4-1987

Confronting Rape Shield

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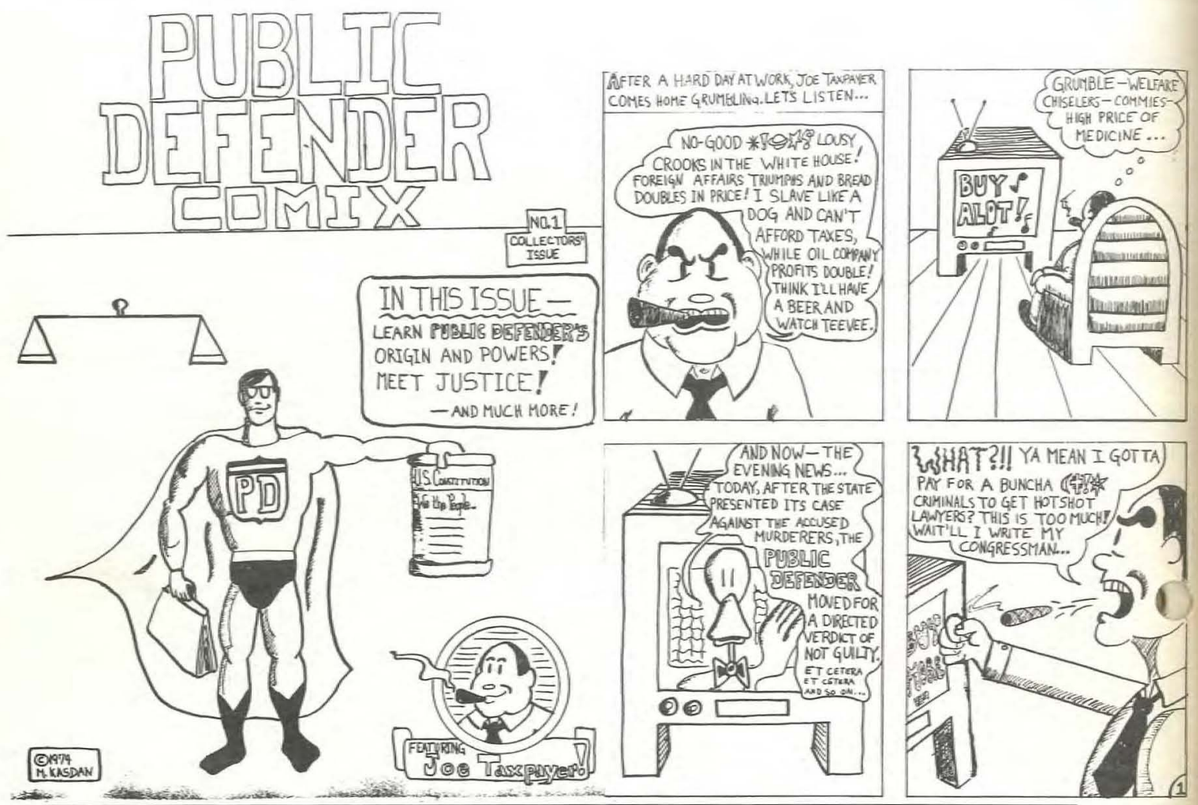
Confronting Rape Shield

