id.*

granted the motion and ordered J.W. to undergo the exam.[51] On February 3, 2009, a second order was entered which directed Dr. Huffman, a board-certified gynecologist, to perform the physical examination, at the cost of the State.[52] The State then sought a writ of prohibition to prevent the Circuit Court of Mercer County from enforcing its compulsory examination order.[53]

In support of the writ of prohibition, the State argued that the pelvic exam "[would be] intrusive and would be humiliating to anyone who [had] not experienced it."[54] The State also argued that Jason failed to demonstrate a compelling reason for the examination.[55] In rebuttal, Jason analyzed the six *Delaney* factors in relation to the facts of this case.[56]

III. THE CURRENT STATE OF THE LAW: A MIXED BAG

Many states have analyzed the defendant's right to require a physical examination of an alleged sexual assault victim under standards tied to the defendant's due process rights,[57] but there is no uniformity in the approaches being employed.[58] There are varied analytical approaches being used to assess when a physical examination of the alleged victim at the behest of the defendant is appropriate.[59] Some states apply the *Brady v. Maryland* standard, requiring the defendant to show the evidence garnered through an examination would exonerate him.[60] Other states use one of two types of "compelling need" tests.[61] One type of this standard is an ad hoc "compelling need" test, which is a balancing approach.[62] The other is a factor-based "compelling need" test that "loosely

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51 *Id.*

52 *Id.*

53 *Knight*, 679 S.E.2d at 619.

54 *Id.* at 620.

55 *Id.*

56 *Id.* at 620–21; *see* State v. Delaney, 417 S.E.2d 903 (W. Va. 1992). These factors are discussed *infra* Part III.

57 *See, e.g.*, Eid, *supra* note 1.

58 *Id.* The lack of uniformity in state courts' standards to determine whether a compulsory physical examination is proper is mirrored in the current state of the law for determining when compulsory psychological examinations should be ordered. *See* Mazza, *supra* note 12, at 764, n.10. "For example, there exists a judicial three-way split between states that do not allow motions to compel psychological evaluations, states that grant the defendant an absolute right to an evaluation of the witness, and states that give trial judge's discretion to grant the motion." *Id.*

59 *See, e.g.*, Eid, *supra* note 1.

60 *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (holding that suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution).

61 Eid, *supra* note 1, at 880.

62 *Id.* West Virginia employs the "compelling need" approach. *See Delaney*, 417 S.E.2d 903, discussed *infra* Section III.

balance[s] the defendant's interest in the evidence against the burden the examination would impose on the complainant."[63] A third standard is an approach used by Kentucky, which "requires an examination when the evidence sought is likely to help the defendant prepare for trial."[64] Kentucky's standard is referred to as the *Turner* "material assistance" approach.[65] Other jurisdictions hold that a trial court has no authority to order a complaining witness in a sex offense case to submit to physical examination by the defendant's medical expert.[66]

A. *The Exculpatory Evidence Standard*

Some jurisdictions base the compulsory physical examination decision on whether the evidence sought is or would be exculpatory.[67] This proves to be a tough standard to meet, as the defense must show that the evidence "likely to be obtained by a compulsory physical examination could *absolutely* bar a conviction."[68] If this standard cannot be met, the court will refuse to order such an examination without looking to any other factors.[69]

This standard holds little benefit for the defendant under modern sexual assault statutes. West Virginia, for example, only requires proof of penetration, however slight, to justify a conviction.[70] The uncorroborated testimony of the victim is sufficient to support a conviction.[71] Since a negative forensic examination would not disprove the allegation under the West Virginia statute, the exculpatory evidence showing could, arguably, never be met. The exculpatory evidence standard is more a rule of refusal than a rule of approval. *People v. Nokes*[72] illustrates this point.

In *People v. Nokes*, California adopted the exculpatory evidence standard in a tragic case involving the defendant's own children and several others.[73] The defendants filed a motion to compel the children to undergo physical examinations.[74] The children had not been examined by any medical expert.[75]

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63 Eid, *supra* note 1, at 880.

64 *Id.*

65 *Id.* at 881.

66 *See* People v. Lopez, 800 N.E.2d 1211 (Ill. 2003).

67 Eid, *supra* note 1, at 884.

68 *Id.*

69 *Id.*

70 *See* W. VA. CODE § 61-8B-1 (2010).

71 *Id.*

72 183 Cal. App. 3d 468 (Cal. Ct. App. 1986).

73 *See id.*

74 *Id.* at 471.

75 *Id.* at 468. Jay Smith, a lawyer representing the children in another matter appeared at the hearing in an attempt to defeat the motion. Smith stated at the hearing

In *Nokes*, the California appellate court held that nothing in prior case law suggests "that a criminal defendant has the right to compel an intrusion into the body of his or her victim for the purpose of attempting to obtain allegedly exculpatory evidence."[76] Only the certainty of the exculpatory quality of the results could justify the physical intrusion that certainty is unattainable since the results could not be known before the fact.

B. Kentucky's "Material Assistance" Approach

Kentucky has the lowest standard to compel a complainant to undergo a physical examination.[77] Kentucky's "material assistance" approach, as enunciated in *Turner v. Commonwealth,*[78] states that a defendant is entitled "as a matter of due process and fairness," to "have the alleged victim examined by an independent gynecologist in preparation for trial."[79] In *Turner*, the victim was only four years old, and was the daughter of the defendant.[80] A gynecologist testified as an expert witness that "the child, at the time of her examination, had injuries to the hymenal ring" in various spots.[81] The gynecologist further testified that "each of the injuries had healed, and had formed scar tissue."[82]

Because of the healing, the gynecologist testified that she could not determine when the injuries were inflicted.[83] The gynecologist testified that the "injury to the superior position of the ring would likely be caused by digital penetration or by the insertion of foreign objects, but that tears in the posterior section of the ring were probably the result of penile penetration."[84] Regardless of this testimony, or perhaps because of it, the Kentucky Supreme Court held that the defendant should have the chance to have his own expert examine the young victim, so that he might "offer evidence to contradict that offered by the

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> I talked to [the son] just about whether or not he was concerned or upset about the possibility of a medical examination. He said that he was. He said that -- we did not get into the details of it but basically a kind of examination that would be an examination of his bottom would make him think of what he'd gone through before. He was concerned about that. He thought he would feel emotionally upset if that happened . . . [The son] was firm, said to me in his own words that he was very upset about the idea of the examination, that's why I appeared in court and asked for an opportunity to oppose it.

