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Evidence - The Pennsylvania Rape Shield Law - Admissibility of Evidence Concerning Sexual Conduct Offered for Purposes of Impeachment

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EVIDENCE — THE PENNSYLVANIA RAPE SHIELD LAW — ADMISSIBILITY OF EVIDENCE CONCERNING SEXUAL CONDUCT OFFERED FOR PURPOSES OF IMPEACHMENT — The Pennsylvania Supreme Court held that testimony offered for the purpose of impeaching an alleged rape victim's credibility does not fall within the "past sexual conduct" provision of the Rape Shield Law when such evidence concerns the alleged victim's provocative conduct during and shortly after the alleged rape.

Commonwealth v. Killen, 680 A.2d 851 (Pa. 1996).

On March 16, 1993, Officer Kevin Killen of the West Mead Township Police Department was tried in the Crawford County Court on charges of indecent assault,¹ attempted involuntary deviate sexual intercourse² and official oppression.³ The charges against Officer Killen were instituted pursuant to his connection with a woman he previously stopped for traffic violations ("the complainant").⁴

1. *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996). Pennsylvania's indecent assault law is found in 18 PA. CONS. STAT. § 3126 (1995). This statute sets forth: "A person who has indecent contact with the complainant or causes the complainant to have indecent contact with the person is guilty of indecent assault if: 1) he does so without the complainant's consent. . . ." 18 PA. CONS. STAT. § 3126 (1995).

2. Pennsylvania provides that involuntary deviate sexual intercourse occurs when one has sexual intercourse with another person: "(1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious. . . ; [or] (5) who suffers from a mental disability which renders him or her incapable of consent. . . ." 18 PA. CONS. STAT. § 3123 (1995).

3. *Killen*, 680 A.2d at 851. Pennsylvania law concerning official oppression is located in 18 PA. CONS. STAT. § 5301 (1995). The statute defines the term as follows:

Official Oppression. A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor of the second degree if, knowing that his conduct is illegal, he: (1) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or (2) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.

18 PA. CONS. STAT. § 5301 (1995).

4. Appellant's Reproduced Record Vol. I-B at 43, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996)(No. 1992-851). Although the Pennsylvania Supreme Court rejected part of the reproduced record on appeal, the citations in this note to the reproduced record are cites to the portions of the record that were admitted at trial and not to those portions that were the subject of the court's objection. *Killen*, 680 A.2d at 851.

On August 19, 1992, Officer Killen had stopped the complainant in front of her apartment for speeding.⁵ When Officer Killen approached the complainant's automobile, he noticed that she appeared to be intoxicated.⁶ In response to Officer Killen's request for identification, the complainant stated that she did not have her driver's license with her, but could retrieve it from her apartment.⁷ Officer Killen then allegedly followed the complainant into her apartment in order to retrieve the license.⁸

After entering the apartment, the complainant spent approximately five minutes in the bathroom.⁹ Upon exiting the bathroom, she found Officer Killen in her children's bedroom.¹⁰ When the complainant confronted Officer Killen, he allegedly shoved her onto a bed.¹¹ The complainant testified that although she freely left the bedroom and entered the living room, Officer Killen followed her into the living room, sat next to her on the couch and began to fondle her breasts.¹² According to the complainant, Officer Killen also pulled down his slacks and underwear and demanded that the complainant perform oral sex.¹³ After the complainant continuously refused Officer Killen's demands, he

5. *Killen*, 680 A.2d at 851. Officer Killen observed the complainant speeding in West Mead Township, the township in which Officer Killen was a police officer. Appellant's Reproduced Record Vol. I-B at 47, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). Officer Killen did not pull the complainant over, however, until she was driving on Randolph Street in the city of Meadville. *Id.* at 48.

6. *Killen*, 680 A.2d at 852. During the trial, testimony revealed that the complainant's blood alcohol content was approximately 0.193%. *Id.* at 851 n.2. The complainant testified that she had been drinking at a bar and that within a five hour period, she consumed many beers and approximately eight mixed drinks. Appellant's Reproduced Record Vol I-B at 44-45, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). The complainant further testified that she thought she would be arrested for driving under the influence of alcohol because she knew that she was drunk. *Id.* at 49.

7. Appellant's Reproduced Record Vol I-B at 49, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851).

8. *Id.* at 49-51. Although Officer Killen followed the complainant into her apartment, according to complainant's testimony she believed that he was going to remain outside near his vehicle. *Id.*

9. *Id.* at 50.

10. *Id.* at 51.

11. *Killen*, 680 A.2d at 852. This was supposedly the only force that Officer Killen used during the entire alleged rape incident. *Id.*

12. *Id.* On cross examination, the complainant discussed the details of the encounter leading to the incident at issue. Appellant's Reproduced Record Vol I-B at 99, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). Allegedly, Officer Killen also started rubbing the complainant's leg and telling her "how good we would be together again." *Id.* At trial, the testimony of a third person also revealed that Officer Killen confessed to rubbing the complainant's legs and touching her breasts. *Killen*, 680 A.2d at 852 n.3. Officer Killen contended, however, that the complainant acted as the aggressor. *Id.* at 853.

13. *Killen*, 680 A.2d at 852. The complainant testified that Officer Killen "placed his hand on the back of her head and directed her toward his penis." *Id.*

ceased attempting to engage in sexual activity, pulled up his slacks and left the apartment.¹⁴

Later that evening, Officer Killen allegedly returned to the complainant's apartment, stood in the doorway to her bedroom, then left the apartment and drove away.¹⁵ After Officer Killen left the second time, the complainant walked downstairs to a neighbor's apartment, told the neighbor that she had been raped and passed out.¹⁶ The neighbor subsequently called an ambulance and the complainant was transported to a hospital.¹⁷

At trial, Officer Killen sought to introduce statements made by the complainant to a paramedic who transported her to the hospital and to the physician who examined her in order to impeach the complainant's credibility.¹⁸ In general, the statements consisted of sexually forward and explicit remarks.¹⁹ Officer Killen also sought to introduce other evidence, including statements allegedly made by the complainant to other individuals after the alleged rape incident, in order to refute the complainant's allegation of attempted rape.²⁰

14. Appellant's Reproduced Record Vol I-B at 62-63, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). Although Officer Killen stopped engaging in sexual advances at some point during the evening, the complainant testified that Officer Killen stated he would return the next day at 6:00 p.m. *Id.*

15. *Id.* at 64-65. The complainant testified that she knew Officer Killen had left the apartment and returned at a later time because the second time Officer Killen left, she watched him leave in an unmarked, red automobile. *Id.*

16. *Killen*, 680 A.2d at 852.