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



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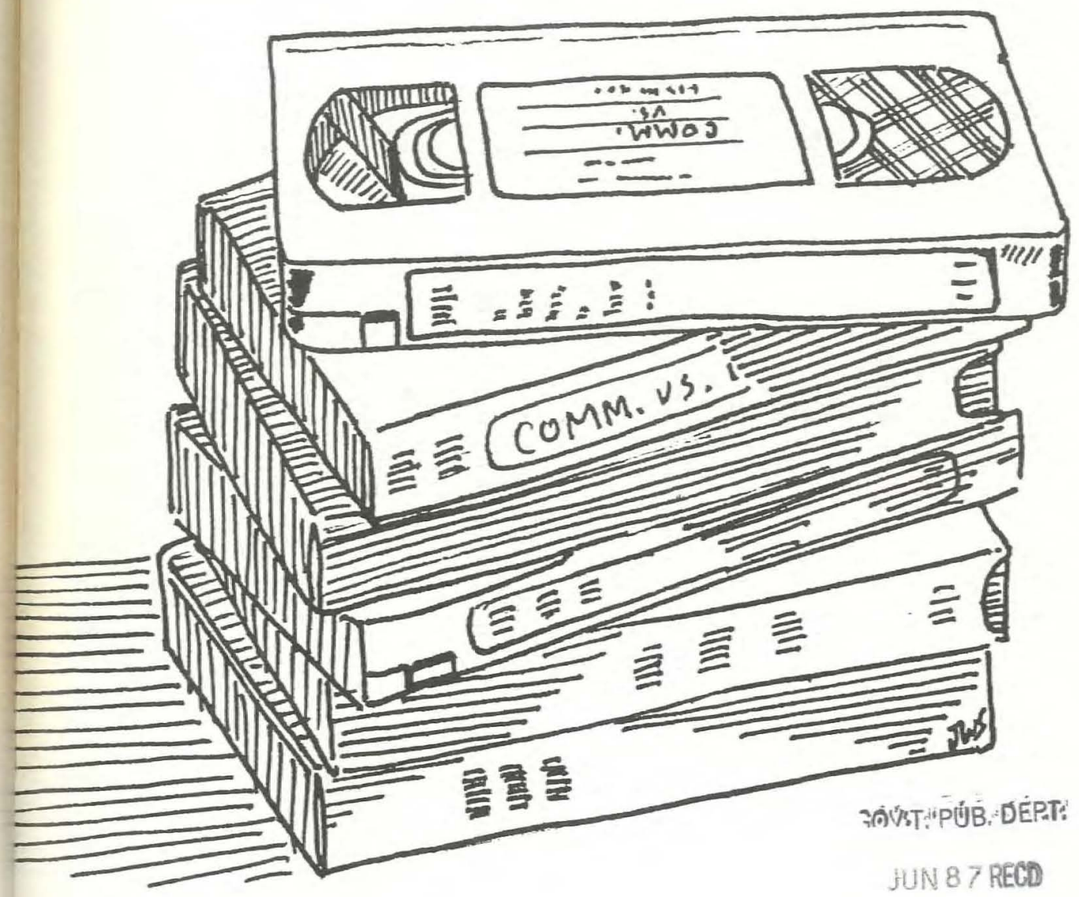

The Video Debate Rages:

Chief Justice Stephens responds to Judge Lester

Also In This Issue: Schizophrenia

after again receiving and waiving Miranda rights.

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

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

The issue before the Court in Martin was whether Ohio could place on the defendant the burden of proving her defense of self-protection at her trial for "aggravated murder." The issue arose because of an apparent "overlap" in Ohio's definitions of aggravated murder and self-protection. A conviction of aggravated murder required that the accused have acted "purposely, and with prior calculation and design," while a finding of self-protection required that the accused not have created the situation resulting in the death and that she believed she was in "imminent danger of death or great bodily harm." Proof of the self-protection defense would thus effectively negate a finding of the mental element of the aggravated murder charge. In Patterson v. New York, 432 U.S. 197 (1977), the Court held that a defendant may be required to prove an affirmative defense if the affirmative defense does "not serve to negative any facts of the crime which the state is to prove in order to convict of murder." The majority in Martin concluded that the above language in Patterson did not benefit Martin because the state court's instructions "did not require Mrs. Martin to disprove any element of the offense with which she was charged." Justices Powell, Brennan, Marshall, and Blackmun dissented.

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LEXINGTON HERALD-LEADER
Saturday, January 24, 1987 A6

6th Amendment outweighs desire to protect children

Kentucky Attorney General David Armstrong has gone all the way to the U.S. Supreme Court with his contention that defendants in child abuse cases do not have the right to confront their accusers in some pretrial hearings. While Armstrong's motive — protecting allegedly abused children from intimidation — is commendable, his legal reasoning doesn't seem sound.

The case Armstrong is pursuing involves a 1984 conviction of a man accused of sexually abusing two girls. The Kentucky Supreme Court overturned the conviction because the defendant was barred from attending a hearing to determine if the two girls, ages 7 and 8, were competent to testify.