Id. at 474.

76 *Id.* at 478.

77 *See* Eid, *supra* note 1, at 881.

78 767 S.W.2d 557 (Ky. 1988).

79 *Id.* at 559.

80 *Id.* at 559.

81 *Id.* at 558.

82 *Id.*

83 *Id.*

84 *Turner*, 767 S.W.2d at 559.

Commonwealth as to whether there were, in fact, any injuries to the hymenal ring."[85] Because the examination of the alleged victim by an independent expert would have been of "material assistance" to the defendant in his cross-examination of the prosecution's expert, the conviction of the defendant was overturned.[86]

C. *West Virginia's "Compelling Need" Test*

The West Virginia "compelling need" test was adopted in *State v. Delaney*.[87] In *Delaney*, defendant Denzil Delaney appealed his sexual assault conviction in part due to an alleged error on the part of the trial court denying his request for a physical examination of the victims.[88] In *Delaney*, the West Virginia Supreme Court affirmed the longstanding right of a defendant to "present evidence on his own behalf and to confront adverse witnesses," yet noted that "pretrial discovery is generally within the discretion of the trial court."[89] The prosecuting attorney urged the West Virginia Supreme Court of Appeals to adopt the standard set forth in a Rhode Island case, *State v. Ramos*,[90] which held:

> The practice of granting physical examinations of criminal witnesses must be approached with utmost judicial restraint and respect for an individual's dignity. In determining whether to order an independent medical examination, the trial justice should consider (1) the complainant's age, (2) the remoteness in time of the alleged criminal incident to the proposed examination, (3) the degree of intrusiveness and humiliation associated with the procedure, (4) the potentially debilitating physical effects of such an examination, and (5) any other relevant considerations.[91]

Further, the State urged the court to "balance the defendant's right to discover possible evidence against the victims' privacy interests in ordering another physical examination."[92] The West Virginia Supreme Court of Appeals agreed with the State, calling the *Ramos* standard a "reasonable method of balancing the defendant's need for the examinations against the victim's right to

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85 Eid, *supra* note 1, at 881 (quoting *Turner*, 767 S.W.2d at 559).

86 *Id.*

87 417 S.E.2d 903 (W. Va. 1992).

88 *Id.* at 906.

89 *Id.* (citing State v. Audia, 301 S.E.2d 199 (W. Va. 1983)).

90 553 A.2d 1059 (R.I. 1989).

91 *Id.* at 1062.

92 *Delaney*, 417 S.E.2d at 907.

privacy."[93] The court held that the party requesting the additional physical or psychological examinations must put forth evidence that "he has a compelling need or reason" for the additional examinations.[94] After the compelling need is identified by the party, the trial court is to apply a modified *Ramos* test.[95] The factors to be considered by the trial court include:

> (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.[96]

The court in *Delaney* affirmed the trial court's decision denying the defendant's request for physical examinations of the alleged victims, three girls as young as eight-years-old at the time.[97] The West Virginia Supreme Court of Appeals stated that the judge made the correct decision "in light of the victims' tender ages, the intrusiveness and humiliation associated with a gynecological examination of the three young girls, and the remoteness in time from the incidents in question to the proposed examinations."[98]

The court made the point that the probative value of the discoverable evidence wanes with time. The court noted the testimony by the State's expert: "physical symptoms of sexual assault can dissipate in as little as six months."[99] Several years had passed since the alleged assaults at issue in *Delaney*.[100] In refusing the defendant's request for a *psychological* examination, the West Virginia Supreme Court of Appeals stated that "[g]iven the effect of a probing mental interrogation on children of their tender years, we believe the trial court was correct in ruling that, in essence, the probative value to the appellant was outweighed by the trauma and intrusiveness to the victims."[101] This standard was

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93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Delaney*, 417 S.E.2d at 907.

99 *Id.*

100 *Id.* at 908. The court in *Delaney* uses similar reasoning for denying the defendant's motion for an additional psychological test. The Court states that the defendant failed to present any reason to justify the additional psychological examination. "Since we cannot find that the appellant's need is greater or more compelling than the burden it would impose on the victims, the trial court did not abuse its discretion in denying the appellant's request." *Id.*

101 *Id.*

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reiterated and affirmed in *State ex rel. J.W. v. Knight*, although for the first time the court held the defendant had satisfied the "compelling need" test.[102]

D. The Delaney *Factors as Applied to the* J.W. *Case*

Jason Wilson, the defendant, used the six *Delaney* factors to convince the trial judge, and later the West Virginia Supreme Court of Appeals, that the balance of the *Delaney* test came out in favor of an order compelling a physical examination of J.W.[103] Looking to the first factor, "the nature of the requested examination and its inherent intrusiveness," Jason argued that because of the limited nature of the pelvic examination, the fact that the examination would be performed by a female physician, and the fact that women regularly undergo extensive gynecological examinations for health reasons, the examination was not intrusive in nature.[104] Looking to the second factor, which "requires a consideration of the victim's age," Jason pointed out that the alleged victim was fifteen-years-old at that time.[105] With the third factor, "which requires consideration of the lasting physical and/or emotional effects of the examination," the West Virginia Supreme Court of Appeals accepted Jason's assertion that a gynecological examination of J.W. would not cause any long term effects, even if J.W. might experience embarrassment as the result of being required to undergo the examination.[106]