17. *Id.* Two paramedics, Larndo "Tooney" Hedrick and Ted Acker, transported the complainant to Meadville Medical Center. Memorandum and Order at 3, *Commonwealth v. Killen*, 680 A.2d 851 (1996)(No. 1992-851). At trial, the defense asked the complainant whether she recalled the paramedics or any conversation between herself and the paramedics. Appellant's Reproduced Record Vol. I-B at 135, *Commonwealth v. Killen*, 680 A.2d 851 (1986) (No. 1992-851). The complainant remembered that two paramedics, one black individual and one white individual, transported her to Meadville Medical Center. *Id.* The complainant further remembered being asked whether she was a diabetic; to which she responded that she had low sugar. *Id.* However, the complainant remembered no further discussion with either paramedic. *Id.*

18. *Killen*, 680 A.2d at 853. Officer Killen's attorney obtained a statement from Hedrick. Appellant's Brief at 11, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). According to that statement, the complainant said, "[i]s it true, you know, what I hear about black men," and "[c]an you tell me why the hair on a white woman's vagina is the same as the hair on a black man's head?" *Killen*, 680 A.2d at 853.

19. *Killen*, 680 A.2d at 853.

20. *Id.* According to Dr. Martin, the emergency room physician, the complainant displayed signs that she had not been raped, such as her flirtatious behavior, jovial mood and vocalness. *Id.* Dr. Martin allegedly witnessed the complainant's sexually forward behavior at the hospital. *Id.* Testimony of Dr. Martin and several emergency room nurses would have revealed that the complainant "made some advances toward Dr. Martin." Appellant's Brief at 12, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851) (No. 1992-851). Dr. Martin would also have testified that the complainant displayed signs that she, not Officer Killen, initiated the sexual activity. *Killen*, 680 A.2d at 853; Appellant's Brief at 12, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851).

The trial court barred the admission of all the statements on the ground that admission of such evidence violated the Rape Shield Law.²¹ Subsequently, a jury convicted Officer Killen of attempted involuntary deviate sexual intercourse, indecent assault and official oppression.²²

Officer Killen moved for a new trial, arguing that the trial court's refusal to admit the complainant's statements constituted harmful error and denied him the opportunity to present an adequate defense.²³ In a memorandum opinion, the trial court denied Officer Killen a rehearing, finding that the statements in issue were protected under the Rape Shield Law since they referred to past sexual conduct of an alleged rape victim and

The defense sought to introduce the paramedics' and doctor's testimony in order to attack the complainant's credibility. Appellant's Reproduced Record Vol. I-B at 304-09, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). The defense contended that the prosecution portrayed the complainant as a frightened individual who did not speak throughout the incident. *Id.* at 305-07. By introducing the testimony of the paramedics and the doctor, the defense could attack the complainant's credibility by showing that she was acting jovial, laughing in response to her own comments and making sexually forward comments after the alleged rape (such as telling Dr. Martin that he was not a bad looking doctor). *Id.* at 308. During an *in camera* hearing, however, the trial court determined that the testimony related to prior sexual conduct and was therefore inadmissible under the Rape Shield Law. Appellant's Reproduced Record Vol. I-B at 302-03, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). Thus, the defense could neither question the complainant about the statements she allegedly made to the paramedics and doctor, nor could the paramedics or doctor testify concerning these statements. *Id.*

21. Memorandum and Order at 7, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). The Pennsylvania Rape Shield Law is located at 18 PA. CONS. STAT. § 3104(a) (1995), and provides as follows:

Evidence of Victim's Sexual Conduct. General rule - Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

Id.

22. *Killen*, 680 A.2d at 853.

23. Memorandum and Order at 2, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851). The defense alleged that the trial court erred in seven separate points, including: 1) error by refusing to allow Ted Acker, Larndo Hedrick and Dr. Robert Martin to testify concerning the complainant's behavior shortly after the alleged incident; 2) error by refusing to allow the defense to properly cross examine Detective Loutzenhiser; 3) error by refusing to allow the defense to properly cross examine the complainant; 4) error in refusing to grant a demurrer as to the criminal attempt count; 5) error by not granting the defendant's motion for a mistrial based on prosecutorial misconduct; 6) error in not granting the defendant's motion to disallow Detective Loutzenhiser's testimony concerning Officer Killen's alleged confession; and 7) error by refusing to disallow testimony that included allegations that Officer Killen made noninculpatory statements. *Id.*

were directed at an individual other than the defendant.²⁴ Importantly, the trial court found the phrase "past sexual conduct" to include any of the complainant's conduct occurring prior to the trial.²⁵ Therefore, even though the statements in issue were made after the alleged incident between Officer Killen and the complainant, they constituted inadmissible evidence.²⁶

As to Officer Killen's contention that a defendant can introduce evidence protected by the Rape Shield Law to attack the alleged victim's credibility, the trial court concluded that such evidence is properly admitted into trial only when there is proof that the alleged victim is hostile towards or holds a bias against the defendant.²⁷ The trial court then determined that since no evidence existed in this case to establish such a bias, the statements in issue could not be introduced for the purpose of attacking the complainant's credibility.²⁸

Officer Killen appealed the case to the Pennsylvania Superior Court, which affirmed the trial court's decision.²⁹ Subsequently, the Pennsylvania Supreme Court granted allocatur in the case.³⁰ On appeal, the supreme court determined whether the Rape Shield Law bars from admission at trial an alleged rape victim's sexually provocative statements, made during or shortly after the alleged rape and evidencing her state of mind, when such evidence is offered for the purpose of attacking and impeaching the alleged victim's credibility.³¹

The court opined that statements made during or shortly after an alleged rape by the victim are not barred from admission at

24. *Id.* at 4. The trial court held that "statements of solicitation directed at third persons have been held to be sexual conduct capable of exclusion under the Rape Shield Law. . . . [W]e believe that the conduct of the victim in the instant case is sexual conduct capable of exclusion under the Rape Shield Law." *Id.*

25. *Id.* The trial court stated that the Rape Shield Law "prohibits the admission of evidence of the alleged victim's past sexual conduct, which both pre-dates and post-dates the incident for which the defendant is on trial." *Id.*