Armstrong contends that since the defendant was able to confront his accusers at the trial itself, he was not denied his constitutional rights. More than 20 states have filed briefs with the U.S. Supreme Court in support of this argument, which Armstrong says shows the nationwide support for protecting victims of child abuse.

That may be true, and we would not question the argument that these victims need to be protected to the fullest extent possible. But neither the weight of public opinion nor the need to protect victims can override the rights afforded to every American citizen under the U.S. Constitution.

One of those rights is outlined in the Sixth Amendment, which says, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." The Sixth Amendment, as we read it (and apparently as the Kentucky Supreme Court read it), makes no distinction between preliminary hearings and trials. The rights of the accused extend to the hearings. And they should, since many crucial decisions are made in such hearings.

The Sixth Amendment was added to the Constitution to provide Americans with some protection against false accusations and malicious prosecution. It was a wise addition that is now an integral part of the American system of justice. If an accuser, even an accuser who is a child, is protected from confronting the accused, the judicial system can be used to generate no end of mischief for an individual for no other reason than that someone else dislikes him.

The Constitution is a living document and therefore subject to interpretation. But such interpretation should be exercised with the utmost caution, lest we render the document meaningless. If we start making exceptions to the civil liberties guaranteed by the Constitution, exceptions dictated by nothing more substantial than the prevailing public mood, where do we stop?

Post-Conviction

Law and Comment


Allison Connelly

Confronting Rape Shield

I. Introduction

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

Rape shield was born of Victorian morality and an abusive criminal justice system that put the victim on trial instead of the defendant. Often, the complaining witness was forced to defend attacks on her chastity as her sex life was paraded before the jury by a defendant attempting to prove she consented. Such evidence was deemed relevant by the specious logic that if she consented once, she'd consent again, and if she didn't consent, she must have been asking for it. Historically, in Kentucky as in most states, evidence of a rape victim's prior sexual history was automatically admissible at trial on the issue of consent. Moreover, such evidence could be proved by either reputation or specific acts. On the other hand, in the past the stakes were also higher for those accused of rape. Not only was there a danger of false accusations, but in many instances the death penalty could be imposed.

Obviously, in our sexually active society the old rationale can no longer be justified; consent to sexual relations with partners of one's choice is not an indication of whether the complaining witness would consent to sex with the defendant. In response to this need for reform and our changing society, most states passed rape shield laws that limit or prohibit a defendant's ability to present to the jury, evidence of the victim's past sexual history with third parties. Now under Kentucky law, such evidence is automatically inadmissible solely because it involves a sex offense instead of some other crime. Instead of dealing with the abuses engendered by unbridled judicial discretion, we are faced with an inflexible legislative mandate that deprives the trial judge of all discretion.

The Kentucky legislature, in its zeal to protect the victims of sex offenses, enacted a statute that absolutely excludes all evidence of "sexual conduct and habits" between the complaining witness and any person, other than the defendant. KRS 510.145; Smith v. Commonwealth, Ky. App., 566 S.W.2d 181 (1978). Indeed, Kentucky's rape shield statute excludes the complaining witness' prior sexual history with third parties whether relevant or not, and disallows evidence of either reputation or specific acts at a trial involving a sex offense.

The Kentucky legislature has seen fit to violate a fundamental rule of statutory drafting; never say never. In doing so, the statute is more than a shield that protects the victim, it is an impenetrable wall that denies one accused of such a crime from presenting even critical evidence.

Unlike the federal rule, Fed. R. Evid. 412, which requires the admission of chastity evidence, if "constitutionally required," Kentucky's law does not contain such a judicial safeguard. Surely, such a blanket exclusion that fails to afford the defendant even the opportunity to establish the relevance of the evidence, despite the fact it may be more probative than prejudicial in its impact, cannot be reconciled with the sixth amendment. Surely, such a blanket exclusion will sooner or later prohibit the introduction of a compelling set of facts that demand the jury's hearing. To say that sexual history is irrelevant begs the question. The question is whether such evidence is relevant in any instance; whether the shield law prevents the defendant from introducing such evidence; and, whether that exclusion is constitutional.