Jason satisfied the fourth factor, "the probative value of the examination" by asserting that the potential evidence was crucial to his defense.[107] He intended to "rely on such evidence to argue that the charges brought against him by the State are baseless."[108] The West Virginia Supreme Court of Appeals points out that this is a risk for Jason, as the discovered evidence might "inculpate, rather than exculpate him."[109] The fifth factor delineated in *Delaney* "looks to the remoteness in time of the examination with reference to the alleged criminal act."[110] In this case, the physical examination would take place four years after the alleged offenses occurred.[111] The prosecution argued that "it is prepared to introduce evidence that after a period of only six months indicia of sexual trauma may no longer exist."[112] Finally, for the sixth *Delaney* factor,

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102 J.W. v. Knight, 679 S.E.2d 617, 618 (W. Va. 2009).

103 *Id.*

104 *Id.* at 620–21.

105 *Id.* at 621.

106 *Id.*

107 *Id.*

108 *Knight*, 679 S.E.2d at 621.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

which looks to "the availability of evidence from other sources," Jason asserted that there is no other obtainable evidence to show that the charges are baseless.[113] Based on the *Delaney* factors, the court found that the trial court did not abuse its discretion in considering these factors and finding in favor of Jason's request.[114] Accordingly, it refused to issue the requested writ of prohibition against the order, in effect affirming the trial court's order for a physical examination.[115]

The physical examination of J.W. never occurred. The prosecution, upon losing this motion, offered a plea deal to Jason. The prospect of a physical examination changed the course of this case.

IV. VICTIMS AND DEFENDANTS ALIKE ARE IMPACTED BY COMPULSORY PHYSICAL EXAMINATIONS

The United States Supreme Court has held there is no general right to discovery in criminal cases.[116] The *J.W.* case raises the question of "whether a state trial court, at the behest of the accused, has authority to compel . . . a minor rape victim[] to submit to a penetrating pelvic examination for the purpose of determining the condition of her hymen."[117] This issue is of great importance to both prosecutors and criminal defendants accused of sexual assault.[118] And of course, this issue is of even greater importance to victims of sexual assault.[119]

A. *The Effect of Physical Examinations on Victims*

"Most victims of sexual assault are women," and most victims of sexual assault that undergo post-assault physical examinations are women.[120] Sexual assault victims often suffer from both psychological and physical injury.[121] And

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113 *Id.*

114 *Knight*, 679 S.E.2d at 622.

115 *Id.* At this point, Wendy Murphy became involved. Wendy Murphy is a former prosecutor who specializes in child abuse and sex crimes cases. Mrs. Murphy became "counsel of record" for J.W. and wrote the Petition for Writ of Certiorari to the West Virginia Supreme Court, filed on behalf of J.W.

116 Weatherford v. Bursey, 429 US 545, 559 (1977).

117 Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5, at 5.

118 Prosecutors rely on physical evidence from the victim to persuade the jury that the offense took place. Defendants rely on physical evidence to provide exculpatory evidence.

119 Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5, at 5.

120 *See* Mazza, *supra* note 12, at 763.

121 *Id.*

89% of rape victims in one study agreed that the post-rape medical exam was traumatizing.[122]

A forensic medical exam can add to the psychological injury and the physical discomfort of the victim.[123] A forensic medical examination is stressful, time-consuming and invasive.[124] The victim will have had "an extremely difficult and sometimes violent or terrifying experience and is likely to find the examination intrusive."[125] As victims, children are "even less able than adults to tolerate medical examination and testing after being victimized."[126] Psychologists have taken note of potential long-term psychological problems in very young children who undergo examinations; however, this risk lessens in the adolescent years.[127]

Medical protocols, if followed, can lessen the harmful effects, but will not remove them entirely. Procedures should be put in place to protect the privacy of the victim during the examination.[128] Physicians also encourage sedation or anesthesia when the victim being examined is a small child and particularly susceptible to emotional trauma.[129] During the collection of forensic specimens, clinicians should take at least two swabs of whatever forensic specimens are obtained to avoid the necessity of re-examination at a later date.[130] But this type of evidence collection procedure cannot be followed when the examination occurs much later than the sexual offense.[131] The examination itself may involve taking tissue samples; removing fluids and scrapings from the walls of

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[122] *See* Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 VIOLENCE & VICTIMS 3, 3 (1999).

> Secondary victimization refers to behaviors and attitudes of social service providers that are "victim-blaming" and insensitive, and which traumatize victims of violence who are being served by these agencies. Institutional practices and values that place the needs of the organization above the needs of clients or patients are implicated in the problem.

Id.

[123] Carole Jenny, *Forensic Examinations: The Role of the Physician as "Medical Detective," in* EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS, 79, 80 (2d ed. 2000).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See Transcript of Evidentiary Hearing* at 1–29, State of West Virginia v. Jason Wilson, Criminal Action No. 08-F-143-DK, Circuit Court of Mercer County, West Virginia (Feb. 3, 2009).

[128] Jenny, *supra* note 123, at 80.

[129] *Id.*

[130] *Id.* at 85.

[131] When physical examinations are delayed, physical evidence is unlikely to be uncovered. This is discussed *supra* Part III.B.

the vagina; and, documenting, through photographic records, an intimate part of the female anatomy.

These are the noted effects when the examination is by consent. There simply have been no studies of the effects on a victim when she is forced to undergo an examination at the insistence of her alleged attacker.[132] Intuitively, the psychological trauma associated with the examination could be similar to the psychological trauma of the initial attack. The victim is forced into a subservient position to the court, much as she was originally forced into a subservient position to her attacker; this could discourage her participation in the prosecution of the case.