26. *Id.*

27. *Id.* at 4-7. The trial court determined that a court should properly admit evidence, otherwise protected by the Rape Shield Law, when the defense seeks to introduce the evidence to show that the alleged victim held a bias against the defendant or was hostile toward the defendant, as this provides evidence that the victim could have fabricated the story. *Id.*

28. Memorandum and Order at 4-7, *Commonwealth v. Killen*, 680 A.2d 851 (Pa. 1996) (No. 1992-851).

29. *Commonwealth v. Killen*, 645 A.2d 890 (Pa. Super. Ct. 1994). The Pennsylvania Superior Court issued a memorandum opinion affirming the trial court's holding and noting that the trial court properly excluded the testimony under the Rape Shield Law. Memorandum and Order at 7, *Commonwealth v. Killen*, 680 A.2d 851 (1996)(No. 1992-851). The court determined that the trial court did not abuse its discretion when it concluded that the testimony remained more prejudicial than probative. *Id.*

30. *Killen*, 680 A.2d at 851.

31. *Id.*

trial by the Rape Shield Law simply because the statements are sexually provocative.³² Rather, the Rape Shield Law is designed only to prohibit the admission of evidence at trial that proves the alleged victim acted promiscuously prior to the alleged rape, or had a reputation of being promiscuous, when such evidence is offered to establish the alleged victim's consent to sexual intercourse.³³ The Rape Shield Law does not prohibit, according to the court, the admission of relevant statements made by the victim during or shortly after the alleged rape evidencing her state of mind when offered to impeach the victim's credibility.³⁴

The court then found that in this case, the complainant's credibility remained open to impeachment by Officer Killen since she testified that Officer Killen attempted to rape her.³⁵ The court further stated that since Officer Killen sought to introduce the statements at issue for the limited purpose of impeaching the complainant's credibility, the trial court erred in barring the statements under the Rape Shield Law.³⁶ Although the statements concerned sexually provocative content, the statements were admissible in order for the jury to assess the credibility of the complainant concerning her testimony that she was sexually assaulted.³⁷

At common law, an alleged rape victim's reputation for chastity was the central issue in a rape trial.³⁸ In 1887, the Pennsylvania Legislature passed a law requiring juries in rape cases to be instructed that if a statutory rape defendant successfully attacked the victim's "good repute" at trial, the defendant shall

32. *Id.*

33. *Id.*

34. *Id.* The state of mind evidence introduced here directly related to a material issue, which was whether the complainant had been the victim or the aggressor. *Id.*

35. *Killen*, 680 A.2d at 854. Since the credibility of the complainant remained relevant, the trial court "severely restricted [the defense's] ability to present an adequate defense . . ." when it refused to admit the evidence in question. *Id.*

36. *Id.*

37. *Id.* Since the statements were made during and shortly after the alleged attempted rape, they evidenced the complainant's state of mind and the mere fact that the statements concerned sexual advances by the complainant did not automatically mean they are barred under the Rape Shield Law. *Id.*

38. *Commonwealth v. Nieves*, 582 A.2d 341 (Pa. Super. Ct. 1990). The court in *Nieves* explained:

At common law, evidence of a female rape complainant's general reputation for morality and chastity was deemed admissible on the issue of consent. The result of this common law rule was notorious abuse of victim witnesses by aggressive defense counsel who essentially put the victim on trial. . . . Rape Shield laws were intended to end the abuses fostered by the common law rule by limiting the harassing and embarrassing inquiries of defense counsel into irrelevant prior sexual conduct of sexual assault complaints.

Nieves, 582 A.2d at 346.

be found not guilty.³⁹ The statutory principle that an alleged rape victim's poor reputation constituted a defense to the crime remained valid throughout the late nineteenth century and early part of the twentieth century.⁴⁰ Simultaneously, however, Pennsylvania case law held that the 1887 statute should not be constructed so as to allow the defendant in a rape trial to introduce evidence of specific acts undertaken by the alleged victim in order to attack the victim's reputation.⁴¹ For instance, in *Commonwealth v. Stewart*,⁴² the Pennsylvania Superior Court determined that evidence of the alleged victim's specific past sexual encounters did not constitute a proper defense to a rape charge.⁴³ Thus, while a rape defendant could introduce evidence in a rape trial regarding the victim's reputation for promiscuity, the defendant could not introduce evidence of the victim's past sexual acts in order to establish consent.⁴⁴

During the 1950's, in *Commonwealth v. Wink*,⁴⁵ the Pennsylvania Superior Court validated the 1887 statute and held that attacking an alleged victim's repute at trial constituted a proper defense to a rape charge.⁴⁶ The defendant in *Wink* had been charged with rape and sought to introduce an admission by the victim that she had engaged in sexual intercourse prior to her sexual relationship with the defendant.⁴⁷ The defense sought to introduce this evidence in order to attack the alleged victim's repute.⁴⁸

39. Act No. 69 at 1887, 1887 Pa. Laws 128, *repealed by* Act No. 375 at 1939, 1939 Pa. Laws 872, 1040. This law specifically provided: "If the jury shall find that such woman . . . was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of the felonious rape. . . ." *Id.*

40. See *Commonwealth v. Jordan*, 39 A.2d 527 (Pa. Super. Ct. 1944) for an example of how this law was used. In *Jordan*, the defendant was charged with rape and attempted at trial to introduce evidence of the alleged victim's bad repute for morality and chastity. *Jordan*, 39 A.2d at 527.

41. See *Commonwealth v. Stewart*, 168 A. 528 (Pa. Super. Ct. 1933).

42. 168 A. 528 (Pa. Super. Ct. 1933).

43. *Stewart*, 168 A. at 529. In *Stewart*, the victim's testimony acknowledging that she engaged in sexual intercourse on several occasions was admitted into evidence not to demonstrate her reputation, but rather to establish the identity of father of her child. *Id.* The court stated that for a jury to find the defendant not guilty, he must attack the victim's good reputation by introducing evidence concerning her general reputation for chastity and not evidence concerning specific past sexual acts. *Id.*

44. See, e.g., *Commonwealth v. Stewart*, 168 A. 529 (Pa. Super. Ct. 1933).

45. 84 A.2d 398 (Pa. Super. Ct. 1951).

46. *Wink*, 84 A.2d at 401.