The legislature simply cannot foresee or list all of the circumstances that may arise in the courtroom given the possibilities of human conduct. The legislature cannot predetermine by statute, the fact specific question of what evidence is relevant and admissible. Eventually, the statute will violate a defendant's due process right to confront witnesses and to compel testimony, and in doing so, present evidence vital to his defense.

The boundaries of Kentucky's rape shield law must be challenged. The constitutional lines need to be drawn and defined. While the statute may be facially constitutional, Smith, supra, there will come a time when it is unconstitutional in its application. See State v. Howard, N.H., 426 A.2d 457 (1981). 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. By 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 laws vary in their 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 should be admitted. See, Tanford and Bocchino, Rape Victims Shield Laws in the Sixth Amendment, 128 U.Pa.L.Rev. 544 (1980). Nevertheless, the Kentucky legislature has enacted the most restrictive type of shield statute. Id.

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

The only two exceptions to this rule of general inadmissibility are: "evidence of the complaining witness' prior sexual conduct or habits with the defendant"; and, "evidence directly pertaining to the act on which the prosecution is based." KRS 510.145(3). Even in this situation, an offer of such proof requires the trial judge to determine the relevancy of the evidence before 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., 712 S.W.2d 366 (1986), 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 an untested area of the law that 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 diseased 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-Prejudicial 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, 380 U.S. 400, 404 (1965), and the right to call witnesses in his own behalf. This right to compel testimony encompasses not only the subpoena power but the right to present defense testimony. Washington v. Texas, 388 U.S. 14, 23 (1967). The underlying aim of these protections is to insure the "integrity of the fact-finding process." Burger v. California, 393 U.S. 314, 315 (1969). Thus,

together the two clauses guarantee the defendant the right to present not only a defense but a full and effective defense.

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

However, regardless of the general legislative power, the state may not infringe upon the constitutional rights of a defendant. Kentucky's rape shield law, in its absolute exclusion of the complaining witness' prior sexual history with third parties, directly implicates a defendant's sixth amendment rights to offer evidence that is logically relevant and necessary to the defense. By denying the defendant the ability to pursue a certain line of questioning on cross examination, or to elicit certain testimony from his own witnesses, the Kentucky rape shield law casts a dark shadow over these constitutional protections. 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. Delawder, Md. App., 344 A.2d 446 (1975).

Since the ability of the accused to present relevant evidence is grounded in a constitutional right, a federal constitutional standard must be applied to resolve the inevitable conflict between the evidentiary rules and state policies that exclude such evidence and the defendant's right to present a defense. The United States Supreme Court developed such a due process balancing test in Chambers v. Mississippi, supra, and expanded it in Davis v. Alaska, 415 U.S. 308 (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 "voucher" 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. At trial, the prosecutor refused to call the confessor to the stand forcing Chambers to call him in defense. On direct examination, the witness admitted confessing the crime to the police, but on cross-examination by the prosecutor, he denied the killing. Chambers was prohibited from cross-examining the confessor further, because of the common law rule that "one may not impeach his own witness." Moreover, the Mississippi hearsay rule prohibited Chambers from introducing the testimony of three civilian witnesses who had heard the confessor orally admit to the killing.

The United States Supreme Court reversed Chambers' conviction finding a sixth amendment violation. The Court held that the state had placed the "integrity of the fact-finding process in jeopardy." Id. at 295. The Court added that although sixth amendment rights are "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," the Constitution mandates the state interests be closely scrutinized. Id. Therefore, the Court concluded that the state's interest in reliable evidence could not prevail over the defendant's need for the evidence.

In Davis v. Alaska, supra, the Supreme Court held that the right of confrontation was paramount to the state's policy of shielding and protecting a juvenile offender. Alaska had enacted a juvenile shield statute that excluded evidence of a juvenile's criminal record in any proceeding. In Davis, the state's only identification witness was a juvenile who was on probation at the time the defendant was accused of committing certain crimes. Even though some of the stolen property was recovered near the juvenile's house, the defendant was prevented from cross-examining the juvenile in relation to his probationary status by the statutory juvenile shield law. The Court found that the evidence was relevant "for the purpose of suggesting that [the juvenile] was biased,"and had a motive to lie. Id. at 311. Although the court acknowledged the state's "legitimate and important interests" in juvenile rehabilitation, the Court held that the defendant's sixth amendment right of confrontation was greater than the identified state interests. Id. In striking this balance the Court declared:

> [W]e conclude that the state's desire that [the juvenile] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of the petitioner to seek out the truth in the process of defending himself.
> Id. at 320.