This concern is illustrated in the case of *J.W.* J.W., from the record, a bashful young girl of fifteen, personally opposed a physical examination ordered by the court. The State of West Virginia struck a plea bargain with the defendant, possibly to spare her the insult of undergoing a forced examination or the litigation that might ensue if the court were to enforce its ruling against her. The granting of a motion to compel a physical examination against the wishes of the victim almost certainly carries the risk that it will have an "extortionate value" for the defendant in obtaining a more favorable outcome without risking a trial.

B. *Physical Examinations are Often Ineffective, Especially in Delayed Report Cases*

Medical evidence shows that the results of any delayed examination will often produce inconclusive, if not incorrect, results. The effectiveness of physical examinations of rape victims is questionable at best. Many physical examinations of rape victims occur months after the sexual abuse has taken place.[133] In most child sexual abuse cases, the disclosure of the abuse occurrs weeks to months after the last episode of sexual abuse, so the physical examination is often delayed.[134] The physical examination is *always* delayed from a

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[132] But Wendy Murphy explains the harm to victims quite well, noting that courts that order physical examinations of victims show:

> [A] serious lack of appreciation for the individualized nature of the harm caused by sexual violence. It is not the physical pain, but the fact that an intrusion into one's personal body parts is "unwanted" that defines the profound harm to the self and the critical need for law to respect the concept of consent as the defining line between pleasure and crime.

Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5, at 12.

[133] S. Jean Emans, *Physical Examination of the Child and Adolescent*, *in* EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS, 57, 58 (2d ed. 2000).

[134] *Id.*

medical standpoint.[135] The healing of "genital and anal injuries usually occur[s] very rapidly," and residual indications may not be present if several days or weeks have passed since the incident occurred.[136] Further, "[t]he possibility of recovering evidence decreases quickly."[137] For example, sperm has been shown to persist in the vagina after intercourse for *at most* seventeen days.[138] If any evidence is to be found, it is unlikely to be found by a physical examination occurring after seventy-two hours.[139]

Examinations with "normal" results occur frequently, even in cases where the sexual abuse has been substantiated or admitted by the accused.[140] Perhaps because of the time lapse between the abuse and examinations, the examinations of most children with *substantiated* sexual abuse are considered medically "normal" and do not show evidence of sexual abuse at all.[141] The percentage of normal examinations has been reported at 70–90% of child complainants, depending on "the case mix, the age of the patients, the definition of 'normal' versus abnormal and the examiners."[142] Even where the accused gives an actual description of vaginal penetration, normal genital findings have been reported in 39% of the victims.[143] Specific findings of physical injury are more common in girls "for whom the perpetrator has acknowledged penetration," yet even this group may not show specific injury.[144] The likelihood of detecting evidence of penetration, nongenital trauma, or genital trauma "increases with the age of the patient, in part, because adolescents are more likely to have been victims of a rape by a stranger or acquaintance."[145] These cases involve more forceful trauma with greater physical consequences than that generally found in incest or familial sexual abuse cases.[146] And as the age of the victim increases, so does the likelihood that the victim has engaged in sexual activity with consent.

Old medical doctrines have yielded to new research in understanding the limitations of physical examinations in delayed cases of sexual assault or sexual abuse. Historically, the hymen has been used as an indicator of sexual

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[135] Even an examination that occurs within a day or two of a sexual assault can be inconclusive. Many factors diminish the evidence that can be obtained, such as if the victim showers before the exam, uses the bathroom, or changes clothes.

[136] Emans, *supra* note 133, at 76.

[137] Jenny, *supra* note 123, at 80.

[138] *Id.*

[139] *Id.*

[140] Emans, *supra* note 133, at 60.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 76.

[145] *Id.*

[146] *See* Emans, *supra* note 133.

activity or sexual abuse.[147] The damage or absence of a hymen was explained by the conclusion that the female had been sexually active.[148] The presence of an intact hymen traditionally meant that no penetration had occurred.[149] Its absence or damage, however, may occur from many instances other than intercourse.[150] Although, as an early study once stated, "all girls are born with hymens," there is a great deal of variety in what type of hymen a practitioner will consider "normal."[151]

Controversy now surrounds using hymenal dimensions to verify sexual assault or sexual abuse.[152] For example, the evidence that a clinician can gather will be greatly altered depending on the person's position during the examination, "the amount of hymenal tissue present, the degree and length of time of applied traction, the amount of relaxation" and the "type" of hymen.[153] Also, a number of medical conditions "may present a challenge to the clinician and may be initially diagnosed as sexual abuse."[154] Thus, many practitioners warn that "an enlarged [hymenal] opening may be helpful if other signs, symptoms, behavioral indicators, or disclosure are present," but the use of hymenal dimensions "should not be used as the *sole* indicator of a sexual abuse diagnosis."[155]

These types of examinations are, from a clinician's viewpoint, fraught with emotional trauma for the victim.[156] Clinicians also speculate that the physical examination "may bring back memories of previous genital contact" and may make behavior outbursts or difficulty sleeping the night after the examination possible.[157] It stands to reason that this trauma may be more pronounced in younger victims.

The justification for permitting these examinations is undermined by recent medical research. These exams do not produce reliable evidence of guilt or innocence under current medical techniques and understanding. The passage of time between the attack and the examination substantially lessens the likelihood any evidence will be found that could be linked to the accused, particularly if

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147 *Id.* at 63. The author noted that "signs consistent with acute sexual abuse have included hematomas . . . lacerations of the hymen, perihymen and posterior fourchette. Signs of previous sexual abuse have included hymenal remnants, scars, and transections." *Id.*

148 *See* Nancy D. Kellogg et al., *Genital Anatomy in Pregnant Adolescents: "Normal" Does Not Mean "Nothing Happened,"* 113 J. OF AM. ACAD. OF PEDIATRICS 67, 67, 69 (2004).