47. *Id.* at 400. The defendant in this case met the alleged victim when she started babysitting for him. *Id.* The alleged victim eventually lived with the Winks and at one point, the defendant offered the alleged victim's father seventeen hundred dollars if the father and mother of the alleged victim would consent to her adoption by the Winks. *Id.*

48. *Id.*

The court held that evidence concerning the specific past sexual conduct of an alleged rape victim was inadmissible at the rape trial.⁴⁹ The court reasoned that although evidence concerning an alleged victim's past sexual reputation was admissible as a proper defense to the rape charge, evidence relating to the specific past sexual acts of the victim did not constitute a proper defense.⁵⁰ This evidence was inadmissible based on general evidence rules, which allow a party to introduce general reputation evidence, but not opinion evidence based on specific incidents.⁵¹

In 1972, the Pennsylvania Legislature again set forth via statute that an attack on an alleged rape victim's sexual reputation was a proper defense to a rape charge.⁵² Four years later, however, the legislature replaced the 1972 statute with the Rape Shield Law,⁵³ under which a rape defendant is not allowed to defend a rape charge by attacking the alleged victim's sexual reputation.⁵⁴ Pursuant to the Rape Shield Law, opinion and reputation evidence regarding an alleged rape victim is not admissible at the rape trial to prove the alleged victim's consent.⁵⁵ Rather, such evidence is barred from admission so that the trial does not become an attack on the victim's sexual reputation and past sexual encounters.⁵⁶

The first significant rape case after the passage of the Rape Shield Law was *Commonwealth v. Folino*.⁵⁷ In *Folino*, the Pennsylvania Superior Court addressed the issue of whether the Rape Shield Law bars the introduction of evidence showing that an

49. *Id.*

50. *Id.* The superior court held that "it is the repute of the alleged victim which constitutes a defense to the felony [of rape], and not her acts." *Id.*

51. *Wink*, 84 A.2d at 401. The court found that both Pennsylvania case law and statutory law make a distinction between opinion and reputation evidence. *Id.* Thus, specific prior acts are inadmissible, while overall reputation evidence, or evidence concerning the alleged victim's good repute, is admissible. *Id.*

52. Act 334 of 1972, 1972 Pa. Laws 1482, 1529, amended by Act 53 of 1976, 1976 Pa. Laws 120, 121. This statute provided:

It is a defense to prosecution under section 3125 of this title (relating to corruption of minors) and section 3126(5) of this title (relating to indecent assault) for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

Id.

53. 18 PA. CONS. STAT. § 3104 (1995). See *supra* note 21 for the specific statutory language of the Rape Shield Law.

54. 18 PA. CONS. STAT. § 3104 (1995).

55. *Id.*

56. *Commonwealth v. Nieves*, 582 A.2d 341, 346 (Pa. Super. Ct. 1990). The enactment of rape shield laws by many states and the federal government is an attempt to rectify abuses of irrelevant, embarrassing and harassing inquiries of the alleged victim during rape cases. *Id.*

57. 439 A.2d 145 (Pa. Super. Ct. 1981).

alleged rape victim approached another individual to solicit sexual intercourse shortly before the defendant approached the victim.⁵⁸ The victims in *Folino*, two minor girls, had allegedly been forced into an automobile by the defendant and subsequently raped at an unidentified house.⁵⁹ At trial, the defendant sought to introduce evidence that the alleged victims solicited sexual intercourse from another individual before the defendant approached them.⁶⁰ The defendant sought to introduce this evidence in order to impeach the victims' testimony and to establish a "continuing course of conduct."⁶¹ The prosecution argued, and the trial court held, that any evidence of the alleged victim's past sexual conduct with third parties was barred under the Rape Shield Law.⁶²

On appeal, the Pennsylvania Superior Court strictly interpreted the language of the Rape Shield Law and prohibited the introduction of the proffered evidence.⁶³ The court reasoned that the Rape Shield Law absolutely bars evidence concerning an alleged rape victim's past sexual conduct from admission at trial unless the conduct occurred with the defendant.⁶⁴ Pursuant to the court's opinion, such evidence may not even be admitted to establish the alleged victim's bias against the defendant.⁶⁵ Thus, the court found that under the facts of *Folino*, evidence concerning the alleged victims' earlier sexual solicitation of an individual other than the defendant was inadmissible at trial for the purpose of impeaching the victims' credibility.⁶⁶

Two years later in *Commonwealth v. Majorana*,⁶⁷ the Pennsylvania Supreme Court determined whether the Rape Shield Law bars admission of testimony establishing that the defendant and alleged victim engaged in consensual sexual intercourse sev-

58. *Folino*, 439 A.2d at 149-51.

59. *Id.* at 147. The alleged victims allegedly ran away from their homes in McKeesport to Point Park in Pittsburgh. *Id.* The defendant approached the alleged victims and bought them a meal. *Id.*

60. *Id.* at 149-50.

61. *Id.* The trial court was not persuaded by defense counsel's attempt to carve out exceptions to the Rape Shield Law. *Id.*

62. *Id.*

63. *Folino*, 439 A.2d at 150. The court opined that in accordance with *Commonwealth v. Duncan*, 421 A.2d 257 (Pa. Super. Ct. 1980), even a limited use of evidence of prior sexual conduct in order to impeach, show bias or demonstrate a continuing course of conduct is prohibited by the Rape Shield Law. *Id.*

64. *Id.* The superior court stated that the only time evidence of past sexual activity could be admitted in order to establish consent at a rape trial is when the evidence demonstrates past sexual activity with the defendant. *Id.*

65. *Id.*

66. *Id.*

67. 470 A.2d 80 (Pa. 1983).

eral hours before the alleged rape.⁶⁸ The defendant sought to introduce such evidence in *Majorana* to provide an alternative explanation for objective evidence indicating that he was guilty of the rape.⁶⁹ The prosecution argued that since the sexual conduct occurred before the alleged incident, such evidence was barred under the Rape Shield Law as past sexual conduct.⁷⁰

The court held that the Rape Shield Law did not bar the defendant's testimony since it provided an alternative theory to the prosecution's objective evidence supporting the rape charge.⁷¹ With respect to the Rape Shield Law, the court specifically found that it does not bar evidence from admission at trial directly contradicting a rape charge when such evidence is offered for the limited purpose of explaining the objective signs of sexual intercourse between the alleged victim and defendant.⁷² The court determined that the legislature did not intend the Rape Shield Law to prohibit objective evidence concerning consensual sexual intercourse between the defendant and the alleged victim from admission at trial, particularly if the evidence negates other evidence offered by the prosecution in support of the rape charge.⁷³