Thus, Davis stands for the general proposition that a defendant has a right under the confrontation clause to expose the bias and interests of a witness, and that a state can't constitutionally restrict that effort.

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

In United States v. Nixon, the President refused to deliver tapes sought by the Watergate prosecutor by asserting that they were privileged presidential communications. The Supreme Court, in resolving this constitutional showdown, weighed the presidential privilege of confidentiality against the Watergate defendants' sixth amendment rights to confrontation and compulsory process. Id. at 711. The Supreme Court held that the President's "weighty" interests in confidentiality "must yield" to the rights of the Watergate defendants. Id. The Court stated that the President's interest was merely "general in nature," while the defendants interests were "specific 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.

Clearly, in most cases, evidence of a complaining witness' prior sexual history with third parties will be irrelevant, but not in every case. Professor Lawson states that "an item of evidence--an evidentiary fact--is relevant when it renders a material ultimate fact more probable or less probable than it would be without the item." R. Lawson, The Kentucky Evidence Law Handbook, § 2.00 (1984). See also O'Brien v. Massey Fergerson, Inc., Ky., 413 S.W.2d 891, 893 (1967). It is impossible to determine statutorily, the thousands of circumstances that may arise where the prior sexual history of a complaining witness may be relevant, and where the probative value of the evidence outweighs its prejudicial effect on the jury and the prosecuting witness. This is the major constitutional flaw in Kentucky's rape shield law. While such a situation will arise only in the unusual case, the legislature can not establish a bright line rule that paints relevance in blacks and whites. By definition, the concept of relevance must be viewed on a continuum. At one end of the scale the evidence is clearly irrelevant, at the other, clearly relevant. It is the function of the trial judge to determine this relevance on a case-by-case basis, excluding even relevant evidence for policy reasons where its probative value is outweighed by its prejudicial effect, and admitting such evidence where its probative value outweighs the prejudicial impact. Yet, Kentucky's law does not contain this judicial mechanism.

IV. Due Process Balancing and Rape Shield

Framed in the context of the Chambers line of cases, the question becomes whether or not the prior sexual history of the complaining witness may ever be probative of an issue that is material to determining the guilt of a defendant charged with a sex crime. Certainly, there will be some cases where chastity evidence is directly related to whether the complaining witness consented to a sex act with the accused. After determining that such evidence is relevant and would aid in the fact-finding process, one must look to the reason for which the evidence is offered to determine whether the defendant's right to present a full defense overrides the state's policy of excluding such evidence.

The articulated policies that support the rape shield law are many. The law protects the dignity of rape victims, and thus, encourages the reporting and prosecution of sex crimes. Furthermore, the shield law protects victims from embarrassment and humiliation. In other words, the rape shield law protects the victim's right to personal privacy in the area of consensual sexual activity. Similarly, the statute aids in the truth finding process by excluding evidence that is unduly inflammatory and prejudicial. It has been stated that jurors react emotionally to evidence of a complaining witness' past sexual history. Such evidence distracts the jury from determining whether the prosecution has proved the crime because the evidence prejudices the jurors toward the prosecuting witness, and so, affects the outcome of the trial. However, the state also has an interest in protecting the defendant from false accusations by untruthful witnesses. In its about-face concern for the complaining witness, Kentucky has failed to sufficiently protect, as the Constitution requires, the one accused of the crime.

In Davis v. Alaska, supra, the Supreme Court recognized that the juvenile shield law was a valid legislative statement of public policy. However, this policy was forced to yield in the face of a more compelling policy; the defendant's right of cross-examination to show possible biases, prejudices, or ulterior motives. Indeed, under Davis, the state's interest in exclusion must be sufficiently compelling and probative, and the value of the offered evidence slight, to justify the exclusion.