149 *See id.*

150 *Id.*

151 *See* Emans, *supra* note 133, at 62.

152 *Id.* at 63–64.

153 *Id.* at 64.

154 *Id.* at 65. The possible conditions are lichen sclerosus, urethral prolapse, failure of midline fusine, herpes zoster, Crohn's disease, dermatitis, psoriasis, and accidental genital trauma to name a few. *Id.*

155 *See* Emans, *supra* note 133, at 64 (emphasis added).

156 Jenny, *supra* note 123, at 80.

157 *Id.* at 75.

the victim had consenting partners in the interval. This is a particular concern in cases which are reported late, as is increasingly common.

For example, a teenager or a young adult in her twenties may report sexual abuse by a parent that occurred when she was eight to twelve years old. An examination of the hymen or vaginal area of a sexually-active twenty-year-old will provide no information that is corroborative or un-corroborative of the victim's statement about what happened a decade earlier. Consider that in one study, only two of thirty-six *pregnant* adolescents had genital changes diagnostic of penetration trauma.[158]

Nor is the absence of observable changes probative on the defendant's innocence in the delayed report case. No observable changes may simply be nothing more than the result of the healing process. The finding of guilt or innocence in delayed report cases almost always will come down to corroborative witnesses, credibility determinations, and admissions and statements made during the course of the investigation. The medical examination, if done by consent or by order of the court, will yield nothing more than ambivalent results or unintelligible results in the delayed report case.[159]

C. *The Hypothetical Delayed Physical Examination of J.W.*

The suspect probative value of evidence from a physical examination in a delayed report case argues strongly against ordering such examinations in the circumstances the court confronted in *J.W.* J.W. was fifteen-years-old at the time the court ordered the examination. The last sexual contact she alleged between her brother and herself of a forcible, traumatic nature was three years earlier. She also had alleged forcible intercourse with a second brother during the same time period. There was absolutely no chance a gynecological examination would reveal any acute changes that could be linked to the defendant alone. Nor would the presence or absence of a hymen in a fifteen-year-old be conclusive of a defendant's guilt or innocence. West Virginia does not require vaginal penetration to establish sexual assault. Like most states, penetration, "however slight," is sufficient to establish the defendant's guilt.[160] Jason Wilson's motion should have been denied, irrespective of the constitutional issue confronted relating to the victim's fundamental right to privacy and bodily integrity.

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[158] *See* Kellogg et al., *supra* note 148.

[159] Rape Shield statutes, such as that embodied in West Virginia Code section 61-8B-11(b) (2009), would also be implicated by these examinations in delayed report cases. The victim may be reporting sexual misconduct that occurred a decade earlier. She may be a young adult who is sexually active. The findings of an examination that showed sexual activity, such as the absence of a hymen or other signs, even previous pregnancy, almost always would call into question the admissibility of the evidence of her sexual activity with other consenting partners under the Rape Shield protections.

[160] W. VA. CODE § 61-8B-1(7) (2009).

V. THE CONSTITUTIONAL COLLISION BETWEEN THE VICTIM'S FUNDAMENTAL RIGHT AND THE ACCUSED'S DISCOVERY RIGHTS

An oft-repeated statement echoes the dilemma of accused sexual offenders: "[i]t must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."[161] If the State had the right to "force" sexual assault victims to undergo physical examinations to generate a case, it might seem fair that defendants would enjoy the same right when generating a defense. But the State does not have the authority to compel victims of sexual assault to undergo physical examinations. Technically, victims are not "ordered, forced or compelled to submit to [gynecological] examinations during the [course of] criminal investigations," but the State can refuse to prosecute the offense if the victim refuses to consent to the examination.[162] Individuals have a "fundamental right to refuse such a deeply personal intrusion at the behest of the government."[163] Yet, individuals often consent to the examination because they want the case to be prosecuted.[164] So it is true that "just because a rape victim can and often does submit to a pelvic examination during a law enforcement investigation, she is not mandated to do so."[165] To many, especially victims, this distinction is important. The United States Supreme Court has spoken to the issue of when the *accused* must endure intrusions into his bodily integrity; in these cases the State has an overriding interest, under its police power, in doing so.[166] Congress, in passing the Violence Against Women Act, helped to establish a federal policy of encouraging immediate physical examinations.[167] Although this does not solve the problem of delayed examinations, if more victims are encouraged to undergo physical examinations early, the likelihood that they will later be subjected to a court order compelling a physical examination becomes very unlikely.

A. *The Accused Must Endure Intrusions into his Bodily Integrity: Why not the Victim?*

The United States Supreme Court has spoken on the issue of the reasonableness of intrusions into the fundamental right of bodily integrity of a criminal defendant. In *Schmerber v. California*, the defendant received treatment in the

161 Mazza, *supra* note 12, at 763 (quoting Rice v. State, 217 N.W. 697, 699 (Wis. 1928)).

162 Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia, *supra* note 5, at 12 n.3.

163 *Id.*

164 *Id.*

165 *Id.*

166 *See* Schmerber v. California, 384 U.S. 757 (1966).