In *Commonwealth v. Black*,⁷⁴ the Pennsylvania Superior Court considered whether the Rape Shield Law bars from admission at trial evidence that an alleged rape victim engaged in sexual intercourse with someone other than the defendant, for which the victim was subsequently reprimanded by the defendant, for the purpose of establishing the victim's bias and hostility against the defendant and reason for accusing him of rape.⁷⁵ In *Black*,

68. *Majorana*, 470 A.2d at 82. Defense counsel sought to introduce evidence that the co-defendant and the alleged victim went for a walk earlier in the evening and engaged in consensual sexual intercourse. *Id.*

69. *Id.* The Commonwealth had introduced evidence that semen, found in the victim's vagina, matched the semen of the defendant. *Id.* In *Majorana*, the victim testified that the defendant allegedly forced her into a car driven by a friend of the defendant. *Id.* The victim further testified that the defendant raped her as the defendant's friend drove. *Id.*

70. *Id.* Pursuant to the Rape Shield Law, the trial court sustained the Commonwealth's objection to introducing evidence of consensual intercourse occurring before the alleged rape. *Id.* The court allowed admission only of evidence of sexual intercourse that occurred during the alleged rape. *Id.*

71. *Id.* at 84.

72. *Id.* The court agreed with the dissenting opinion of the Pennsylvania Superior Court, which stated that because the sexual conduct evidence that the defendant wished to introduce occurred only two hours prior to the alleged incident, the sexual conduct evidence did not constitute a past act. *Id.* Furthermore, the sexual conduct evidence remained relevant in order to "rebut [the victim's] version of the act of intercourse and as an explanation for the existence of the sperm in [the victim's] vagina." *Id.*

73. *Majorana*, 470 A.2d at 84-85.

74. 487 A.2d 396 (Pa. Super. Ct. 1985).

75. *Black*, 487 A.2d at 399-401.

the alleged victim accused her father of rape shortly after he reprimanded and threw her brother out of the home for having sexual intercourse with her.⁷⁶ At trial, the defendant sought to introduce evidence showing that because he threw the victim's brother out of the house for having sexual intercourse with her, the victim held a bias towards him.⁷⁷ The trial court found the proffered evidence of past sexual conduct inadmissible under the Rape Shield Law.⁷⁸

On appeal, the superior court found that the defendant's reprimand and eviction of his son could have prompted the victim to seek revenge against him, thus establishing the victim's bias against the defendant and reason to accuse him of rape.⁷⁹ The court then reasoned that since this bias may have existed, defense counsel could properly cross-examine the alleged victim at trial concerning her sexual relationship with her brother in order to establish the bias.⁸⁰ The court opined that although the Rape Shield Law is designed to protect an alleged rape victim from public humiliation resulting from the exposure of evidence concerning past sexual conduct, a defendant's right to confront the alleged victim concerning her possible bias against him, protected under the Sixth Amendment to the United States Constitution, exceeds the victim's rights under the Rape Shield Law.⁸¹

In the 1985 case of *Commonwealth v. Dear*,⁸² the Pennsylvania Superior Court addressed the issue of whether the *Black* decision altered the Rape Shield Law's general prohibition against allowing evidence concerning an alleged rape victim's past sexual conduct to be admitted at trial for the purpose of establishing consent.⁸³ The court also considered whether this general rule, if not altered or overruled by *Black*, denies a defendant his or her

76. *Id.* at 398. The victim filed the rape allegation with the court approximately three months after the alleged incident occurred, which was around the same time the defendant father engaged in heated discussion with his fifteen year old son. *Id.*

77. *Id.* The alleged victim admitted that she wanted her brother back in the home and that she continued to engage in consensual sexual intercourse with her brother after he had been thrown out. *Id.*

78. *Id.* at 399. The trial court found that the Rape Shield Law absolutely barred admission of any evidence of the victim's past sexual conduct unless the past sexual conduct occurred with the defendant. *Id.*

79. *Id.* at 398-99.

80. *Black*, 487 A.2d at 398-99.

81. *Id.* at 400. The court analogized *Black* to an Alaska case, *Davis v. Alaska*, 415 U.S. 308 (1974), in which an Alaskan statute designed to protect a juvenile by preventing cross examination of a witness concerning the juvenile's record was held to violate the defendant's Sixth Amendment right to confront the alleged victim and establish a bias. *Id.*

82. 492 A.2d 714 (Pa. Super. Ct. 1985).

83. *Dear*, 492 A.2d at 718-19.

Sixth Amendment constitutional right to confront an adverse witness.⁸⁴

According to the trial court testimony in *Dear*, the defendant raped the alleged victim outside a bar where they had met and talked earlier that evening.⁸⁵ At trial, the defendant sought to introduce evidence that the alleged victim had previously been convicted of prostitution in order to establish a theory that the alleged rape incident consisted of consensual sexual intercourse for compensation.⁸⁶ The prosecution argued that the evidence should be barred by the Rape Shield Law because it constituted past sexual conduct with a third person.⁸⁷

The trial court and Pennsylvania Superior Court held that under the Rape Shield Law, evidence concerning an alleged rape victim's past sexual conduct introduced for the purpose of establishing consent is barred from admission at trial.⁸⁸ The Pennsylvania Superior Court reasoned that the *Black* decision did not alter this general rule, but rather only carved out a limited exception to the Rape Shield Law prohibition.⁸⁹ Specifically, the *Black* exception allows a defendant to introduce evidence of the victim's past sexual conduct when used for the limited purpose of establishing the victim's bias against the defendant.⁹⁰

By comparing *Black* with *Dear*, the court made two important determinations. First, the introduction of a victim's past sexual conduct to demonstrate a bias is an exception to the Rape Shield Law.⁹¹ Second, *Black* held that evidence of prior sexual conduct, offered to prove a victim's consent is inadmissible under the Rape Shield Law.⁹²

The *Dear* court also concluded that a rape defendant's Sixth Amendment right to confront his or her alleged victim concern-

84. *Id.* at 716, 718.