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

Several rape shield statutes in other states recognize as relevant, evidence of prostitution or indiscriminate sexual conduct. These statutes admit such testimony following an in camera hearing to assess the probative value of the evidence versus its prejudicial effect. See Minn. Stat. Ann., § 609.347; Neb. Rev. Stat. §§ 28-321 to 323; and Fla. Stat. Ann., § 794.001(2). Indeed, a Minnesota case applied the common evidentiary standard of "common scheme or plan" in a sex case. State v. Hill, Minn., 244 N.W.2d 731 (1977).

If rules of evidence are to be uniformly applied, what distinguishes a pattern of promiscuous sexual conduct on the part of the prosecuting witness, from the common law doctrine that allows the introduction, against the defendant, of prior bad acts or crimes to show a common scheme or plan, motive, or intent. Indeed, this is the evidentiary rule in Kentucky. Evidence law is premised on the notion that rules of admissibility do not develop differently for each substantive crime, but rather focus on issues common to all trials. Yet, Kentucky's rape shield law sets a stricter standard of admissibility of evidence on the consent issue than it does on the issue of forced intercourse.

While evidence regarding the past sexual misconduct by the accused with third parties is admissible in some instances, Kentucky's rape shield law absolutely bars the admission of such evidence as to the victim and third parties. Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985) 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 552.

Indeed, under Kentucky's statute, the defendant is prohibited from introducing evidence of prostitution by the complaining witness, or other testimony to show the witness had engaged in sexual practices with persons similar to the defendant under similar circumstances. This distinction cannot be constitutionally justified. Even when one examines the state's interest in protecting a sex victim by keeping potentially prejudicial information from the jury, the state's general interest cannot prevail where the defendant's need in the evidence is specific and legitimate. Davis v. Alaska, supra; U.S. v. Nixon, supra.

Another example where the rape shield law clearly effects a defendant's right to present probative evidence to the jury is premised upon the holding in Davis v. Alaska, supra. Davis held that the confrontation clause was violated by Alaska's refusal to permit the defense in cross-examining a crucial witness "to show the existence of possible bias and prejudice."

Id., at 317. In a later case, State v. Howard, N.H., 426 A.2d 457 (1981), 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 'biases, prejudices, or ulterior motives of the witnesses as they may relate directly to issues or personalities in the case at hand. ...Strictly construed, our state rape shield statute precludes an accused from making any showing that the victim's prior sexual activity has a bearing on any of these factors.
> Id. at 460.

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 Parsley v. Commonwealth, Ky., 306 S.W.2d 284 (1957), the court observed:

> The interests of a witness, either friendly or unfriendly, in the prosecution or in a party is not collateral and may always be proved to enable the jury to estimate credibility. It may be proved by the witness' own testimony upon cross-examination or by independent evidence.
> Id. at 285

See also Clark v. Commonwealth, Ky., 386 S.W.2d 458 (1965).

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 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 and until such a procedure 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 on the relevance 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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6th Circuit Highlights

Donna Boyce

BATSON HEARINGS

In United States v. Davis, ___ F.2d ___. 40 Cr.L. 2358, 16 S.C.R. 3,8 (1987), the 6th Circuit reviewed the procedure one federal trial court followed in dealing with a Batson challenge. During voir dire, defense counsel objected to the government's use of peremptory challenges to remove black jurors. When the defense established a prima facie case of racially motivated exclusion of blacks from the jury panel, the trial court allowed the prosecution to explain the reasons for its exercise of the challenges in an in camera hearing. After the hearing, the court concluded that the prosecution was justified in exercising its challenges but would not disclose on the record what transpired during the hearing.

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

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

BLIND STRIKE PEREMPTORIES

The 6th Circuit found no Sixth Amendment violation in the blind strike method of exercising peremptory challenge in United States v. Mosely, ___ F.2d ___, 40 Cr.L. 2364, 16 S.C.R. 3, 11 (1987). Under the blind strike method, both the defense and prosecution exercise their peremptories simultaneously without benefit of knowing who the other side is striking. The Court noted that since the true nature of the peremptory challenge right is to reject rather than select potential jurors, the mere simultaneous exercise of challenges does not impair the accused's rights under the Sixth Amendment.

ABSENCE OF COUNSEL

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

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