167 18 U.S.C. §§ 2241–2246 (1994).

hospital for injuries he sustained in an auto accident.[168] A police officer at the hospital directed a physician to withdraw blood from Schmerber to test his blood alcohol content.[169] Schmerber objected to the blood test, but it was performed over his objections.[170] The Supreme Court held that the test did not violate Schmerber's right under the Fourth Amendment to be free of unreasonable searches and seizures.[171]

In 1985, the Supreme Court undertook the question of whether the surgical removal of evidence without the surgery subject's consent, for use in a criminal prosecution, is per se unreasonable within the meaning of the Fourth Amendment.[172] The Court answered the question in the affirmative.[173] The surgery to remove a bullet without the consent of the accused, for prosecutorial purposes, was too severe an intrusion to be permissible under the Fourth Amendment.[174]

The Supreme Court's wary attitude toward bodily intrusions to seek evidence is illustrated in its decision in *Ronchin v. California*.[175] In that case, a suspect, expecting to be arrested, swallowed narcotic capsules when he was approached by law enforcement officers.[176] The officers demanded that the suspect's stomach be pumped against his will in a hospital.[177] The Court called the pumping of his stomach offensive even to the most "hardened sensibilities" and deemed the practice to be unreasonable and thus unconstitutional.[178] The defendant has been protected against compulsory physical examinations that are deemed too intrusive in sexual offense prosecutions.

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168 *Schmerber*, 384 U.S. at 758.

169 *Id.*

170 *Id.* at 759.

171 *Id.* at 772. The factors to be considered are:

> [T]he reliability of the method to be employed, the seriousness of the underlying criminal offense and society's consequent interest in obtaining a conviction, the strength of law enforcement suspicions that evidence of crime will be revealed, the importance of the evidence sought, and the possibility that the evidence may be recovered by alternative means less violative of Fourth Amendment freedoms. These considerations must, in turn, be balanced against the severity of the proposed intrusion. Thus, the more intense, unusual, prolonged, uncomfortable, unsafe or undignified the procedure contemplated, or the more it intrudes upon the essential standards of privacy, the greater must be the showing for the procedure's necessity.

Eid, *supra* note 1, at 898–99 (quoting People v. Scott, 21 Cal. 3d 284, 298 (1978)).

172 Winston v. Lee, 470 U.S. 753 (1985).

173 *Id.* at 766.

174 *Id.*

175 342 U.S. 165 (1952).

176 *Id.* at 166.

177 *Id.*

178 *Id.* at 172.

In *People v. Scott*, the Supreme Court of California reversed a guilty verdict because of harmful error of a substantial invasion of "dignity and privacy" of the defendant.[179] In *Scott*, the complainant developed an infection called trichomoniasis, an infection that is primarily transmitted through sexual intercourse.[180] The complainant alleged that she had not had intercourse with anyone except the defendant, her father.[181]

Just before trial, the People moved to have the defendant physically tested for trichomoniasis to determine whether he had been the donor of the infection to his daughter.[182] The problem was that the "routine test for trichomoniasis consisted . . . of a manual massage of the prostate gland administered through the rectum and causing a discharge of a sample of semen."[183] The defendant objected to the test, but the trial court ordered the examination, which was subsequently conducted.[184] The results of the test were negative for trichomoniasis, except that they revealed the possibility of a symptom associated with trichomoniasis in the form of an inflamed prostate.[185] These results were introduced at trial and the defendant was convicted.[186]

On appeal, the Supreme Court of California found merit in the defendant's contention that the test "constituted an unreasonable search and seizure."[187] The court said it was "well settled that unjustified intrusions beneath the body's surface may violate a suspect's 'due process' rights guaranteed by the Fifth and Fourteenth Amendments."[188] The court further looked to the Fourth Amendment's "solicitude for personal dignity and privacy," indicating that searches of the body that are intrusive must be founded on a clear indication that evidence will be found.[189] Finally, the court looked to the degree of intrusion, noting minor examinations, such as blood tests, are routine, but that more substantial invasions must be subject to higher scrutiny.[190] The court stated that the "human body is not . . . a sanctuary in which evidence may be concealed with impunity," but it was entitled to a high degree of protection and the factors the court should consider militated in favor of the defendant's privacy rights in this particular case.[191]

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179 People v. Scott, 21 Cal. 3d 284, 294 (1978).

180 *Id.* at 289.

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Scott*, 21 Cal. 3d at 298.

186 *Id.* at 284.

187 *Id.* at 290.

188 *Id.* at 291.

189 *Id.* at 292.

190 *Id.*

191 *Scott*, 21 Cal. 3d at 292.

For the criminal defendant, the United States Supreme Court rulings illustrate that physical searches, physical examinations, and even the removal of body fluids do not conflict with the defendant's constitutional protections so long as the Fourth Amendment requirements are satisfied.[192] A defendant's fundamental rights under the Fourth and Fourteenth Amendments yield to the superior interests of the State in its police power and enforcement of its laws. The court also has made it clear that physical examinations may be required of persons other than those under reasonable suspicion of committing crimes. The analysis in those circumstances has been one of balancing the governmental interests versus the privacy interests.[193]

B. *The Compelling Governmental Interest in the Enforcement of its Laws is not Present When the Victim's Fundamental Right to Privacy is Being Invaded to Satisfy the Defendant's Discovery Needs*

J.W., *Delaney*, and courts following this approach apply the "compelling need" inquiry, which basically balances the defendant's interest in the evidence against the psychological or physical burden of the examination imposed upon the complainant.[194] At least one state has taken the position that the defendant would only be entitled to an examination when he could show that the evidence is qualified for disclosure under *Brady v. Maryland*.[195] Many courts have rejected the notion that a criminal defendant could ever obtain an order requiring a victim to submit to a physical examination absent some direct legislative authority.[196]

All of these decisions fail to discuss the fundamental constitutional right of the rape or sexual assault victim to protect his or her bodily integrity. There are two types of due process privacy interests that have been recognized by the United States Supreme Court: (1) "the individual interest in avoiding disclosure of personal matters" and (2) "the interest in independence in making certain kinds of important decisions."[197] An unwanted gynecological examination arguably implicates both of these types of due process privacy interests because it

> commands the extraction of information from a private body part, and deprives [the Victim] of the ability to control who has access to her intimate body, thus threatens her interest in con-

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192 Schmerber v. California, 384 U.S. 757, 767 (1966).