85. *Id.* at 715. The defendant allegedly approached the victim after she left the bar, at which point he forced the victim into an alley and raped her. *Id.*

86. *Id.* at 716. Defense counsel sought to introduce the alleged victim's prior criminal record in an attempt to show that she was convicted of prostitution. *Id.*

87. *Id.* The prosecution argued that the alleged victim's prior criminal record of convictions of criminal solicitation in prostitution should be barred because such evidence was evidence of past sexual conduct. *Id.*

88. *Dear*, 492 A.2d at 716. The trial court determined that the Rape Shield Law was designed to prevent the victim from being placed on trial. *Id.* The court was unwilling to shift the focus of the trial to the alleged victim's prior sexual encounters with individuals other than the defendant. *Id.* Rather, the court noted that the focus of the trial would remain on whether the defendant raped the alleged victim. *Id.* Thus, the court prohibited any records of prior convictions regarding prostitution from admission at trial. *Id.*

89. *Id.*

90. *Black*, 487 A.2d at 399, 401.

91. *Dear*, 492 A.2d at 720.

92. *Id.*

ing the victim's past sexual conduct is clearly outweighed by the state's interest in shielding the victim from having his or her reputation and past conduct exploited during a rape case.⁹³ The Commonwealth's interest in excluding past sexual conduct evidence derives from the fact that such evidence has little probative value as to whether the alleged victim consented to the conduct at issue.⁹⁴ Furthermore, the exclusion of such evidence from admission at trial protects a rape victim from harassment and encourages other rape victims to report the crimes without fear of a later rape trial that focuses on and exploits his or her past sexual conduct.⁹⁵

In *Commonwealth v. Dickerson*,⁹⁶ the Common Pleas Court of Delaware County addressed the issue of whether the Rape Shield Law prohibits the admission of evidence concerning an alleged rape victim's sexual conduct occurring after the alleged rape.⁹⁷ The alleged victim in *Dickerson* testified at trial that after the defendant raped her, she went to her boyfriend's apartment where she subsequently had sexual intercourse with her boyfriend.⁹⁸ The defendant sought to use this evidence to attack the victim's credibility and prove that she was not raped, but rather consented to the sexual intercourse.⁹⁹

The court held that the Rape Shield Law prohibits the introduction of any evidence dealing with an alleged rape victim's sexual conduct occurring after the alleged rape.¹⁰⁰ The court opined that "past sexual conduct," for purpose of the Rape Shield Law, is sexual conduct occurring anytime prior to trial, including conduct occurring before or after the alleged rape.¹⁰¹

93. *Id.* at 718. The court determined that the defendant's only interest in introducing evidence of the victim's past sexual conduct was to create an inference that since she engaged in consensual sexual intercourse in the past, she engaged in consensual intercourse during the incident at issue. *Id.*

94. *Id.*

95. *Id.* The Commonwealth argued that its substantial interest in encouraging a rape victim to report a rape outweighs the defendant's interest in creating an unsupported inference that the victim consented to the incident at issue. *Id.*

96. 4 Pa. D. & C. 4th 297, 302 (1989), *aff'd*. 564 A.2d 1002 (Pa. Super. Ct. 1989).

97. *Dickerson*, 4 Pa. D. & C. 4th at 302.

98. *Id.* at 299-302. The victim was allegedly raped after she was abducted at knife-point. *Id.* The alleged victim and her boyfriend engaged in sexual intercourse before reporting the alleged rape to the police. *Id.* at 301-02.

99. *Id.* at 306

100. *Id.* at 304-06. The court stated that the evidence in issue proved that the victim sought comfort from her boyfriend, but did not prove that the victim either held a bias against the defendant or consented to sexual intercourse. *Id.* at 307-09.

101. *Id.* The court stated, "[w]e see no logical reason to restrict the meaning of the word 'past' as used in section 3140 to a particular or specific time before the present." *Id.* at 305.

In the 1989 case of *Commonwealth v. Miller*,¹⁰² the Court of Common Pleas of Lancaster County addressed the issue of whether the Rape Shield Law prohibits defense counsel from introducing evidence at a rape trial establishing that the alleged victim previously stated her first sexual encounter occurred after the alleged rape.¹⁰³ The defense sought to introduce such evidence in *Miller* to impeach the alleged victim's credibility.¹⁰⁴ The prosecution stated that if the defense pursued such inquiry, the alleged victim would respond to the inquiry by stating that she did not consider the alleged rape to be her first sexual encounter because it was not consensual.¹⁰⁵

The court found that the contested evidence would not sufficiently impeach the victim's testimony, reveal the victim's bias against the defendant or provide the victim with a motive to falsely accuse the defendant.¹⁰⁶ Moreover, the court concluded that the victim's planned response to the contested inquiry would have an extremely prejudicial effect on the defendant.¹⁰⁷ Consequently, the court found the evidence to constitute past sexual conduct and thus barred from admission at trial under the Rape Shield Law.¹⁰⁸

In *Commonwealth v. Nieves*,¹⁰⁹ the Pennsylvania Superior Court addressed the issue of whether a defendant must offer a specific incident of an alleged rape victim's past sexual conduct to establish objective evidence establishing the defendant's innocence in a rape case.¹¹⁰ In *Nieves*, the prosecution introduced medical records to prove that the alleged victim contracted gonorrhea from the defendant when he raped her.¹¹¹ The defendant then attempted to introduce evidence regarding the alleged victim's past sexual conduct to rebut the theory that she contracted gonorrhea from him.¹¹² The defendant did not identify any spe-

102. 4 Pa. D. & C. 4th 652 (1989).

103. *Miller*, 4 Pa. D. & C. 4th at 656.

104. *Id.* at 654.

105. *Id.* at 657.

106. *Id.* at 655-57. The court determined that after reviewing *Black*, the evidence sought to be introduced did not adequately support a bias and could not be used to impeach the alleged victim's credibility. *Id.* at 655.

107. *Id.*

108. *Miller*, 4 Pa. D. & C. 4th at 655.

109. 582 A.2d 341 (Pa. Super. Ct. 1990).

110. *Nieves*, 582 A.2d at 346. The defendant argued that the trial court should have allowed him to blindly cross examine the alleged victim about past sexual conduct in order to determine whether she could have contracted gonorrhea from someone other than the defendant. *Id.*

111. *Id.* at 343. The court found that the medical records were properly admitted under the business record exception to the hearsay rule. *Id.* at 344-45.