193 Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 619 (1989); United States v. Ward, 131 F.3d 335 (3d Cir. 1997) (holding that Violence Against Women's Act provisions authorizing the forced HIV testing of inmates do not violate Fourth Amendment).

194 *See, e.g.*, People v. Wheeler, 575 N.E.2d 1326 (Ill. App. Ct. 1991); People v. Melendez, 80 P.3d 883 (Colo. App. 2003).

195 373 U.S. 83 (1963).

196 Clark v. Virginia, 551 S.E.2d 642 (Va. 2001).

197 Whalen v. Roe, 429 U.S. 589, 599–600 (1977).

> trolling the release of confidential information, but also encroaches on her fundamental right to individual autonomy and authority over the self.[198]

The right to privacy includes a fundamental right to bodily integrity.[199] It is a right "deeply-rooted in this Nation's history and tradition."[200] "The Fourth Amendment protects 'expectations of privacy'. . . individual's legitimate expectations that in certain places and at certain times he has 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'"[201] And the Supreme Court has said that the question of whether the individual's privacy interests are outweighed by society's interests in conducting the procedure is to be considered on a case-by-case basis.[202]

This right may have to yield in those limited circumstances when a compelling governmental interest is at stake.[203] There is no Supreme Court authority for the notion that this fundamental right of bodily integrity must yield to the discovery needs of a criminal defendant when the United States Constitution accords no discovery rights to the accused.[204] These decisions focus more on the process by which the decision is made and fail to analyze the request for an examination under the "strict scrutiny" standards—a "must" when a fundamental right is being tread upon.[205]

The Fourth and Fourteenth Amendments guarantee that a State will not deprive "any person of life, liberty or property without due process of law."[206] It has long been recognized that the Fourth and Fourteenth Amendments guaran-

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198 Brief in Opposition of Jason Wilson, Real Party in Interest, to Petition for a Writ of Certiorari at 15, *J.W. v. Knight*, 679 S.E.2d 617 (W. Va. 2009) (09-191).

199 Albright v. Oliver, 510 U.S. 266, 272 (1994); *See also* Seegmiller v. Laverkin City, 528 F.3d 762, 771–72 (10th Cir. 2008).

200 *Seegmiller*, 528 F.2d at 767 (quoting Chavez v. Martinez, 538 U.S. 760, 775 (2003)).

201 Winston v. Lee, 470 U.S. 753, 758 (1985) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

202 *Id.* at 760.

203 United States v. Knights, 534 U.S.112, 119 (2001).

204 Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

205 *See* Chavez v. Martinez, 538 U.S. 767–75 (2003); County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998).

206 The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Fourteenth Amendment, in relevant part states "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

tee more than a "fair process."[207] These Amendments create a protective shield that bars certain governmental action regardless of the procedures used to implement them.[208] Fundamental rights "deeply-rooted in this Nation's history and tradition" may not be infringed upon by government action, no matter what procedural safeguards are provided.[209] Only when the State shows a compelling governmental interest and narrowly tailors its intrusion to advance that interest may courts require a person's fundamental right to yield.[210]

J.W. and all citizens have a fundamental right to protection of their bodily integrity from government intrusion.[211] Forcing children to undergo intrusive medical examinations at the request of a defendant is bad policy and, more importantly, an unconstitutional intrusion. Traditional Fourth Amendment analyses of the competing interests at stake miss the mark. Courts, in Fourth Amendment cases, determine the reasonableness of the search or seizure by balancing the intrusion into the person's privacy with a legitimate governmental interest being promoted by the search.[212] The competing governmental interest that justifies the intrusion typically relates to the exercise of the police power in enforcing criminal statutes.[213] As the United States Supreme Court explained in *Brinegar*, the probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the laws and protecting the individual right to privacy.[214]

That analysis may work when deciding whether an accused may be forced to donate blood, provide hair samples, or submit to fingerprint analysis in the context of a criminal prosecution.[215] Even in police power cases, however, there is a limit to what the Fourth Amendment will allow in terms of the intrusion of the accused's person. The interests in human dignity and privacy, which the Fourth Amendment protects, forbid any intrusions on the mere chance that desired evidence will be obtained. As the United States Supreme Court explained in *Schmerber*, in the absence of a clear indication that, in fact, evidence supporting the police power and enforcement of the laws will be found, the fundamental human interest of privacy and human dignity require law enforcement officials to suffer the risk that such evidence may disappear.[216]

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207 Certainly it is interesting that the same constitutional amendment that gives a victim her right to privacy has been used to take away that right in due process issues.

208 *Lewis*, 523 U.S. at 840.

209 *Chavez*, 538 U.S. at 775.

210 Washington v. Glucksberg, 521 U.S. 702, 719–21 (1997).

211 Albright v. Oliver, 510 U.S. 266, 272 (1994); *see e.g.*, Seegmiller v. Laverkin City, 528 F.3d 762, 770–71 (10th Cir. 2008).

212 United States v. Knights, 534 U.S. 112, 118–19 (2001).

213 Brinegar v. United States, 338 U.S. 160 (1949).

214 *Id.*

215 Schmerber v. California, 384 U.S. 757 (1966); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

216 384 U.S. at 769–70.

An intrusive physical examination at the request of the defendant does not implicate a compelling governmental interest of commensurate importance to the police power or the enforcement of the laws. It is true the United States Supreme Court has recognized that there may be "special needs" empowering the State to require those not under suspicion of criminal conduct to submit to intrusive examinations.[217] But, the Supreme Court has never ruled that the accused may step into the shoes of the State and assert compelling government interest to serve his own discovery needs in a criminal prosecution.

The State's interest in enforcing its law and its exercise of police power are constitutionally-based. The defendant or accused in a criminal case, however, has no general constitutional right to discovery.[218] The accused is entitled to the presumption of innocence throughout his proceedings.[219] Of course, this presumption is in conflict with the presumption that a complainant is telling the truth. The olden days of intense scrutiny of a victim complainant are largely over;[220] therefore, it is paradoxical to say that a victim is presumed to be truthful but the accused is presumed to be innocent. The accused's constitutional right to discovery is limited to those circumstances in which the state or the government entity holds or is in possession of exculpatory evidence and fails to disclose that evidence to the accused.[221]

The flaw in the case involving J.W. and in other cases that have discussed this issue from other jurisdictions is that there has been no application of the "strict scrutiny" analysis required when a fundamental right is at stake. The Supreme Court's denial of certiorari of the *J.W.* case was a mistake, as the Supreme Court should speak to this issue and breathe life into the victim's right of privacy in a sexual offense case.

C. *The Conflicting Interests Will be Eased by the VAWA in Cases Where Recent Abuse is Alleged*

The unreliability of the medical results in delayed report cases does not lessen the dilemma for the accused. In the absence of a physical examination, he must trust his fate to credibility determinations by the jury when there might have been physical evidence that could have supported his denials of involvement. Errors in a credibility case are always present. The articulate, guilty defendant may go free. The inarticulate, innocent defendant may face long confinement. The issue arises from a concern for basic fairness: Would not society

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217 *See, e.g.*, Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 619 (1989).

218 Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

219 *In re* Winship, 397 U.S. 358, 363 (1970). Moreover, the accused has an absolute right to have his defenses heard.

220 *See* Eid, *supra* note 1, at 899.

221 Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

be better served if more science rather than passion was introduced into the process by which sexual assault cases are decided?

The answer is in the affirmative and Congress has responded. When it enacted the VAWA of 1994 it established a federal policy of encouraging, not discouraging, forensic medical evaluations of sexual assault victims.[222] The VAWA accomplishes this federal policy by providing the states with a set of incentives, encouraging them to enact training programs for medical providers in performing medical examinations, especially children.[223] It provides funding for this training and requires states receiving the funds to enact their own statutes that guarantee each victim of sexual assault a free forensic medical examination.[224] States may not require the alleged victim of a sexual assault to participate in the criminal justice system or to cooperate with law enforcement in order to receive the forensic medical examination. Nor can a State punish her for her refusal to undergo examination by abandoning the prosecution if she should choose to pursue it.[225]

However, the VAWA and the state statutes that are enforcing and advancing the policy enunciated therein do not address the delayed report case. The guaranteed right to a forensic medical examination is limited to those circumstances "within a reasonable time of the alleged violation."[226] There is a statutory recognition that delayed examinations hold little chance of producing evidence corroborative or contradictory to the claims of the victim.[227]

The VAWA will be effective in bringing more science into claims of sexual assault or sexual abuse during the acute phase. This will serve both the interests of the victim and the defendant. More professional and complete examinations will dispense with the need for repeat examinations. The complaining witness will have the benefit of a complete, thorough, professional examination that may be corroborative of her claim and the defendant will have available to him a record of those examinations to be viewed by his own expert. This will remove the victim from the cross-hairs of having to undergo repeat examinations at the insistence of her alleged attacker. Yet, it will also serve the truth-finding process of the trial by providing corroborative or dispositive medical evidence to charges that are extremely serious for both the victim and the accused.

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[222] 18 U.S.C. §§ 2241–2246 (1994). *See also* 18 U.S.C. §§ 2261–2266 (1994).

[223] *Id.*

[224] *See, e.g.*, W. VA. CODE § 61-8B-15 to -16 (2009).

[225] *See, e.g.*, W. VA. CODE § 61-8B-16(c) (2009).

[226] *Id.*

[227] W. VA. CODE § 61-8B-16(a)(3) (2009).

VI. CONCLUSION

We are now left with a patchwork of different standards applied by the states as to when a victim of sexual assault may be forced to undergo a physical examination. This is unacceptable when one considers that the right at stake for the victim arises under the United States Constitution. The fundamental right of privacy and bodily integrity finds its roots in the Fourth and Fourteenth Amendments of the United States Constitution and should have a consistent and uniform meaning throughout the states. It is often observed that the genius of the federal system is that it allows experimentation by the states in developing jurisprudence that may one day become the law of the land. The experimentation in the area of forced examinations of sexual assault victims has confounded the issue more than illuminated it. Some states outright refuse to acknowledge any interest of the accused that would justify a forced examination of the victim. Others permit it under standards as relaxed as a showing of an examination being of material assistance to the defendant.

The probative value of any information that could be obtained by such an examination is highly suspect. Not only do most states have statutes similar to West Virginia that require only "slight penetration to justify a conviction for sexual assault, the emerging medical science indicates that any examination after the non-acute phase of the intercourse will not produce results helpful to either side of the argument.

For those who desire more science and less passion in prosecutions for sexual assault, especially where the stakes for both sides are so high, the Violence Against Women's Act is an important step forward. It will bring uniform standards to forensic medical examinations and will expand their availability to all sexual assault victims. The evidence, materials, and results of such examinations will be available to experts for the defendant so those concerned about the truth-finding mission of the court system may have some of their fears allayed.

The Violence Against Women's Act, however, is limited to those circumstances involving acute injury or those examinations that are done within a medical timeframe that is reasonably connected to the date of the event. It will not solve the issue in the context of delayed report cases.

To bring order and balance to this issue, the United States Supreme Court must step in and define the boundaries of victims' and defendants' constitutional rights.

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