112. *Id.* at 346.

cific incident of past sexual conduct, however, in which the alleged victim would have contracted gonorrhea.¹¹³

The court held that in order to overcome the Rape Shield Law and introduce the alleged victim's past sexual conduct, the defendant must offer specific evidence in support of a theory introduced to contradict or detract from objective evidence implicating the defendant in the rape.¹¹⁴ The court then concluded that since the defendant in this case did not adequately establish an alternative specific incident establishing that the alleged victim contracted gonorrhea from someone else, the Rape Shield Law prohibited the defendant's introduction of the victim's prior sexual activity at trial.¹¹⁵

In *Commonwealth v. Spiewak*,¹¹⁶ the Pennsylvania Supreme Court addressed the question of whether past sexual conduct evidence could be introduced to attack an alleged rape victim's credibility by showing that she previously referred to another individual as the person who sexually abused her.¹¹⁷ In *Spiewak*, the prosecution argued that the stepfather of the alleged rape victim engaged in involuntary deviate sexual intercourse with her before her sixteenth birthday.¹¹⁸ In response, the defendant sought to introduce evidence establishing that the alleged victim previously testified at a custody hearing that she actually engaged in the sexual activity with another man.¹¹⁹ The defendant sought to introduce this evidence to establish his inno-

113. *Id.*

114. *Id.* The superior court stated:

The Rape Shield law will bow to a defendant's right to confront and cross-examine when a specific proffer demonstrates that the proposed inquiry is intended to elicit relevant evidence, which is more probative than prejudicial, and which is not cumulative of other evidence available without encroaching upon Rape Shield law protections.

Id. at 347. Additionally, the court stated that in order to admit evidence under the Rape Shield Law, "the evidence must be relevant; must be more probative than prejudicial; and may not be merely cumulative of other unprivileged impeachment or rebuttal evidence." *Id.*

115. *Nieves*, 582 A.2d at 347. In *Majorana* and *Black*, the defendants offered specific incidents for which the proffered evidence concerning past sexual conduct was relevant to establish an alternative explanation to objective evidence establishing that they were guilty of the crime. Compare *Majorana*, 470 A.2d at 82, 84, and *Black*, 487 A.2d at 398-99, with *Nieves*, 582 A.2d at 347.

116. 617 A.2d 696 (Pa. 1992).

117. *Spiewak*, 617 A.2d at 697.

118. *Id.* The defendant admitted to engaging in sexual intercourse with the victim, his stepdaughter. *Id.* The defendant stated, however, that they did not engage in sexual intercourse until after she was sixteen years old. *Id.* In Pennsylvania, sexual intercourse with a female under sixteen years of age is defined as involuntary deviate sexual intercourse. 18 PA. CONS. STAT. § 3123 (1995).

119. *Spiewak*, 617 A.2d at 698. The prosecution did not ask, and the victim did not testify, as to whom that man was. *Id.*

cence.¹²⁰ The trial court agreed with the prosecution and held that such evidence could not be admitted at trial because the Rape Shield Law is an absolute bar to the introduction of evidence concerning the victim's past sexual conduct.¹²¹

On appeal, the Pennsylvania Supreme Court found that the Rape Shield Law was not designed to exclude evidence from admission at a rape trial that may "exculpate" the defendant of the sexual offense.¹²² Rather, testimony evidencing the alleged victim's past sexual conduct, offered by the defendant for the purpose of denying the alleged rape, is admissible if it is relevant to a material fact and its probative value outweighs its prejudicial effect.¹²³ The court then found that the evidence in this case was relevant to a material issue because it tended to make the alleged rape victim's allegation against her stepfather less believable.¹²⁴ Furthermore, the probative value of this evidence outweighed its prejudicial effect upon the victim.¹²⁵ The court noted that without introducing the evidence in question, a jury would infer that it was the defendant, not another individual, with whom the alleged victim testified to have previously engaged in sexual intercourse.¹²⁶

The court also found that the Rape Shield Law cannot be mechanically applied because, as in this case, a mechanical application would deny the defendant his constitutional right to confront the alleged victim under the Sixth Amendment to the United States Constitution.¹²⁷ The court specifically stated that

120. *Id.* Factually similar testimony was offered at both the custody hearing, concerning the sexual encounters with the other man (an older man), and at the defendant's trial, concerning the sexual encounters with the defendant. *Id.* Consequently, the defendant sought to introduce the alleged victim's allegations of sexual misconduct with the other man as evidence that he, and not the defendant, committed the crime. *Id.* at 699.

121. *Id.* at 698 n.1.

122. *Id.* at 698.

123. *Id.* at 699-700.

124. *Spiewak*, 617 A.2d at 699. Since the testimony implicated someone other than the defendant, a reasonable person could find that the alleged victim was in fact not sexually abused by the defendant. *Id.*

125. *Id.* at 700. Given the alleged victim's testimony concerning the "older man," the probative value of defense counsel's cross-examination concerning the identity of the "older man" as someone other than the defendant materially related to the defendant's right to present a full defense. *Id.*

126. *Id.* at 698.

127. *Id.* at 701. The Pennsylvania Supreme Court held that although the legislative aims of the Rape Shield Law are admirable, denying the defendant the opportunity to cross-examine the alleged victim concerning evidence that is extremely relevant and reliable to his defense was an infringement of his Sixth Amendment constitutional right to Confront. *Id.*

a mechanical application of the Rape Shield Law would unfairly result in this law being used as both a shield and a sword.¹²⁸

In *Commonwealth v. Berkowitz*,¹²⁹ the Pennsylvania Supreme Court decided the issue of whether an accusation by the alleged victim's boyfriend of her infidelity was "so closely tied" to the victim's actual past sexual conduct as to be barred from admission at trial under the Rape Shield Law.¹³⁰ The defendant in *Berkowitz* allegedly raped the victim after she entered the defendant's dorm room looking for his roommate.¹³¹ At the rape trial, in order to establish the victim's consent to the sexual intercourse, the defendant sought to introduce evidence that the victim's boyfriend previously accused the victim of being unfaithful.¹³² The prosecution argued that such evidence was inadmissible because it was used to establish consent and thus barred under the Rape Shield Law.¹³³

The Pennsylvania Supreme Court concluded that the proffered evidence exemplified the type of evidence that the Rape Shield Law was designed to exclude.¹³⁴ The court held that the purpose behind the Rape Shield Law is to prevent a rape case from turning into an attack on the victim's past sexual conduct and reputation.¹³⁵ According to the court, a rape defendant's attempt to introduce evidence that the alleged victim's boyfriend previously accused her of being promiscuous is the same as an attempt to introduce evidence regarding the alleged victim's past sexual conduct or reputation.¹³⁶ Consequently, the Rape Shield Law barred the contested evidence in this case from admission at trial.¹³⁷

Generally, evidence concerning a rape victim's past sexual conduct or reputation is barred from admission at a rape trial when it is introduced to establish the victim's consent to the alleged rape. The historical application of Pennsylvania's Rape Shield Law illustrates, however, that evidence concerning the past sex-

128. *Id.* at 702.

129. 641 A.2d 1161 (Pa. 1994).

130. *Berkowitz*, 641 A.2d at 1165.

131. *Id.* at 1163. After the incident, the defendant stated, "[w]ow, I guess we just got carried away," to which she responded, "[n]o, we didn't get carried away, you got carried away." *Id.*

132. *Id.* at 1165.

133. *Id.* at 1163, 1165.

134. *Id.* Specifically, the type of evidence that the Rape Shield Law is designed to exclude is evidence that the alleged victim had previously engaged in sexual conduct with someone other than the defendant. *Id.* Thus, accusations that the alleged victim had been unfaithful are the same as such evidence. *Id.*

135. *Berkowitz*, 641 A.2d at 1163, 1165.

136. *Id.* at 1165.

137. *Id.*

ual conduct of an alleged rape victim is not barred from admission at trial by the Rape Shield Law when the evidence is introduced to either: 1) support the victim's bias against the defendant and thus the victim's reason for accusing the defendant of the crime;¹³⁸ 2) provide an alternative theory for objective evidence supporting the rape allegation and thereby suggest that the alleged victim consensually engaged in sexual intercourse with the defendant;¹³⁹ or 3) attack the victim's credibility.¹⁴⁰ Importantly, though, specific evidence in support of any of these uses for the past sexual conduct evidence must be produced in order for such evidence to be admissible. Moreover, if the evidence of past sexual conduct is not barred because of an exception to the Rape Shield Law, the probative value of the evidence must outweigh its prejudicial effect.

The Pennsylvania Supreme Court correctly decided in *Commonwealth v. Killen*¹⁴¹ that the Rape Shield Law does not exclude evidence of an alleged rape victim's sexual conduct occurring either during or shortly after the alleged rape when the evidence is relevant to the issues at trial. The intent of the Rape Shield Law is only to exclude evidence concerning the alleged victim's irrelevant past sexual conduct or reputation when such evidence is introduced to establish the victim's consent to the alleged crime. The Pennsylvania Supreme Court in *Killen* concluded that the phrase "past sexual conduct" includes evidence concerning only the alleged victim's sexual activity occurring *prior* to the alleged rape.¹⁴² The Rape Shield Law does not exclude evidence concerning the activities that occurred *during or shortly after* the alleged incident, particularly when offered to establish the alleged victim's state of mind during the incident.

An alleged victim's sexual conduct occurring during or shortly after the incident ("present sexual conduct") remains relevant and admissible in a rape trial for several reasons. First, the alleged victim's actions during or shortly after the incident present an overall picture of how the events transpired and may

138. See *supra* notes 74-81 and accompanying text for a discussion of past sexual conduct evidence introduced to establish the victim's bias. See also *Black*, 487 A.2d at 399-401.

139. See *supra* notes 67-73 and accompanying text for a discussion of past sexual conduct evidence introduced to establish an alternative theory to objective evidence supporting the rape allegation. See also *Majorana*, 470 A.2d at 84.

140. See *supra* notes 116-128 and accompanying text for a discussion of past sexual conduct evidence introduced to attack the victim's credibility. See also *Spiewak*, 617 A.2d at 699.

141. 680 A.2d 851 (Pa. 1996).

142. *Killen*, 680 A.2d at 854.

establish the alleged victim's consent to the sexual intercourse.¹⁴³ Second, such evidence provides a basis for determining the alleged victim's state of mind during the incident.¹⁴⁴

Allowing evidence pertaining to an alleged victim's "present sexual conduct" to be admitted into evidence in a rape trial is not necessarily an attack on his or her chastity or reputation, even though the evidence may be used to illustrate that the victim consented to the sexual intercourse. Rather, the evidence provides a basis for determining what actually happened *at the time in question*. In *Killen*, the complainant stated that Officer Killen attempted to rape her; however, "present sexual conduct" evidence existed tending to prove that the complainant was the aggressor and that following the alleged attack, she acted unlike an individual who had been raped.¹⁴⁵ This evidence was relevant to the issues at trial because it could be used to test the complainant's credibility and aid the defendant in setting forth an adequate defense.¹⁴⁶

One should not interpret *Killen* to mean that evidence of an alleged rape victim's sexual conduct occurring during or after the alleged rape is admissible at trial even if such evidence has no probative value. Rather, it should be recognized that defense counsel in a rape case is still required to present a persuasive reason as to why such evidence is relevant to the case. Moreover, the defense's reasoning for presenting the evidence must be based on more than a general theory that the evidence should be admitted simply because the conduct occurred during or after the incident.

In conclusion, the holding of the Pennsylvania Supreme Court in *Killen* does not allow evidence of past sexual conduct to be introduced in a rape trial in order to establish the alleged victim's consent. Rather, *Killen* allows relevant evidence concerning sexual conduct which occurred *during or shortly after* the

143. *Id.*

144. Without introducing an alleged victim's "present sexual conduct," his or her testimony can portray a completely inaccurate picture of the incident at issue that the defense cannot correct or dispel since it would be provided with no recourse.

145. *Killen*, 680 A.2d at 852-53.

146. While an unsupported correlation exists when a defendant seeks to introduce evidence regarding an alleged rape victim's past sexual conduct to establish consent during the alleged rape incident ("present consent"), evidence of an alleged victim's "present sexual conduct" can establish that an alleged victim consented to or was the aggressor during the alleged incident. In *Killen*, the defendant's evidence was not offered to establish consent by introducing evidence of past sexual conduct; rather, the evidence attacked the victim's credibility by introducing present sexual conduct that suggested the victim acted in a manner inconsistent with one who had recently been a victim of an attempted rape. *Killen*, 680 A.2d at 854. Although the evidence may have inadvertently established consent, the evidence presented "present sexual conduct," not "past sexual conduct."

alleged incident to be introduced in order to demonstrate the alleged victim's state of mind *during* the incident. Consequently, the Pennsylvania Supreme Court did not in any way compromise or jeopardize the importance and meaning of the Rape Shield Law.

Brian J. Golias